

## UNITED STATES DEPARTMENT OF DEFENSE

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

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## 16TH PUBLIC MEETING

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FRIDAY  
FEBRUARY 14, 2020

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The Advisory Committee convened in the Fitzgerald Room of the Westin Arlington Gateway Hotel, located at 801 North Glebe Road, Arlington, Virginia, at 9:00 a.m., Eastern Time, Ms. Martha Bashford, Chair, presiding.

## PRESENT:

Ms. Martha Bashford, Chair  
MG Marcia Anderson, US Army (Ret.)  
Ms. Kathleen Cannon  
Ms. Meg Garvin  
Ms. Gentile Long  
Hon. Paul Grimm (via telephone)  
Mr. A.J. Kramer  
Sgt. James Markey, Phoenix Police Department  
(Ret.)  
Dr. Jenifer Markowitz  
BGen James Schwenk, US Marine Corps (Ret.)  
Dr. Cassia Spohn  
Ms. Meghan Tokash (via telephone)

**STAFF:**

Mr. Dwight Sullivan, Designated Federal Official  
Colonel Steven Weir, US Army, DAC-IPAD Staff  
Director

Ms. Julie Carson, Deputy Staff Director  
Ms. Theresa Gallagher, Attorney Advisor  
Mr. Glen Hines, Attorney Advisor  
Ms. Kate Tagert, Attorney Advisor  
Ms. Stacy Powell, Senior Paralegal  
Mr. Dale Trexler, DAC-IPAD Chief of Staff  
Ms. Amanda Hagy, Senior Paralegal  
Mr. Chuck Mason, Attorney Advisor  
Ms. Marguerite McKinney, Management & Program  
Analyst  
Ms. Megan Peters, Attorney Advisor  
Ms. Stayce Rozell, Senior Paralegal  
Ms. Theresa Saunders, Attorney Advisor

**WITNESSES:**

Colonel (Ret.) Andrew Glass, US Army  
Colonel (Ret.) J. Wesley Moore, US Air Force  
Colonel (Ret.) Jeffery Nance, US Army  
Captain (Ret.) Bethany L. Payton-O'Brien, US Navy

**SERVICE REPRESENTATIVES:**

Major Paul Ervasti, US Marine Corps  
Ms. Janet Mansfield, US Army  
Jim Martinson, US Navy  
Captain Vasilios Taskikas, US Coast Guard  
Ms. Asha Vaghela, US Air Force  
Josephine Van Driel, US Air Force

**ALSO PRESENT:**

Colonel Patrick Pflaum, US Army  
Jennifer Elmore

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

2 (9:02 a.m.)

3 MR. SULLIVAN: Good morning. I'm  
4 Dwight Sullivan, the Designated Federal Officer  
5 of the Defense Advisory Committee for the  
6 Investigation, Prosecution, and Defense of Sexual  
7 Assault in the Armed Forces.

8 This meeting is open. Ms. Bashford,  
9 you have the conn.

10 MS. BASHFORD: Before we get started,  
11 apparently, in order to speak, you need to hit  
12 Request, the green part, and when you're done,  
13 hit the part that says Speak. That seems odd,  
14 but in any event.

15 Mr. Sullivan, thank you, and good  
16 morning. I want to welcome the members and  
17 everybody in attendance today, on Valentine's  
18 Day, to the 16th public meeting of the Defense  
19 Advisory Committee on the Investigation,  
20 Prosecution, and Defense of Sexual Assault in the  
21 Armed Forces, or DAC-IPAD.

22 We are going to begin by taking

1 attendance. General Anderson?

2 MG ANDERSON: I'm here.

3 MS. BASHFORD: Ms. Cannon?

4 MS. CANNON: Here.

5 MS. BASHFORD: Ms. Garvin?

6 MS. GARVIN: Here.

7 MS. BASHFORD: Mr. Kramer?

8 MR. KRAMER: Here.

9 MS. BASHFORD: Ms. Long?

10 MS. GENTILE LONG: Here.

11 MS. BASHFORD: Mr. Markey?

12 SGT MARKEY: Here.

13 MS. BASHFORD: Dr. Markowitz?

14 DR. MARKOWITZ: Here.

15 MS. BASHFORD: General Schwenk?

16 BGEN SCHWENK: Present.

17 MS. BASHFORD: Dr. Spohn?

18 DR. SPOHN: Here.

19 MS. BASHFORD: Judge Grimm, by

20 telephone?

21 HON. GRIMM: Telephonically here.

22 MS. BASHFORD: Great.

1 Ms. Tokash, by telephone? Ms. Tokash?

2 MS. TOKASH: I'm here.

3 MS. BASHFORD: Great. Judge Brisbois,  
4 Chief McKinley, and Judge Walton could not be in  
5 attendance today. But with 11 members present,  
6 we have a quorum for this public meeting.

7 The DAC-IPAD was created by the  
8 Secretary of Defense in 2016 in accordance with  
9 the NDAA for fiscal year 2015, as amended. Our  
10 mandate is to advise the Secretary of Defense on  
11 the investigation, prosecution, and defense of  
12 allegations of sexual assault and other sexual  
13 misconduct involving members of the Armed Forces.

14 Today's meeting is being transcribed,  
15 and the complete written transcript will be  
16 posted on the DAC-IPAD website.

17 We will begin today's meeting with a  
18 panel of retired military judges. The Committee  
19 has not previously had the opportunity to hear  
20 the perspectives of military judges who have  
21 presided over sexual assault cases. On today's  
22 panel, we will hear from two retired Army judges,

1 a retired Navy judge, and a retired Air Force  
2 judge. And the Committee looks forward to  
3 hearing from each of you.

4 Following the military judges' panel,  
5 the Committee will discuss the judges' testimony  
6 and then take a break for lunch. In the  
7 afternoon, the Committee will deliberate and vote  
8 on whether to approve the DAC-IPAD's draft 4th  
9 annual report.

10 The Committee will then receive an  
11 update from the staff on its 2020 military  
12 installation site visits and members'  
13 observations of courts-martial.

14 Next, the Army's Chief of Criminal  
15 Law, Colonel Patrick Pflaum will provide the  
16 Committee with a presentation on the fiscal year  
17 2020 NDAA provisions that affect the DAC-IPAD and  
18 military justice. The DAC-IPAD Staff Director  
19 has informed me that an individual has made a  
20 request to provide a public comment at today's  
21 meeting. We will hear the comment after Colonel  
22 Pflaum's presentation.

1           If a member of the audience would like  
2           to make a public comment, please direct your  
3           request to the DAC-IPAD Staff Director, Colonel  
4           Steven Weir. The comment may be heard at the  
5           discretion of the Chair, and written public  
6           comments may be submitted at any time for  
7           Committee consideration.

8           Finally, the DAC-IPAD Staff Director  
9           will wrap up the meeting and answer any questions  
10          the Committee may have. Thank you all for being  
11          here today.

12          Judges, we are ready to begin. We  
13          have your bios. But if you could, please provide  
14          us with a short description of your military  
15          career, your military judicial experience, and  
16          any training you received as a military judge.  
17          Thank you so much.

18          CAPT PAYTON-O'BRIEN: Good morning.  
19          Thank you for this opportunity. My name is  
20          Bethany Payton-O'Brien. I'm a retired Navy Judge  
21          Advocate and military judge. I spent  
22          approximately nine years on the bench between the

1 trial judiciary and the appellate court.

2 Prior to becoming a military judge, I  
3 attended the judges course in Charlottesville.  
4 While I was on the bench, I attended various  
5 training, some focused on sexual assault, other  
6 training such as evidence, scientific evidence,  
7 courtroom security, and drug cases.

8 But other than that, during the course  
9 of my career, I spent five years prosecuting  
10 sexual assault cases. Thank you.

11 COLONEL MOORE: Hello. I'm Colonel  
12 Wes Moore, U.S. Air Force, retired. I retired  
13 from the United States Air Force after 26-1/2  
14 years, six and a half of those on the trial  
15 bench. I also served as a Staff Judge Advocate  
16 twice. I've served as a prosecutor and defense  
17 counsel and now work for the Office of Military  
18 Commissions.

19 COLONEL NANCE: Hi. I'm Jeff Nance.  
20 I retired after 30 years in the Army.  
21 Twenty-five of those years was -- I was involved  
22 with military justice in some form or fashion,

1 and more than 13 as a military judge.

2 The training we received included what  
3 has already been talked about, the military  
4 judges' basic course, and then at least twice  
5 annually refresher training on various issues of  
6 criminal law and military judge business,  
7 including training at the National Judicial  
8 College in Reno, Nevada.

9 COLONEL GLASS: Hi. I am Andrew  
10 Glass, 26 years in the Army, was a prosecutor,  
11 defense counsel, supervised prosecutors, defense  
12 counsel, was a trial judge on three different  
13 occasions at three different locations,  
14 culminating in being a Chief Circuit Judge with  
15 Jeff.

16 Went to the military judges course in  
17 Charlottesville, which is a three-week course.  
18 Twice, in between my first time as a judge and  
19 coming back to the trial judiciary, I was a Staff  
20 Judge Advocate, and so they made you go back  
21 again.

22 In terms of sexual assault training

1 within the context of being a judge, I tried to  
2 remember when we started doing specialized sexual  
3 assault training, typically in August of the  
4 year. It's a week-long course. I think it's  
5 four or five times -- Jeff may have a better  
6 memory -- when we would go and have intensive  
7 courses discussing sexual assault cases,  
8 discussing evidentiary issues, for example, and  
9 the kind of procedural issues that were germane  
10 to that issue.

11 I also went to several national  
12 judicial college courses. The ones I recall are  
13 a death penalty case -- I was actually there with  
14 Jeff -- advanced evidence, and then some judicial  
15 art course.

16 COLONEL NANCE: I think the sexual  
17 assault training started in either 2011 or 2012  
18 for judges.

19 COLONEL GLASS: And I should say for  
20 Jeff, we both attended and presented, moderated  
21 panels, et cetera.

22 MS. BASHFORD: Thank you very much for

1 being here. This Committee has in the past heard  
2 from -- we have heard from victims, we have heard  
3 from accused, we have heard from victims'  
4 counsel, we have heard from defense attorneys,  
5 and we have heard from prosecutors and  
6 investigators.

7 But this is our first chance to really  
8 have questions for people who have kind of seen  
9 the whole thing being put together. So I open it  
10 up to questions from the Committee.

11 (No response.)

12 MS. BASHFORD: Then I'm going to  
13 start. What has been your experience with the  
14 VLCs and the SVLCs? Has it changed how the  
15 courts-martial proceed, in your opinion, in terms  
16 of witness preparedness or surprises seeming to  
17 come out for which the complainants have not been  
18 prepped? But if each of you could just take a  
19 moment.

20 CAPT PAYTON-O'BRIEN: You don't always  
21 have to start with me, but thank you. Feel free  
22 to jump in, gents.

1           The VLC program really changed sexual  
2 assault cases, in my view. Prior to VLCs being  
3 involved -- and I look back at even my time in  
4 prosecuting these cases -- it was a free-for-all  
5 against the victim where oftentimes the victim,  
6 male or female, seemed to be sort of dragged  
7 through the mud.

8           The VLCs really have stepped up and  
9 are protecting them, to I think an extreme now,  
10 because when I prosecuted cases the victims would  
11 come in generally and testify at an Article 32.  
12 That was a good opportunity as a prosecutor to  
13 see how that individual would fare under  
14 cross-examination.

15           They don't have that opportunity  
16 anymore. Most victims will assert their rights  
17 to not come to an Article 32. Thus, they come  
18 into court, it seems sometimes, unprepared for  
19 what is going to happen and how the questions  
20 will come at them.

21           As a judge, cross-examination often  
22 was the opportunity for defense counsel to really

1 point out how they prepared with the prosecution  
2 and completely refused to talk with the defense.  
3 I think that's a disadvantage to the government,  
4 to their case, if the victim has never had that  
5 opportunity and refuses to, as is their right.

6 Understandably so, there have been  
7 some bad scenarios with Article 32s, as we know,  
8 for the victims being cross-examined, but -- and  
9 I am using the phrase victim -- alleged victim  
10 but the -- I think in terms of preparation for  
11 trial, all they are getting is the ability to  
12 prepare with the government, and in some ways  
13 that is not doing them a service because they are  
14 not having that opportunity for cross-examination  
15 at any point or even interviews with the defense.

16 I will mention that I am -- I now have  
17 my own practice. I am a criminal defense  
18 attorney. Sexual assault cases are something I  
19 defend, and it can be difficult on both sides, if  
20 that opportunity is not there for victim  
21 interviews, understanding that it's their right,  
22 but I think that it would help if they -- for the

1 process -- would have interviews with counsel on  
2 both sides, because then it looks as if -- and I  
3 saw this as a judge -- it looks as if they have  
4 something to hide. And we know they don't in  
5 most cases, but perhaps they do.

6 I don't know, but it just seems that  
7 there is something missing from the process. All  
8 you get as a defense counsel now is the CD from  
9 an interview with NCIS or CID or OSI, and I don't  
10 think they are asking the tough questions either  
11 during the investigation.

12 Thank you.

13 HON. GRIMM: Could I ask a question?

14 This is Paul Grimm.

15 COLONEL MOORE: I think the VLCs have  
16 sort of a great purpose in empowering victims and  
17 in preparing them for what they are about to  
18 face. The process is a difficult and arduous  
19 process to go through, and one of the best things  
20 that the VLCs do is to -- is to very  
21 realistically describe what that process is going  
22 to be like. And I think that's empowering for

1 victims.

2 I think before the VLCs it was kind of  
3 up to the variability, the personality of the  
4 individual prosecutor in the case, who was pretty  
5 much charged with taking care of the victim. But  
6 the victim was not the prosecutor's primary  
7 concern, and so having somebody whose primary  
8 concern is taking care of the victims has had a  
9 positive effect.

10 As a judge, I did not find that it was  
11 skewing the results one way or the other. I do  
12 believe, as Captain O'Brien says, you do have  
13 less opportunities to evaluate that testimony,  
14 and that's a double-edged sword.

15 As she said, it does have an impact on  
16 credibility. It certainly can be woven by a good  
17 defense counsel into a narrative that is not  
18 supportive of the victim. But, by the same  
19 token, the VLCs can advise and the victim can  
20 decide to testify. I have seen that happen to  
21 great effect as well, and to engage in  
22 interviews. And so I have seen both.

1                   But by and large, I think it has been  
2 a positive development. I know as a staff judge  
3 advocate, in the early days of the program when  
4 they were coming directly out of my manning, it  
5 was a difficult transition. But I think the  
6 transition proved to be worth it.

7                   MS. BASHFORD: Colonel Nance?

8                   COLONEL NANCE: Yes, ma'am. I agree  
9 with what has been said so far. You know, my  
10 experience was that early on in the  
11 implementation of the program, the VLCs almost  
12 uniformly, in the Army, had no criminal law  
13 experience, and so they were coming in advising  
14 alleged victims about things that they really had  
15 only a very narrow understanding of.

16                   And sometimes, as Beth said, that  
17 advice would -- which was designed to protect  
18 that alleged victim from abuse -- would run  
19 counter to the overall object of that victim, of  
20 having the perpetrator convicted.

21                   And so not understanding the criminal  
22 court process, they would sometimes give advice

1 that didn't necessarily advance the ultimate goal  
2 of that victim. That said, as time went on, I  
3 believe that the training got better, the lessons  
4 learned were implemented in the training, and the  
5 advice got better, and things sort of evened out.  
6 That was my experience.

7 Andy?

8 COLONEL GLASS: So without -- I'll  
9 just underline a couple of things said  
10 previously, and then hit a couple different  
11 points. I think access when you're a judge  
12 matters, because your job is to make sure there  
13 is a fair trial. And if there is something, for  
14 example, the defense hears for the first time in  
15 an open courtroom, you have to do something to  
16 accommodate that issue, whether that is giving a  
17 delay, whether that is giving a delay, whether  
18 that -- and sometimes it can be a substantial  
19 delay, because there is some new nugget that has  
20 come out. And so I think having somebody who  
21 understands the process matters.

22 Having said that, that's a

1 double-edged sword. Here is why it's a  
2 double-edged sword in the Army. The Army does  
3 not have enough experienced trial litigators. It  
4 is near crisis. The problem is that as kind of  
5 the victim advocate program has waxed and waned,  
6 it has become politically more necessary to put  
7 people with a lot of trial experience in the  
8 victims' realm. That has a positive benefit, as  
9 discussed by Jeff and the other panel members.

10           It can have a negative benefit because  
11 Bob or Mary, who have tried a bunch of cases, are  
12 no longer trying cases, and we don't have that  
13 many Bobs and Marys. Okay? The reality is, in  
14 the current era, there are a lot of people who  
15 are trying cases and it's their first two or  
16 three or five cases.

17           Prosecutors and defense counsel trying  
18 these cases, which are always narrow, complicated  
19 cases, often involving complicated discovery  
20 issues, complicated expert issues, you can't be  
21 doing this for the first time. You just can't,  
22 and do it well. And when the evidence is close,

1 ultimately what that can result in is an  
2 acquittal, sometimes when it wouldn't otherwise  
3 be an acquittal.

4           The other thing that I have seen as a  
5 judge that, again, derails and slows down the  
6 process, is in the context of interviews and  
7 ongoing conversations with the alleged victim,  
8 sometimes material will come out that is what's  
9 called Brady material. Those of you who are  
10 lawyers understand what that means. It just  
11 means exculpatory material. It is required to be  
12 disclosed.

13           My experience again is often that  
14 material is disclosed either during trial or on  
15 the eve of trial. And so the reason that the  
16 trial gets pushed back is, if it's exculpatory  
17 material that involves the possibility of expert  
18 analysis and testimony, which happens with some  
19 frequency, you're talking about a lengthy delay  
20 because you have to go through a contracting  
21 process that does not work.

22           The contracting process to get expert

1 witnesses does not work in the Army. It just  
2 doesn't. It can take forever. It can result in  
3 circumstances where you have much more delay than  
4 you would otherwise have to do because of trial  
5 dockets.

6 And so the problem is, when this  
7 process is kind of lurching to trial and this new  
8 material is coming out that changes the context  
9 and the setting of the trial, when you're a  
10 judge, you're just trying to do the fair thing.  
11 And the fair thing is to throw time at it, and  
12 sometimes money, so that you have the opportunity  
13 to address those issues.

14 So those are the things that off the  
15 top of my head seem to be -- and I would tell you  
16 the victims' practice has gotten better. I used  
17 to speak at the victims course and kind of say,  
18 hey, this is kind of the code. This is what I  
19 need from you as a judge. This is how you help  
20 your client.

21 And it has gotten better, but in the  
22 context of the entire system, it has created

1 challenges that are kind of unforeseen  
2 challenges.

3 MS. BASHFORD: I believe Judge Grimm  
4 on the phone has a question.

5 HON. GRIMM: Thank you. Thank you  
6 very much. I appreciate your comments, and I  
7 think that you have spoken to an issue --

8 MS. BASHFORD: Judge Grimm, can you  
9 speak a little more loudly, please?

10 HON. GRIMM: Yes. Is that better?

11 MS. BASHFORD: Not really.

12 HON. GRIMM: Is that louder?

13 MS. BASHFORD: No, Judge.

14 HON. GRIMM: Can you hear me?

15 MS. BASHFORD: You are really going to  
16 have to shout.

17 HON. GRIMM: All right. Can you hear  
18 me now? I can just pass on my question and go on  
19 to the other panel members. For some reason, I'm  
20 not -- I'm talking pretty loud, and I know that  
21 this phone will work this way, but I think it's  
22 on the receiving end, maybe there is something

1 going on. I apologize.

2 Why don't you go on to the next  
3 person.

4 MS. BASHFORD: I think we've got you  
5 a little bit louder. Can you repeat the  
6 question?

7 HON. GRIMM: Can you hear me now? Is  
8 it better now?

9 MS. BASHFORD: Yes.

10 HON. GRIMM: Okay. So my question is  
11 this. We have noticed that in the statistics  
12 that show the number -- the outcomes of trials,  
13 penetrative offenses when they go to trial, that  
14 the conviction rate on the penetrative offenses,  
15 the most serious ones, the sexual assault  
16 offenses, that the overall conviction rate across  
17 the Services, but particularly in the Army, is  
18 shockingly low when compared to conviction rates,  
19 certainly in the federal system where we don't  
20 have sexual assault that often, but in the state  
21 system as well.

22 And one of the things that we, as a

1 group, have been trying to do is to try to come  
2 up with an explanation for why that may be. And  
3 there are many factors, no doubt.

4 But part of it suggests that maybe it  
5 has something to do with the experience of the  
6 prosecution, and the frequency with which the  
7 military assignment system, you get a job, you're  
8 in it for two years, maybe three, and, boom,  
9 you're off to something else. And for career  
10 progression, you are moving out of it, and you  
11 may come back to it.

12 So you don't get the situation like we  
13 have on our Committee, of Ms. Tokash, who is a  
14 career prosecutor who has an unbelievable  
15 career's work of being in court dealing with  
16 cases.

17 And I wonder whether or not there is  
18 some correlation between the lack of experienced  
19 prosecution and people who develop expertise over  
20 a length of time that then allows them to teach  
21 others and carry that forward when it is a  
22 correlation between that and what might be the

1 low conviction rate.

2 COLONEL GLASS: So, first of all, it  
3 to me is interesting that you reference Ms.  
4 Tokash. I was her first supervisor in the Army.

5  
6 HON. GRIMM: You did a good job.

7 COLONEL GLASS: Yeah. Well, I could  
8 take credit for that, but that doesn't seem  
9 honest. She has always been very talented.

10 So the talking point you will always  
11 get about this is that the Army tries cases that  
12 the civilians don't, and that is the truth. I  
13 will tell you as a staff judge advocate, a former  
14 staff judge advocate, I would try cases on some  
15 occasion -- I wouldn't say habitually -- that the  
16 civilians wouldn't take, and sometimes they would  
17 be tried to acquittal, and sometimes they would  
18 be tried to conviction. And we can talk about  
19 that process and how you approach that process,  
20 but to me that's not the overriding factor.

21 The overriding factor is Ms. Tokash  
22 used to be an SVP in the army. There are a ton

1 of SVPs who used to be SVPs in the Army. Ton is  
2 -- there are not that many SVPs in the Army, but  
3 people who like to try cases like to try cases.

4 And when you tell them that they have  
5 to go be the chief of ad law after the graduate  
6 course, or they have to go do whatever else, it's  
7 like telling a cook that he has to go be an auto  
8 mechanic.

9 And the reason the Judge Advocate  
10 General's Corps tells people they have to do that  
11 is twofold. It's a personnelist approach to  
12 managing people. I've got X number of slots. I  
13 need staff judge advocates. The pinnacle job in  
14 the JAG Corps is not to be a judge, not to be an  
15 SVP, it's to be a staff judge advocate. It just  
16 is.

17 The way you become general officer of  
18 the JAG Corps -- there's five -- is by what you  
19 do operationally and what you do as a staff judge  
20 advocate. It's just -- it's a truth.

21 So when you look at, why is this,  
22 there are -- I think to fix this you have to

1 break some -- you have to break some china. You  
2 have to recognize that most of the trial  
3 advocates I know -- and you can certainly  
4 informally talk to people.

5 Some of whom are on your panel would  
6 have said, if you just tell me I'm going to be a  
7 major my whole life, but I get to try cases,  
8 that's what I want to do. Or a lieutenant  
9 colonel. I was told I had to leave being a trial  
10 judge to go be a staff judge advocate or "You  
11 probably won't get promoted."

12 Now, there is a lot of fixes to that.  
13 There are people sitting in who have sat on  
14 myriad promotion boards. You can give  
15 instructions to boards about relative importance  
16 of jobs. You can change your assignment cycle.

17 Specialization in the JAG Corps is  
18 perceived as bad or unnecessary. It's ironic to  
19 me that we have contract specialists who spend  
20 most of their time in contracts. There is an  
21 incrementalism. There just is.

22 In 2000 -- and I can't remember if

1 Jeff was on the same panel -- but I sat on a  
2 blue-ribbon panel. I love blue-ribbon panels.  
3 But we had these conversations in 2000, and not  
4 much has changed.

5 The SVP program is a band-aid, and  
6 this is what I mean. There is a lot of really  
7 good, talented SVPs. There are some who aren't  
8 that good. The problem is, there is no SVP for  
9 life program or, go be an SVP and we'll make you  
10 senior defense counsel. We'll keep you in this  
11 realm where you want to be. We'll recognize your  
12 particular specialty and build on that specialty.

13 I honestly don't think that exists in  
14 the civilian world. There is a lot of  
15 explanations for that that you will hear. We  
16 have to be able to go down-range and try cases.  
17 Sure we do.

18 We need people with military justice  
19 experience as SJAs. You don't need that much  
20 experience. I've been an SJA. I can tell you in  
21 an hour what you need to know to be an SJA and  
22 advise people.

1                   It helps if you can answer nuanced  
2 questions, but guess what? You can call Mr.  
3 Nance, if he's a civilian working for you, and  
4 say, hey, how does this work, because that's how  
5 this society works, right? We reach out to  
6 expertise.

7                   I can't tell you the number of times  
8 I was told I needed to do claims or ad law  
9 because it was good for my career. Worked out.  
10 I made colonel. Okay? But there is an awful lot  
11 of really, really good prosecutors who don't stay  
12 in the courtroom. And how do you fix that?  
13 Well, I don't know of a way. Society fixes that  
14 with specialization.

15                   When I walk into a room, I don't want  
16 to hear that my surgeon just got off of a tour,  
17 again, as an auto mechanic. I want to know they  
18 know how to fix me up or try cases. And that  
19 just doesn't exist, and I think it requires  
20 significant change.

21                   Another piece of china that you might  
22 consider is we believe that the province of

1 military justice is only green-suiters or  
2 whatever the color of the suit is now. The suit  
3 has changed it seems like 30 times since I was  
4 in. I'm just happy I don't have to buy the PT  
5 uniform anymore.

6 But there are almost no civilians  
7 except at a very high level, highly qualified  
8 experts, that are informing the system on a  
9 day-to-day basis, that are saying -- and then  
10 what you'll hear is, well, we can't deploy that.  
11 Yeah, you can. You do it now. You take  
12 civilians down-range now. Civilian defense  
13 counsel go in-theater and try cases.

14 So in terms of, Judge, I think it's a  
15 great question. I think it's fixable. I think  
16 it takes the will to fix it. I know the current  
17 Army system -- and I know very little about it  
18 has a pilot program. I understand that's how the  
19 Army does things. We pilot things.

20 The analogy to me is really a Navy  
21 analogy. We're trying to turn a battleship going  
22 full speed. I think it requires more drastic

1 change, a greater commitment to changing how we  
2 approach prosecution and defense work. And it  
3 requires money. It always requires money.

4 MS. BASHFORD: Anybody have anything  
5 to either add or contradict?

6 COLONEL MOORE: I would say my  
7 experience in the Air Force has been markedly  
8 different than my Army colleagues. I do not  
9 recall a case where the performance of the  
10 special victims prosecutor was the reason for an  
11 acquittal. I have -- my experience has been that  
12 they have been highly professional, highly  
13 effective, highly available, doing tons of cases.

14 I think the real challenge for the Air  
15 Force SVP program, and Air Force senior  
16 prosecutors in general, is that it is just such a  
17 grueling job. It involves tons of travel.

18 The Air Force does cases more  
19 expeditionary at the various bases as opposed to  
20 centralized, which some of the other services do,  
21 which makes that assignment a particularly  
22 grueling one as a surrogate counsel, and I think

1 we lose some really good litigators just to the  
2 fact that that's also happening at a point in  
3 their personal lives when they are trying to have  
4 families. And so they have to make some choices  
5 there as to what they pursue.

6 So anything we can do in the paradigm  
7 to make that job less grueling and more  
8 attractive, I think we could attract some better  
9 litigators there. But I think currently, at  
10 least in the Air Force, we are attracting some of  
11 the best and the brightest litigators to the  
12 special victims prosecutor. And I have seen them  
13 be very effective.

14 BGEN SCHWENK: Do you want to comment  
15 on Judge Grimm's question about convictions?

16 COLONEL MOORE: There are any number  
17 of factors that go into the increased acquittal  
18 rate. I will say, the chief factor that I have  
19 seen in the increased acquittal rate is that  
20 beyond a reasonable doubt is a very high  
21 standard. Court members do a very meticulous job  
22 of applying that standard, and these are very

1 tough cases.

2           And as Colonel Glass said, we're  
3 taking cases that perhaps wouldn't be taken in  
4 the civilian sector. Whether that's good or bad,  
5 we can talk about some more. But that's just an  
6 indication that we're taking tough cases, that  
7 there is risk involved in that, and the ability  
8 to take on that risk sometimes results in  
9 acquittals, and they are not necessarily a  
10 reflection that anything is wrong with the  
11 system.

12           I think the pendulum has swung and is  
13 in the process probably of recentering on the  
14 prosecutorial judgment on whether cases should go  
15 to trial. For a long time, it was a swinging to  
16 almost everything needs to go to trial. And if  
17 it recenters a little -- and I think that could  
18 happen in conjunction with the special victims  
19 counsel, giving realistic advice to victims about  
20 what the process is going to put them through and  
21 what the likelihood of ultimate success would be  
22 -- I think that pendulum should recenter. It

1 should probably recenter somewhere with a greater  
2 number of prosecutions than before it started to  
3 swing, but somewhere less than it is now.

4 MR. KRAMER: I am curious. Now two of  
5 you have said that the military takes cases the  
6 civilians wouldn't take, and I'm -- why that is.  
7 Was there some -- especially given the effects on  
8 both victims and the accused of such cases, why  
9 it is that the services take cases that the  
10 civilians wouldn't? Was there pressure or  
11 emphasis that these cases should be tried, or why  
12 that is?

13 COLONEL NANCE: I think commanders --  
14 first of all, we trust these two-, three-, and  
15 four-star generals to protect our country and to  
16 keep our soldiers safe. And I think we can trust  
17 them to make decisions on referral. I think the  
18 commanders -- this is a commander system, and it  
19 should be a commander system.

20 But I do believe that there is an  
21 incredible amount of pressure on commanders with  
22 respect to sexual assault cases. And as a human

1 being, their inclination is to say, let's send it  
2 to trial and let the judge and/or panel members  
3 decide.

4           The people that decide those things at  
5 big levels, whether that should be the process  
6 that we follow or not, you know, I'm perfectly  
7 happy to let them live with the decisions they  
8 make on whether that should be the process. But  
9 if -- and I think it should be a commander  
10 system, and I don't have any problems with that  
11 process, of the commander saying, look, I don't  
12 know what happened here. Nobody knows what  
13 happened here. So let's send it to trial and let  
14 impartial judges and/or panel members make the  
15 decision.

16           If that's the dynamic we follow, then  
17 we have to be willing to live with the results.  
18 And the results are going to be where you have  
19 bad facts, it's a bad case, and you're going to  
20 get an acquittal.

21           COLONEL GLASS: Well, and just to  
22 dovetail on that, I agree with all of that. I

1 agree it should be a commander-based system. If  
2 it comes out of the commander's hands, I don't  
3 think the military justice system is what it is,  
4 which is an effective -- if used properly, an  
5 effective tool for not just justice but also for  
6 good order and discipline.

7 The point I would make is this: there  
8 have been myriad high-profile instances where  
9 someone has made a tough call, and that tough  
10 call has come up publicly and has impacted  
11 promotion. For the less morally courageous  
12 commanders -- and I'm not saying that's  
13 necessarily the world that Jeff is talking about  
14 -- sometimes when you walk into that office and  
15 you brief and say -- I mean, I've been in a brief  
16 with a general officer, two-star general, where I  
17 said, sir, we've got these preferred charges. I  
18 don't think we should take them to trial. She is  
19 not credible. My trial counsel does not believe  
20 her.

21 I don't know ethically that that's an  
22 appropriate case to take to trial, just under the

1 rules of ethics. And that's where we end up.  
2 That's why the case does not get referred,  
3 because we're moving in that conversation, which  
4 many of you have had with staff judge advocates,  
5 we're moving in that conversation to a referral  
6 decision, where I finally just say, sir, if you  
7 refer this case, you need to get a different SJA,  
8 a different set of prosecutors, because it is not  
9 ethical to try it.

10 That commander then says, got it,  
11 Andy. I didn't know you felt so strongly. And  
12 we move out.

13 I will tell you, I've sat in another  
14 seat where I'm the judge and that just hasn't  
15 happened, where there is just no way the  
16 government had a good faith basis to bring that  
17 case to trial. And the problem is, front of the  
18 mind, back of the mind, with all due respect to  
19 the general officers here, little generals want  
20 to be bigger generals, generally. They want to  
21 get promoted. It's a promotion-based system.  
22 It's how we gauge success.

1           It's hard when there are what are  
2           perceived sometimes as unfair shots against their  
3           friends to sit there and say, I'm not going to  
4           push this to trial, recognizing that five, six  
5           years later, three, four, years later, sometimes  
6           less, there will be an implication that will  
7           change your career.

8           So, I mean, we'll talk presumably  
9           later about the DOJ standard. I think one of the  
10          things you can do is give insulation to those  
11          commanders by instituting a standard that is at  
12          least -- not taking away their discretion, but is  
13          at least presumptive, that if you don't meet a  
14          certain standard -- I mean, there is a standard,  
15          right? So there is -- there are existing  
16          standards, but they're not the standards that  
17          we're talking about.

18          And so I think it takes an awful lot  
19          of courage for a staff judge advocate and a  
20          commander -- we ask them to do that all the time  
21          in more important -- or not more important, but  
22          equally important decisions, and -- but that's

1 why we take them.

2 And I took cases -- I can think of  
3 three or four off the top of my head that the  
4 prosecutors literally would say, well, I'm not  
5 touching that, because they know they'd lose and  
6 they know their conviction rates come up on  
7 re-election.

8 CAPT PAYTON-O'BRIEN: If I may give a  
9 perspective of the Navy. I'll echo what I've  
10 heard up here. The Navy -- I see it from both  
11 angles, both experienced litigators and non  
12 experienced litigators. Why is that? Retention.  
13 We can't keep good people in that want to try  
14 cases, even -- we have a military justice track.

15 I spent about 16 or 17 years of my  
16 almost 23 years in the Navy involved in military  
17 justice. And back in 1994, when I started in the  
18 Navy, I was told, don't be a litigator. You  
19 won't get promoted. But I wanted to try cases.

20 I joined the Navy to try cases.  
21 That's what I wanted to do. And so I spent my  
22 first two tours trying cases, despite the urgings

1 of my seniors and my detailers to get out of  
2 litigation. You won't get anywhere. You're not  
3 going to make captain.

4 Well, I did. It worked out for me,  
5 thanks to the military justice track, in my view.  
6 But I've really tried cases, so I did 16 of 22  
7 years and saw a lot of cases. We used to have a  
8 saying when I was a prosecutor: We try  
9 everything. And if we don't, we put it in  
10 writing why you don't go forward.

11 And we would tell commanders, this is  
12 why you don't go forward, and let me tell you my  
13 -- after interviewing witnesses and the  
14 credibility and evaluating credibility, I made a  
15 recommendation.

16 And back then it was -- may not have  
17 been followed in every case, but at least the  
18 commander had a letter to rely on that was a  
19 prosecutorial merits memo is what they call them  
20 now, it seems, in the Navy. But we would tell  
21 them, don't go forward, and here's why. They  
22 often would choose to go forward anyway.

1           Okay. I will tell you my -- I had a  
2           losing record as a prosecutor, because, back to  
3           what I said earlier, we tried everything. So now  
4           what I would say is I think -- and echoing what  
5           I've heard up here -- some of the commanders  
6           don't have the ability to make that tough call.  
7           Should it go forward? Should it not? Because of  
8           some of the potential ramifications to them.

9           Yes, little generals want to make big  
10          generals, but commanders want to make captain,  
11          too. And so if they are seen as the -- not being  
12          tough on good order and discipline, and ignoring  
13          the desires of the victim, that has ramifications  
14          for them.

15          But when it comes to senior  
16          prosecutors, we used to try a lot more cases than  
17          we do today. And we would cut our teeth as baby  
18          prosecutors on the unauthorized absence, the AWOL  
19          cases, the drug cases. We would cut our teeth on  
20          those small little specials.

21          We don't have many of those anymore.  
22          A lot of that goes the administrative route or

1 the non-judicial punishment route. So you're not  
2 having the opportunity for litigators to really  
3 try cases. And then in certain areas right now,  
4 even in the Navy, there aren't enough  
5 prosecutors.

6 There is not even enough support  
7 staff. Prosecutors are making copies, and they  
8 can't keep up with discovery obligations. Thus,  
9 we end up as judges now having to take up  
10 discovery issues right before a trial because the  
11 prosecution can't get the work out to the  
12 defense. That impacts military justice and how  
13 cases languish in the system.

14 I mentioned that I'm a defense  
15 attorney. I have a case that I am defending  
16 where it has been around for a year, and it is  
17 still not moving anywhere. I mean, a year seems  
18 like a really long time for a case to be in  
19 investigation and then under consideration by  
20 either the prosecutor or the command.

21 A year is a long time, both to an  
22 alleged victim and to the sailor who is facing

1 potential action in the future. It is a grueling  
2 job to be a prosecutor, or it can be. It can be  
3 also very professionally rewarding.

4 But we have prosecutors as lieutenant  
5 commanders who are saying, I've had enough. I'm  
6 leaving. Because they can't be prosecutors, they  
7 can't get support for either staff or other  
8 prosecutors, and they leave, they punch.

9 I mentioned I spent nine years on the  
10 bench, so my process was two years trial bench,  
11 three years appellate bench, four years trial  
12 bench. I was told I could no longer be a judge;  
13 I had to go back and be a staff judge advocate.  
14 After 16 years of doing military justice, I was  
15 told, you need to go be a staff judge advocate  
16 now. We have no more military justice job for  
17 you.

18 So I retired in 2017 because I was  
19 told there was nothing more for me in military  
20 justice. So if we're telling the judges after so  
21 much time that they have to leave, and we're  
22 telling the prosecutors they can't try cases, or

1 even the defense counsel that they can't  
2 litigate, we lose good people.

3 But the commanders, going back to --  
4 they need to make the tough call and often don't.  
5 And I understand that they send cases to trial  
6 that would not otherwise go to trial. I was one  
7 of those prosecutors that took those cases to  
8 trial. But we need to put people in command that  
9 can make those tough calls, even at the  
10 prosecution level or the defense counsel level.

11 If we're putting non-litigators as  
12 commanding officers of litigation shops, then  
13 that's a problem, because you're having  
14 commanding officers who are operators supervising  
15 the prosecutors. And the operators haven't been  
16 in the courtroom in a very long time, and they  
17 don't know prosecution. They might know how to  
18 be a commanding officer, but they don't know  
19 prosecution, they don't know defense.

20 So we may be -- we may have to look  
21 at, how do we select who is in charge of those  
22 various offices?

1 Thank you.

2 COLONEL MOORE: My experience with  
3 cases --

4 MS. TOKASH: Hi. This is Meghan  
5 Tokash. Can you hear me?

6 COLONEL MOORE: -- that were declined  
7 in the civilian system that we went forward with,  
8 is generally those were local, state-level  
9 prosecutors that were declining those  
10 prosecutions. And there is just a different set  
11 of dynamics that goes into the prosecutorial  
12 decision.

13 A staff judge advocate and the  
14 commander doesn't have to run for reelection, for  
15 instance, so doesn't have a conviction rate to  
16 protect. And it's -- generally, your conviction  
17 rate is not something that is going to determine  
18 whether you were successful as a staff judge  
19 advocate or not.

20 And so, in that regard, having the  
21 greater latitude to take some of the tougher  
22 cases to trial is not a bad thing. I think it's

1 a good thing that we're taking some of those  
2 cases. Should we be taking everything that we  
3 are taking to trial now? I don't think so.

4 But the fact that we are taking some  
5 of the harder cases I don't think is a knock on  
6 us. And the cost of that is that the acquittal  
7 rate is going to be higher, but I think we can  
8 manage that cost.

9 I want to take a contrary position to  
10 my colleagues, or at least state the contrary  
11 position on the specialization. I was a  
12 specialist for a while, then I went and  
13 specialized in something else, and then I went  
14 and did the staff judge advocate thing on a  
15 couple of occasions and I found that that  
16 actually was helpful.

17 I believe that being a staff judge  
18 advocate made me a better military judge,  
19 because, as a staff judge advocate, you are  
20 working with commanders, you are working in the  
21 trenches, you get a better feel for what is  
22 actually out there going on in the Air Force.

1 I also believe that the best way to  
2 train the next generation of new prosecutors is  
3 in that staff judge advocate office, because as a  
4 lieutenant colonel staff judge advocate, I was  
5 getting in the new lieutenants, fresh out of law  
6 school who were raring to try cases, and the best  
7 way to develop them into the litigators is to  
8 have former litigators in that staff judge  
9 advocate's office to train them up and to show  
10 them how it's done.

11 So there is a case to be made for  
12 specialization, but generalization also has its  
13 benefits, which can't be overlooked.

14 MS. BASHFORD: Ms. Cannon, and then  
15 Ms. Tokash.

16 MS. CANNON: Thank you for your  
17 comments. Regarding the question of commanders  
18 making the ultimate decision and some of the  
19 competing interests that they might be troubled  
20 by, including ethical issues, we have discussed  
21 among ourselves here on the DAC-IPAD the issue of  
22 the preliminary hearing and how that is, or has

1       been at times, a vetting process for cases where  
2       there is actual evidence introduced and where you  
3       can see what a case looks like.

4                   I would like your thoughts on  
5       preliminary hearing officers having binding  
6       decision-making capability when they come to the  
7       issue of probable cause, and if that would have  
8       an effect on insulating commanders with regard to  
9       those decisions.

10                   COLONEL NANCE:  I'll speak to this  
11       first, I guess.  You know, I thought about this  
12       and I think it's -- there is pluses and minuses  
13       to both sides of that question.  And what I came  
14       down to was what I thought is kind of a hybrid  
15       preferral process.  So, and here are the five  
16       elements of it that I came up with.

17                   First, the general court-martial  
18       convening authority can send the case to a  
19       binding 32 for any offense, not limiting it to  
20       sexual assault offenses.  Otherwise, the default  
21       is to the current Article 32 standard.

22                   Second element.  At that binding 32,

1 the investigating officer would need to be an  
2 active duty or reserve component military judge  
3 or a full-time magistrate judge. More on that in  
4 a minute.

5 Third element. Probable cause is  
6 still the standard. I don't see anything wrong  
7 with the R.C.M. 406 standard as it now applies,  
8 and that's the same standard that is applied in  
9 the civilian criminal justice system.

10 Fourth element. The government can  
11 come back with new evidence if no probable cause  
12 is found and reenergize the hearing.

13 And then the fifth element, and this  
14 might -- I don't know if this will be  
15 controversial or not, but only a no probable  
16 cause finding is binding. This preserves the  
17 general court-martial convening authority's  
18 authority to -- and it does not erode the current  
19 important protections for an accused.

20 I think that these -- this concept of  
21 a full-time magistrate judge that would be a  
22 senior O-4, they would be -- they would -- as

1       opposed to our current part-time military  
2       magistrates, they would do nothing but magistrate  
3       duties and do 32s. They would supervise the  
4       part-time military magistrates, and they could  
5       help the actual military judges with important  
6       rulings on controversial motions, or whatever.

7                But I think -- as I think about it and  
8       have thought about it, I think something like  
9       that might work, and it might provide sort of an  
10      escape valve for the commander, who is under a  
11      tremendous amount of pressure on some of these  
12      sexual assault and high-profile cases.

13               And it's -- you know, it's tough at  
14      the top. And like I said before, I think  
15      sometimes the decision is just to say, on a close  
16      case, we'll just let the panel decide or let the  
17      judge decide.

18               COLONEL GLASS: So for a number of  
19      years, Jeff and I worked together on the Military  
20      Judges Benchbook Committee. He was my boss. You  
21      know why now.

22               I endorse the Nance proposal, but I

1 would note a couple of issues that you are going  
2 to hear. One of the issues you are going to hear  
3 is, at least in the Army, at post, camp, or  
4 station, there is often only one judge. Most  
5 places there are multiple judges. And so are you  
6 really going to at Fort Riley, at Fort Drum, add  
7 an O-4 billet that works there? I mean, that's  
8 one of the logistical -- that's one of the  
9 pushbacks you're going to get from -- I would  
10 guess. I don't presume to know what pushback you  
11 would get from the services is we don't have the  
12 bodies.

13           The thing I like about Jeff's  
14 proposal, beyond just the fact that it -- it puts  
15 it in a little different box is that -- and I  
16 think a more favorable box for the system, for  
17 the commanders, and more favorable box for the  
18 soldier or the service member, but it also allows  
19 you to start to develop judges. Your O-4  
20 magistrate in this system would be able to get  
21 some reps.

22           One of the things you are going to

1 hear over and over again, to use a sports  
2 analogy, is, you know, my son is swimming in  
3 regionals today, hopefully doing great. He  
4 doesn't get to be good unless he gets reps. But  
5 we expect trial advocates and military judges to  
6 be good without getting repetitions. Okay? That  
7 O-4, whatever we're calling them chief  
8 magistrate -- gets some time in the saddle where  
9 they get to make decisions.

10 One of my best jobs was as a part-time  
11 military magistrate, as a captain at Fort Bragg.  
12 It was -- I didn't know at the time -- a stepping  
13 stone job that helped me to be a judge. And so I  
14 think it does provide a benefit. My only concern  
15 is it goes back to the normal Army issues, right?  
16 Staffing, et cetera.

17 I think one of the questions that we  
18 were told might be asked of us was, how about  
19 judges doing preliminary hearings? And the  
20 problem is, when I'm -- when I was at Fort Drum,  
21 I don't have the time, and there is one of me,  
22 you know, and if you're going to say, bring a

1 reservist, reservists have life issues, too.  
2 They are not always going to be available.

3 And some of the other issues that  
4 you're concerned about -- timing, and how things  
5 move through the system, again, experience.  
6 Those become issues as well.

7 COLONEL NANCE: And then if you've  
8 done -- if you're the judge that's doing the 32,  
9 you're not trying the case.

10 COLONEL GLASS: Right.

11 COLONEL MOORE: I will say in the Air  
12 Force, judges do almost all of the Article 32  
13 hearings for sexual assault cases. I did several  
14 when I was a judge. We really handled the  
15 logistics issue by doing most of them by video  
16 teleconference.

17 And so we could do one in a morning  
18 many times and spend the afternoon writing it up  
19 and still have it done. So at least in the Air  
20 Force's experience we had the manning, we had the  
21 ability to do that.

22 I think it did add value, and I think

1 if a military judge is making a no probable cause  
2 call, then there is no reason that that should  
3 not be binding, at least as -- at least subject  
4 to the opportunity to come back and present  
5 additional evidence.

6 CAPT PAYTON-O'BRIEN: I agree that --  
7 with the proposition that an Article 32 no  
8 probable cause determination should be binding.  
9 If the government has an opportunity later on, if  
10 new evidence is found, then they can come back  
11 and revisit it.

12 What I see, though, as the problem  
13 with the preliminary hearing currently is it's  
14 almost a foregone conclusion, because the  
15 government's obligation is to walk in -- and  
16 while I agree with the probable cause standard,  
17 how they are meeting it generally in the Navy is  
18 to walk in with an investigation and give it to  
19 the preliminary hearing officer and say, here you  
20 go. No cross-examination of witnesses. No  
21 testimony. They just drop a paper case on the  
22 preliminary hearing officer.

1           So back to some of my earlier  
2 statements about alleged victims not testifying,  
3 many witnesses aren't testifying. Most witnesses  
4 aren't testifying, because the government's  
5 position has been in most cases is we don't have  
6 to bring in testimony because it's cumulative  
7 with that report.

8           Despite defense counsel asking for  
9 witnesses to come, in many cases the witnesses  
10 aren't because either they are civilians and they  
11 decline or the government's position is that  
12 their testimony is cumulative with the paper. So  
13 are you really vetting a case out based on paper?  
14 I would submit that maybe not. You are not  
15 really getting into the issues of the case.

16           And in the case of the Navy, I don't  
17 know if the Army and Air Force are doing it  
18 differently. I have to assume because their  
19 investigators are uniformed. We have NCIS  
20 declining to appear claiming they are civilians.  
21 They don't have to.

22           So that's causing a lot of discussion

1 amongst preliminary hearing officers -- our  
2 preliminary hearing officers. While sometimes we  
3 do use the judiciary for the more serious cases,  
4 it's usually a staff judge advocate from another  
5 command that hears the case, an O-3, an O-4,  
6 sometimes an O-5, hearing the evidence.

7 I was a staff judge advocate as well.  
8 I mean, I didn't specialize in just military  
9 justice. I was a staff judge advocate. Some of  
10 our junior staff judge advocates don't have a lot  
11 of military justice experience either, and they  
12 are making recommendations in their -- maybe  
13 their second tour.

14 Let's assume it's a second-tour  
15 lieutenant. They didn't try very many cases in  
16 their first tour, and now they're a staff judge  
17 advocate weighing the evidence at a preliminary  
18 hearing officer, the evidence which consists of a  
19 report and no testimony, not even by the agent  
20 who investigated. And I think that is a hollow  
21 process. You're not really getting to the  
22 evidence and what exists, other than what is in

1 an investigation, which may not be thorough.

2 It seems the agents have a checklist  
3 that they use for investigating sexual assault  
4 cases, and so they are not really delving deep  
5 into some of the issues that might exist that are  
6 credibility issues that would be important to  
7 know at the preliminary hearing phase.

8 Colonel Moore made a comment about in  
9 the morning he might hear a 32 as the preliminary  
10 hearing officer and in the afternoon write it up.  
11 That tells me that it sounds like a paper case,  
12 right? We drop a report on it. In the  
13 afternoon, all he has to do is review it and  
14 write it up. I would think that that might not  
15 have been a thorough 32, all due respect to  
16 Colonel Moore. But did the government really  
17 present the evidence other than what was written  
18 on paper?

19 And while I understand that's what the  
20 rules allow for, the rules also allow for the  
21 defense to have that opportunity to present  
22 witness testimony, and it seems they are not

1 getting that opportunity.

2 Thank you.

3 MS. BASHFORD: Ms. Tokash, and then  
4 Ms. Long.

5 MS. TOKASH: Thank you. I hope you  
6 can hear me okay.

7 MS. BASHFORD: Meghan, you're going to  
8 have to speak louder.

9 MS. TOKASH: Okay. Can you hear me  
10 okay?

11 MS. BASHFORD: That's better.

12 MS. TOKASH: Okay. From where you sat  
13 as judges, and where you sit today, what impact,  
14 if any, does the lack of a required prosecution  
15 standard akin to the U.S. Justice Manual have on  
16 acquittal rate? And would a standard that you  
17 must have admissible evidence sufficient to  
18 obtain and sustain a conviction be helpful?

19 So, in other words, are the military  
20 services really seeking harder cases because of  
21 the facts, or is the military labeling them hard  
22 because the military doesn't have a prosecution

1 standard akin to federal civilian prosecutors?

2 COLONEL MOORE: I'll take the first  
3 shot at that one. I think that higher standard  
4 would actually remedy the observations that  
5 Colonel Payton-O'Brien has about the pro forma  
6 nature of the Article 32 investigation.

7 The reason that there is not a lot  
8 being presented at the Article 32 investigation  
9 now is that there is not a lot that is needed to  
10 meet the probable cause standard. So, to me, if  
11 we're saying that you would need to bring more  
12 information out at these investigations, what  
13 we're really saying is that we need a higher  
14 standard.

15 And so I think that's the question is,  
16 do you want someone to look at the case just  
17 based on what's there, what's minimally necessary  
18 to establish probable cause? If so, status quo,  
19 continue as we are. If you think you need more  
20 information, if you think you need to evaluate  
21 witness credibility, well, that doesn't go into  
22 probable cause, really. In that case, you're

1 going to need to have a higher standard, and  
2 maybe the Department of Justice standard does  
3 make sense.

4 COLONEL GLASS: So when we talk about  
5 discretion, again, I hate to beat this drum, but  
6 it's relevant. Who is making that discretionary  
7 call? You can impose a higher standard, but if  
8 that discretionary call is an experienced  
9 prosecutor making a recommendation to somebody  
10 who has experience in the process, that's a  
11 different discretionary call than somebody who  
12 has two or three cases making a recommendation.

13 And it does matter that the  
14 prosecution standards are different. They are  
15 dramatically different. I would tell you I have  
16 sat in cases and I believe this to be true, where  
17 the -- I would look and I would think, how are we  
18 hearing a motion to dismiss a sexual assault  
19 case, a very, very -- what's called an R.C.M. 917  
20 motion -- how are we even hearing this? Why are  
21 we here? Because that's not a credibility  
22 determination. That's just the base-level facts,

1 have they met this burden? Meaning the  
2 government. Have they met this burden?

3 And if you're there, that tells me  
4 there is something really wrong with your case,  
5 which happens, right? Sometimes witnesses don't  
6 show up or change their testimony. Or that you  
7 didn't fully consider whether this case should  
8 see the inside of a courtroom.

9 Now, does that happen a lot? No, it  
10 absolutely does not. I don't want to overstate  
11 that. But to have it happen once to me is  
12 problematic in that system, because that's an  
13 ethical call a lawyer ought to be making.

14 I'll tell you. I sat as a judge a  
15 number of times ruling on motions where I would  
16 have both sides present evidence, facts,  
17 whatever. For example, one time I had a motion  
18 where the relevant issue was, when did the  
19 Article 32 change? That's a fact. That's a  
20 fact.

21 Experienced defense counsel --  
22 experienced defense counsel, experienced

1 prosecutors did not give me that fact. That's  
2 if done intentionally, that's an ethical  
3 violation. I don't think it was done  
4 intentionally, so there was no ethical follow up.  
5 But it's an ascertainable fact.

6 You know what I know? I googled it.  
7 It exists. I took judicial notice of it. But  
8 the reality is that at the end of the day, yes, I  
9 think it would make a difference, Meghan. I  
10 think it would make a huge difference in having a  
11 standard. It would insulate people in the  
12 system. But at some point in time, it doesn't  
13 fix all of the issues that are out there.

14 Now, I want to make one -- make sure  
15 there is one clarifying point. I think SVPs in  
16 the Army are amazing, talented people. I'm not  
17 besmirching that program. I'm just saying it's  
18 not enough.

19 Ultimately, if those SVPs go on to be  
20 older SVPs, they are better going to be able to  
21 inform a system, inform commanders, and make that  
22 system work.

1 COLONEL NANCE: And I would just sort  
2 of agree with what has been said so far about the  
3 standard and just sort of refer back to what I  
4 said earlier about, what is our purpose? And if  
5 our purpose is to get more convictions on sexual  
6 assault cases, then having a higher standard will  
7 reduce the number of bad cases that judges hear  
8 or panels hear, and reduce the number of  
9 acquittals in sexual assault cases.

10 If the object is to give a sort of --  
11 pull back the mists of uncertainty that the  
12 public might have about the military justice  
13 system by having all cases go to trial and live  
14 with the results, then I'm not sure standard -- a  
15 higher standard is going to achieve that goal.

16 MS. BASHFORD: Ms. Long?

17 MS. GENTILE LONG: Okay. Thank you  
18 for being here. I guess before I ask my question  
19 I do want to be the dissenting voice that I don't  
20 think that we can actually say that your  
21 acquittal rate is any better or worse than the  
22 civilian world, because we don't have that

1 comprehensive data.

2           And I think everyone always thinks  
3 they are taking cases that the other doesn't  
4 take, and I think that that's true. You have  
5 certainly sat some place where you know your  
6 civilian jurisdiction hasn't taken something that  
7 you have, so that's definitely helpful.

8           But I did just want to -- for me, I  
9 just wanted to put that out there, so that there  
10 is some comfort, that I don't think you are  
11 chasing a -- you are different than any other  
12 standard right now.

13           My question is on the Article 32. And  
14 since a lot of you also have civilian experience,  
15 you know that preliminary hearings in the  
16 civilian world are definitely more than what you  
17 have described the current Article 32 as, by not  
18 necessarily a full and open discovery piece where  
19 defense witnesses are called, although they can  
20 be. Can you envision a system -- a process in  
21 the Article 32 where it is different than it is  
22 now?

1           It's not a paper, but it also isn't a  
2 full hearing basically where you are determining  
3 issues that are not necessarily relevant at the  
4 probable cause standard and maybe would be then  
5 determined by the SJA if there was admissible  
6 evidence or other things to go forward?

7           Can you envision a hearing that would  
8 be protective of victims but also fair to the  
9 accused and fair to the process than exists now?  
10 Because from what I'm hearing, what you're saying  
11 now about the paper, that doesn't seem to be  
12 satisfactory based on your experience.

13           CAPT PAYTON-O'BRIEN: I'll start. You  
14 seem to be looking at me. So while certainly as  
15 a defense counsel it would be great to have  
16 opportunity to cross-examine a victim, I'm not  
17 talking necessarily about that for a fair  
18 hearing, or even a thorough hearing.

19           Because victims decline, as is their  
20 right, to be present at the 32 -- and I've seen  
21 some that do come in. They are willing to do it.  
22 But then, when you use a paper case, when it's

1 the agent's interpretation of what was said  
2 summarized in a report, which may or may not have  
3 some sort of -- I think there was just a change  
4 in the volume.

5 I lost my train of thought there for  
6 just a moment. When the agent puts on just the  
7 report, or when a prosecutor puts on just the  
8 report, which may or may not have the testimony  
9 or a statement, verbal, you know, an audio or a  
10 video, then we just get a summary, which is not  
11 helpful in the process.

12 And when you have an agent that  
13 declines to come in because they view themselves  
14 as being protected under the rule as a, quote, a  
15 civilian -- and I would disagree. I believe that  
16 if that had come to me as a judge, that I heard a  
17 motion for a new 32 because I don't believe that  
18 our civilian law enforcement, who work for the  
19 Department of the Navy, can claim they are a  
20 civilian, don't have to testify.

21 But if that's the only person that  
22 comes in -- and I've been part of civilian

1 processes where at a preliminary hearing the only  
2 person that came in was the police officer. At  
3 least there was some testimony that while I  
4 understand it's not a full discovery avenue for  
5 the defense, it's also just an opportunity to see  
6 what is there and present some of perhaps defense  
7 evidence that might go to that determination of  
8 probable cause.

9           If as a defense attorney you don't  
10 have that ability, then all that needs to be  
11 presented is that little bit of evidence to get  
12 over probable cause, which, as we know, it's a  
13 fairly low standard.

14           Do I think it needs to be back to the  
15 old days of when it was an all-day 32 and we  
16 paraded all of these witnesses in? No. I think  
17 there can be something in between.

18           But to claim that any witness who  
19 testifies -- and this seems to be, at least from  
20 my perspective now, what is happening is the  
21 government claims anybody who testifies, if their  
22 name is in the report and they have given a

1 statement, then their testimony would be  
2 cumulative.

3 I would disagree that that's always  
4 the case. I think, as a defense attorney, when I  
5 -- when I talk to witnesses and interview people,  
6 there is probably something I find that I would  
7 like to present. I can't do that if they're not  
8 there, because the government has said, Well,  
9 they're cumulative. And oftentimes the  
10 preliminary hearing officer will agree, I have a  
11 report; I don't need the person.

12 I think something in between, because  
13 you need to explore some of the issues. And it's  
14 not a full discovery tool, like it used to be.  
15 But the defense still does have an opportunity to  
16 put on witnesses. It's in the rule, and it's not  
17 happening.

18 And I think if they had that  
19 opportunity, it would be a more thorough  
20 investigation, at least for that credibility or  
21 that -- that determination by the commander who  
22 has to make that call when they receive a report,

1 if a probable cause standard was met, you know,  
2 but -- and we see those recommends, yeah, met,  
3 but don't go forward and here's why, or go  
4 forward but know you're going to lose.

5 And don't get me wrong, I don't  
6 believe the objective should be let's just get  
7 more convictions. The objective should be  
8 present the case. If it's going to trial, let the  
9 process take place. And the objective of a 32  
10 shouldn't be to perfect a government case or to  
11 poke enough holes so it doesn't get probable  
12 cause, but at least so that there is an  
13 evaluation of the evidence.

14 Thank you.

15 COLONEL MOORE: I think, again, the  
16 standard will drive behavior. If the standard is  
17 probable cause, I don't think any prosecutor is  
18 going to show any more of his cards than he has  
19 to to meet that standard. And so if you think  
20 that more needs to be done, that more needs to  
21 come out, then the answer is to raise the  
22 standard, or to change the rules of admissibility

1 at the Article 32 investigation perhaps.

2 I think any change to the rules,  
3 prosecutors will adapt and overcome. So  
4 certainly I think any modification is easily  
5 enough implemented. I think we've seen  
6 adaptations to changes over the last five years  
7 that everybody has handled with aplomb, so I  
8 think it's certainly doable.

9 MS. GENTILE LONG: Colonel Moore, just  
10 a follow up, though. But the civilian standard  
11 at preliminary hearing is probable cause, and  
12 there is not this issue. So would it have to be  
13 a change in standard at the hearing for there to  
14 be a change in behavior, or do you think the Air  
15 Force or the people that you're saying you had  
16 seen in the courtroom could change the behavior?

17 COLONEL MOORE: You can probably  
18 change the underlying rules as well. And so, for  
19 instance, Captain Payton-O'Brien mentioned the  
20 cumulativeness standard. And so maybe you  
21 tighten that up and you have a broader definition  
22 of what is -- or a tighter definition of what's

1 cumulative or you eliminate cumulative as a basis  
2 altogether or you have military judges who feel a  
3 little bit more comfortable standing up to the  
4 prosecutor and saying, "I want to hear from this  
5 witness."

6 COLONEL NANCE: I think a more robust  
7 Article 32 hearing would be useful in providing  
8 information, so that the person who makes the  
9 decision about referral has the most information  
10 available to make an informed decision.

11 And I don't know, I'm a simple guy.  
12 I don't see how that's a negative thing.

13 COLONEL GLASS: So I think we think  
14 there is a public benefit -- and I understand  
15 that these hearings would be closed at the -- at  
16 certain critical portions. But I think we think  
17 there is a public benefit to this being able to  
18 be on TV today.

19 I joked with Jeff that if I -- one of  
20 the good reasons that we don't have TVs in a  
21 military courtroom is what that gentleman did  
22 before, I would have found him in contempt.

1 Okay? I know he's doing his job, but my point is  
2 -- my point is that we believe that this has a  
3 public benefit to being out there.

4 What public benefit is there to a  
5 paper case? And what does it do to the  
6 presumption in society that this really isn't a  
7 justice system? So that's the first point.

8 The second point -- and this is -- I  
9 know these things are numeric as can be, and you  
10 maybe already have this statistic. But if you  
11 don't -- and I know that all of the various  
12 departments are going to love me; this table over  
13 here is going to hate me. But I would look into  
14 how often in sexual assault cases the 32 is  
15 waived by the defense, because they don't think  
16 it's fair, because they don't think there is any  
17 benefit, and because they don't think that  
18 anything good can come of it. So I would check  
19 that if I were you.

20 Then the other piece. If a judge  
21 doesn't have comfort standing up to a prosecutor,  
22 whatever the rules, and making sure something is

1 fair -- let me say that a little more positively.  
2 The judges here at this table have -- would have  
3 no trouble saying, "Nope, we're going to hear  
4 this case." Or, "Nope, I'm going to allow some  
5 latitude."

6 Now, there is no doubt -- and I don't  
7 know the specifics of some very, very public  
8 misuses of the Article 32 system in the past, but  
9 there is no doubt that there have been some  
10 misuses and abuses in the former Article 32 that  
11 resulted in this change.

12 I think there is a middle ground, and  
13 I think to the degree you can get somebody who  
14 knows what they are doing, who has been trained  
15 what they are doing, whether they are a major or  
16 a lieutenant colonel or a colonel, sitting there  
17 saying, "Nope, I'm going to allow this," or  
18 "Nope, you need a little more." I think it makes  
19 a difference. It does matter.

20 MS. BASHFORD: Mr. Kramer?

21 MR. KRAMER: I'm sorry to switch  
22 topics for a second. I wonder what you think of

1 the ability of defense counsel to obtain experts  
2 and the procedure they have to go through to do  
3 that and whether that should be changed?

4 COLONEL NANCE: Sir, I have preached  
5 on this for my entire time in the military. I  
6 think it should be changed. I think it's  
7 difficult to impossible for the defense counsel  
8 to get experts. I think having it approved by  
9 the prosecutor is the wrong answer.

10 I think the defense bar should be --  
11 or TDS in Army parlance should be funded, and  
12 they should have at the TDS headquarters level a  
13 warrant officer who is in charge of dispensing  
14 money for expert witnesses. And the chief of TDS  
15 is the adult in the room who makes sure that  
16 there are no abuses for frivolous requests.

17 And of course the judge is going to do  
18 that, too. I mean, the judge ultimately gets to  
19 say whether an expert gets to testify or not.  
20 But I think that's a better dynamic, a better  
21 system for experts for the defense bar.

22 COLONEL GLASS: So I agree with all of

1 that. I would just say this -- and I think this  
2 has changed -- I am not conversant with what is  
3 going on in the Army in terms of the Trial  
4 Defense Service. But sometimes you need an  
5 expert to be able to establish you need an  
6 expert, right?

7 So somebody has got to come in and  
8 testify and say that "This is what I'll provide  
9 to the court to persuade the judge that this  
10 person should be allowed to testify." I think  
11 there is money -- I know, again, years back in  
12 Trial Defense Service that was a big  
13 conversation.

14 I mean, hey, how do we do this? We  
15 can't get there without -- and it's the rare  
16 expert or the very dedicated expert that is  
17 willing to come in and testify to establish that  
18 they are needed for free, because if they don't  
19 get retained, they're not getting that back.

20 And so, yeah, absolutely. I think --  
21 I think -- I want to echo what Jeff said. There  
22 needs to be a pot of money that the defense can

1 go to, and I think now with investigators also,  
2 so that you can establish that kind of baseline  
3 case for that additional assistance.

4 COLONEL MOORE: I think the current  
5 system has actually worked fairly well in the Air  
6 Force. I generally more often than not would see  
7 experts that I did not have to compel as a  
8 military judge, so that they were getting  
9 appointed and funded. That's not to say that  
10 Colonel Nance's proposal isn't superior.

11 I think the fact that I'm saying it  
12 works in the Air Force and it doesn't work in  
13 another service indicates that the process is not  
14 as good as it should be. It shouldn't depend on  
15 one service's implementation of it.

16 And to that extent, having Trial  
17 Defense Services in charge of it does make sense.  
18 You're still, as a judge, going to have those  
19 circumstances where the individual defense  
20 counsel doesn't agree with his boss' decision,  
21 but I think you're going to see a lot fewer of  
22 those than you do disagreeing with the prosecutor

1 as he advised the convening authority on granting  
2 that expert.

3 CAPT PAYTON-O'BRIEN: I have actually  
4 tried a case with Colonel Moore as a defense  
5 counsel, and I will say that I was surprised,  
6 because I came from the Navy, that the Air Force  
7 did it, in my view, so well. There were multiple  
8 experts granted by the convening authority, but  
9 in the other services we struggle as defense  
10 counsel to get experts just for purposes of  
11 consultation. Do we need an expert?

12 And convening authorities often --  
13 more often than not deny that, and I think that  
14 for defense counsel that is a -- that's a  
15 difficult road for them when they are trying to  
16 evaluate their case, they think there is  
17 something there, they are trying to find somebody  
18 who might talk to them for free.

19 And as defense counsel, we all have  
20 sort of that group of experts we can reach out to  
21 just to, you know, have that five-minute  
22 conversation. Do you think there is something

1 there? They won't charge us. But then in order  
2 to do the evaluation, they need to be appointed,  
3 and convening authorities resist.

4 I do a lot of appellate work now, and  
5 I read records of trial, and I am often shocked.  
6 I guess I shouldn't be because I know this is  
7 happening, but I'm often shocked at how many  
8 pages of transcript I am reading with the  
9 government fighting over experts, you know,  
10 hundreds and hundreds of pages on motions, and  
11 the court not granting experts, or ultimately  
12 granting the expert after, you know, a day of  
13 testimony and fighting back and forth.

14 And I think the system needs to be  
15 changed to allow the defense to have that  
16 opportunity to seek consultation because we know  
17 the government has it, right? They have all of  
18 the tools at their disposal they can call,  
19 although I would say that maybe even in the Navy  
20 medical system many of the experts don't want to  
21 be involved, and that presents a trouble for the  
22 government as well. But I think the current

1 system does need to be improved upon.

2 MR. KRAMER: Why is it that they don't  
3 want to be involved?

4 CAPT PAYTON-O'BRIEN: I don't think  
5 anybody relishes the idea of having to testify in  
6 court, no matter what side you're on.

7 COLONEL NANCE: Plus, it's a hassle.  
8 It takes away from what they're doing on their  
9 day-to-day --

10 CAPT PAYTON-O'BRIEN: Right. Our  
11 military medical system is overstressed just with  
12 patient care. I mean, see what is happening with  
13 dependents and retirees. They are not  
14 necessarily seeking treatment at the medical  
15 facilities anymore because they can't.

16 There is not enough -- there aren't  
17 enough doctors, not enough time, so now you have  
18 a doctor who sees patients and has to be an  
19 expert, and they are just -- they don't want to  
20 get involved. There are some who love it. They  
21 want to. But I would say that oftentimes you  
22 will find the medical because they are stressed

1 on just doing patient care. They don't want to  
2 be involved.

3 So we then look to the civilian  
4 population. There are plenty of civilians out  
5 there who do this for a living, and I would say  
6 that I think the Navy has a pretty good pool of  
7 who they utilize, and it's probably shared with  
8 the other services as well. But it is difficult  
9 to find the active duty to be involved.

10 MS. BASHFORD: That's a great segue  
11 for Dr. Markowitz.

12 DR. MARKOWITZ: So this is an issue  
13 near and dear to my heart. I am interested in  
14 hearing from all of you because the services do  
15 use experts differently, whether or not you  
16 believe that experts are being used effectively  
17 at trial.

18 CAPT PAYTON-O'BRIEN: So, in the Navy,  
19 I would say that in the sexual assault cases  
20 there would be experts involved. In every case  
21 that I have ever tried, whether I was a judge,  
22 trial counsel, defense counsel, there was some

1 sort of expert involved.

2 Do I believe they were effective?

3 Well, I think that sometimes is expert-specific.

4 But we're talking DNA; we're talking computer  
5 forensics. There is this phrase that often is  
6 batted about about cases are so much more  
7 complicated today.

8 I would tend to disagree that the  
9 cases are more complicated than they were 20  
10 years ago, perhaps except with computer, cell  
11 phones, you know, the Snapchat where things  
12 disappear. Maybe that side is a little more  
13 complicated because of just the forensics that  
14 goes into that. And if you have trial counsel  
15 who are young, who don't understand the computer  
16 forensics and the phone, that can be problematic.

17 And I see it in transcripts I read,  
18 and I saw it when I was a judge. I mean, I won't  
19 tell you my age, but I can tell you that my 16-  
20 and 18-year-old kids are way more proficient on  
21 the iPhone than I am. I hand it to them. "Hey,  
22 screenshot this for me. I'm not sure what to

1 do."

2           So if I'm a judge and I have that  
3 difficulty, we can imagine that maybe some of the  
4 counsel do as well. But do I think they're being  
5 used effectively? I think for the most part yes.  
6 But is it a fair playing field? I would say no.

7  
8           I think that with the defense -- and  
9 we go back to your question of having to ask for  
10 the expert, you know, come sort of begging hat in  
11 hand, "Please give us an expert. We need it for  
12 this." And oftentimes the court might say,  
13 "Well, you should be experienced in this. You've  
14 done enough of these cases."

15           I know as a defense counsel when I  
16 seek experts I often do get the response back  
17 from the government that says, "You were a judge  
18 advocate for 23 years. You were a judge for  
19 nine. You don't need an expert. You're fully  
20 versed in this." But I can't testify, so they  
21 tend to miss that part that I need a consultant  
22 to help me who may turn into an expert. But they

1 are denying because of the experience level of  
2 just the counsel.

3 Admittedly, you know, the case law  
4 indicates that I should be -- I should educate  
5 myself, but that only goes so far, and sometimes  
6 -- oftentimes we need an expert.

7 COLONEL MOORE: I would say most of  
8 what I've seen from experts has been that they  
9 have been very helpful and very well employed.  
10 What I saw in my Air Force practice was the same  
11 handful of experts over and over again working  
12 equal number of cases on the prosecution and on  
13 the defense side, which gave them great  
14 credibility.

15 I can recall a few cases where the  
16 experts were advocates in disguise, and that was  
17 very easily revealed throughout the course of the  
18 court-martial. And they were not effectively  
19 employed, and they were not persuasive, and had a  
20 really negative impact on the overall outcome of  
21 that case.

22 But, by and large, many of the issues

1 that we are dealing with, particularly in sexual  
2 assault cases, I have been much more enlightened  
3 by hearing from experts. Alcohol is almost  
4 always involved, and so the education I've gotten  
5 on issues like blackout and on the effects of  
6 alcohol on memory, those are invaluable to these  
7 court members and to a judge sitting as a  
8 court-martial in evaluating all of this evidence  
9 that you have before you.

10 So my experience has been it has been  
11 very effective, very helpful, and the experts  
12 that I see on a regular basis have been very,  
13 very professional, neutral, tell it as it is, and  
14 have been very helpful.

15 COLONEL NANCE: I agree with what Wes  
16 said. When an expert gets to trial, my  
17 experience has been that most of the time, a vast  
18 majority of the time, counsel -- both defense  
19 counsel and trial counsel -- do a good job of  
20 getting the pertinent information out of that  
21 expert in a good way, in a good presentation.

22 I think they struggle, and I think

1 that's because the expert helps them, you know,  
2 design their direct or cross-examination. But I  
3 think where they struggle is in the decision and  
4 in figuring out whether or not and how -- they  
5 need an expert and how to get the expert. And  
6 that's a product of lack of experience.

7 But I want to just add to that that I  
8 think the HQE program, at least -- I don't know  
9 if they -- if the Air Force or the other services  
10 said it, but I think the HQE program,  
11 particularly in the Army, they do a great job of  
12 helping young counsel understand the expert  
13 process and helping them make the decision about  
14 whether an expert would help their case or not.

15 I think that's the question that young  
16 counsel struggle with the most. Do I really need  
17 an expert or am I just hypersensitive about  
18 ineffective assistance of counsel and asking for  
19 an expert when I really don't need one?

20 COLONEL GLASS: So I just want to echo  
21 what other panel members have said. I think  
22 discernment matters, right? So discernment of

1 not just, do I need an expert, but what are the  
2 consequences to the timeline of my case if I call  
3 an expert because often you are going to get a  
4 kind of concomitant defense request for, you  
5 know, an opposite expert.

6 And also, what are the consequences in  
7 terms of evidence that is now admissible or  
8 approaches that are now admissible? You don't  
9 always see that. I would say, just to echo,  
10 again, the testimony I have heard in my  
11 courtrooms has -- from experts has almost  
12 uniformly been when given, professionally done,  
13 usually professionally cross-examined, sometimes  
14 I have wondered, huh, why did he or she testify?

15 Especially when I am the fact-finder,  
16 I'm like, well, why did I have to hear this? Or  
17 what did this add to in terms of the development  
18 of the case?

19 I have had instances in sexual assault  
20 cases where experts have been almost dispositive  
21 because of the -- because, you know, it just  
22 strikes me always with young counsel, judges like

1 to learn. You know, sitting -- those of you who  
2 have been judges, sitting on the bench every day  
3 can get kind of dry, and so learning and  
4 developing an understanding of how this works, a  
5 good expert is a good educator. And so that  
6 certainly has been interesting.

7 I want to give you a contrast. I'm  
8 not sure exactly what it means, and, obviously,  
9 we can't fund all cases like this. But I had --  
10 I had the honor to sit as a defense counsel in a  
11 capital murder case. And when you talk about  
12 experts, because death is different, you get --  
13 it's pretty much like a candy store of experts.  
14 You get all you want.

15 And it is at least striking to me to  
16 see the contrast of all you want versus we can't  
17 figure out getting this expert to trial to give  
18 both sides an adequate opportunity. It rarely,  
19 in my experience -- and the others can certainly  
20 correct me -- it rarely, in my experience, looks  
21 fair, for Dr. Jones to come in and testify for  
22 the government. And if any of you are Dr. Jones,

1 I apologize. Dr. Jones to come in and testify  
2 for the government and there be nothing on the  
3 other side.

4 So I'm not saying it can't happen.  
5 Obviously, the standard allows that sometimes.  
6 But in a capital world, for good reason, there  
7 are millions of dollars spent on expert  
8 witnesses. It seems to me that there could be a  
9 greater balance in how we approach that.

10 MS. BASHFORD: Ms. Garvin, and then  
11 Ms. Long.

12 MS. GARVIN: Thank you. Thank you all  
13 for being here. I have an intentionally broad  
14 question, so that you all can take it where you  
15 want. And it's a compound question, but you all  
16 can't object to it, which is fun, to have judges  
17 on the other side.

18 So, really, just want you to share  
19 your experiences with 412 and 513, and  
20 particularly as the SVCs and VLCs have been  
21 involved in those. What have you seen hopefully  
22 post-2015 when they were amended? But, if not,

1 that's okay, too.

2 And with the constitutionally required  
3 exception, which I find odd as an explicitly  
4 drafted exception because, of course, it would be  
5 there even if it wasn't explicitly in the  
6 language, but what are your experiences? How are  
7 you seeing that impact trial? Are you seeing it  
8 impact trial? And what are you seeing with the  
9 role of the SVC/VLC?

10 And, truly, wherever you want to go  
11 with 412, 513. It has been something that has  
12 been talked about quite a bit by this committee,  
13 by other committees, and would love to hear the  
14 judicial perspective.

15 COLONEL GLASS: Sure. I'll take the  
16 tough legal question first. So I -- my  
17 experience kind of runs the gamut, from the old  
18 412 to the newer 412 to the new 412, and 513  
19 doesn't exist, simple privacy issues, and then  
20 litigating and expanding how we look at 513.

21 I would say generally that victim's  
22 counsel in the Army, in my experience, are really

1 good on 412. And I don't know if it's because  
2 they've been collaborative with the government  
3 but are really good at saying "me, too." I don't  
4 get a lot of new, nuanced arguments about -- or I  
5 didn't get a lot of 412 or 513 from victim's  
6 counsel where I said, "Huh, that changes the  
7 landscape."

8 In that context, one of my concerns as  
9 a judge, as the 513 system evolved, was I had a  
10 couple of cases under the old 513, or maybe under  
11 a misunderstanding of 513, where medical records  
12 came in, were disclosed under a protective order,  
13 and were huge in a determination of judicial  
14 guilt, but may have also been huge in the  
15 determination as to whether this thing ever  
16 happened.

17 I've had instances -- not recently,  
18 obviously, follow the law -- but I have instances  
19 where there were personality disorders disclosed  
20 in the release of medical records that went  
21 directly to the claim.

22 And, frankly, and one of the medical

1 records said -- well, I won't give the specifics,  
2 but said -- gave facts that undermined the  
3 original claim of sexual assault, and had a  
4 diagnosis of a personality disorder that was  
5 among the DSM criteria, has a difficulty telling  
6 the truth, which, you know, that's huge.

7 And so having litigated under a  
8 different paradigm and released it, sure, it was  
9 -- defense had a heyday with it.

10 So my concern I guess as a human and  
11 as a judge was always, what don't I know, right?  
12 What is out there that I haven't seen that may  
13 a year or two years, maybe never, implicate  
14 whether or not this was a just trial, whether  
15 this is a just process, whether this was a just  
16 verdict. So that's kind of my observations of  
17 the system.

18 COLONEL NANCE: You know, and just to  
19 sort of dovetail on that, I think my experiences  
20 were similar to Andy's because our time in the  
21 judiciary sort of spanned the same timeframe.

22 So I lived with and experienced myself

1 and struggled with the implementation of the  
2 rules as they changed and, you know, sort of  
3 coming to an understanding of what was required  
4 and how logistically to go about it.

5 I'll say that unlike my current job,  
6 as a military judge, I didn't have a law clerk.  
7 It was me and me alone. And so when I would get  
8 a stack of medical records this high to go  
9 through and try to see if there was something in  
10 there that needed to be released, man, I didn't  
11 have the time to do it. I really didn't have the  
12 medical expertise to be able to do it.

13 And I was always afraid I'm going to  
14 miss something that should be released and not  
15 and not release it because I just don't know what  
16 I'm looking for or because I don't understand  
17 what I'm seeing.

18 So that was always my fear. I mean,  
19 maybe that was a good thing because it made me  
20 more vigilant in reviewing those things. But it  
21 really was a burden as a military judge to try to  
22 have to go through that in the midst of a hotly

1       contested trial when I had a lot of other things  
2       to do.

3                       So, yeah, I mean, I think that,  
4       though, as counsel became more experienced with  
5       it, I saw the requests in those areas sort of  
6       shrink, not just in terms of numbers but in terms  
7       of the scope, so they learn to narrow their scope  
8       and figure out what they were looking for, which  
9       made life a little bit easier, and I think made  
10      the chance of making a mistake reduced -- from my  
11      perspective as the military judge reduced the  
12      chances of me making a mistake on that front.

13                      Wes?

14                      COLONEL MOORE: I agree with Colonel  
15      Nance. 513 made the job of reviewing  
16      psychotherapist patient records immensely more  
17      difficult. Sometimes you have to do the  
18      difficult, and so the other side of that is I  
19      think we do a much better job of protecting those  
20      confidential records than we did before.

21                      I think the default position before  
22      513 was release everything, subject to a

1 protective order, and then we'll just fight  
2 whether it comes out during trial or not, and  
3 without much consideration to the fact that that  
4 is a victimization, in and of itself, of  
5 somebody, because so many of those records turn  
6 out to be irrelevant.

7 That's one area where I think the VLCs  
8 have been of value -- having somebody who is on  
9 that victim's side who can talk through that  
10 issue with them, and very often come back and  
11 waive privilege as to huge amounts of the  
12 records.

13 It turns out in many cases that there  
14 was only this one little part of the records that  
15 she really had any issue with anybody seeing.  
16 And if the VLC could help you to narrow that  
17 issue, they can help you to get to a better  
18 quality decision.

19 But I echoed many times Colonel  
20 Nance's feeling of inadequacy to be doing this,  
21 just from the terms of knowing what you are  
22 looking at and making the right call, so you have

1 to have your own DSM out and looking at things  
2 like that.

3 COLONEL NANCE: That's malpractice.

4 COLONEL MOORE: Probably so. So when  
5 we talked about experts before, having an expert  
6 available to the court maybe to talk to on a  
7 confidential basis on something like that would  
8 have certainly been helpful, and helpful in  
9 defraying that workload issue as well.

10 COLONEL NANCE: Exactly. That's a  
11 good -- that's a good thought. I think that's a  
12 good thought.

13 CAPT PAYTON-O'BRIEN: So I have tried  
14 cases as a prosecutor under old 412, tried cases  
15 as a judge under new 412 and newer 412, and of  
16 course even newer 513. We talked early on about  
17 the training we had had as judges, and the annual  
18 sexual assault-focused training for judges was  
19 invaluable to sort of navigate, okay, what are we  
20 doing now, and how are we doing it, and who has  
21 suggestions on what you do?

22 Perhaps I got it wrong on more than

1 one occasion. I can think of at least one case  
2 that the court said I did it wrong under  
3 constitutionally required. But it could be a  
4 struggle, right? If you don't have a court  
5 expert -- and I have used a court expert in one  
6 case because I had a -- it was a mental health  
7 issue. It wasn't even sexual assault.

8 It was a mental health issue for an  
9 offender, and so I think using a court expert  
10 would be invaluable when you are going to be  
11 evaluating mental health records, to determine if  
12 anything needs to be released.

13 The comment about the requests are  
14 shrinking, I would agree that it seems that the  
15 number of requests and motions that I was  
16 receiving towards the end of my time on the bench  
17 seemed to drop. Or at least, to be frank, some  
18 of the motions were the same every case. I need  
19 the mental health records because she saw a  
20 therapist.

21 That's not helpful. I mean, seeing a  
22 therapist was not necessarily what you needed.

1 You needed to know if she had a mental health  
2 disorder.

3 The problem for the court and for  
4 counsel is, yes, they might know that somebody  
5 sought mental health treatment, but they don't  
6 know why. And so what are we missing? What  
7 don't we know? And sometimes counsel struggle  
8 with that because the VLC is doing a great job in  
9 protecting their client, but the prosecution may  
10 not know what is out there. The defense may not  
11 know. They just know there is something.

12 And at least in one particular case I  
13 can recall, not for me as a judge, the mental  
14 health issue came up in sentencing. And so then  
15 now there is this -- we have to continue the case  
16 and look and see what that is.

17 That's too late in the game for that  
18 issue to be now vetted. I mean, it's very late  
19 in the game because it comes up in a victim's  
20 statement during sentencing. And while in the  
21 old days we would look at 513 records for -- and  
22 I think I did this. I'm certain others did as

1 well. You would look for prior inconsistent  
2 statements. Of course, that's not what we do  
3 now. We look for the mental health disorders.

4 But I can think back when we were  
5 releasing records, if there were prior statements  
6 in there.

7 Now trying to find the mental health  
8 disorders that might be there, and counsel for  
9 both sides are still unaware of what they are,  
10 presents a challenge for the court, because we  
11 are being asked to rule on 513 motions without  
12 all of the information.

13 Defense counsel motions, well, we  
14 think there is something there. Do you have  
15 anything more than that? No. Okay. So our  
16 hands are tied by the law.

17 MS. BASHFORD: Ms. Long?

18 HON. GRIMM: This is --

19 MS. GENTILE LONG: And I think then  
20 Judge Grimm. Thank you again.

21 HON. GRIMM: Yeah. I --

22 MS. GENTILE LONG: I want to go back

1 to an issue that came up -- I think both Colonel  
2 Glass and Colonel Nance raised it -- about  
3 command decision and cases going forward that may  
4 not -- that the command or someone may not  
5 actually believe there is a credible claim or  
6 that the person did it, which I -- is something  
7 that when you said it is concerning.

8 And I'm curious, sort of like the  
9 Article 32, if there is some solution you could  
10 think of where that command decision to go  
11 forward could be subject to attorneys, if there  
12 is an ethical issue -- and I understand that from  
13 the civilian perspective and from the military  
14 justice perspective sometimes we differ in terms  
15 of the ethical obligations of the prosecutors  
16 going forward.

17 Sometimes we have had arguments about  
18 whether the rules of professional -- not you and  
19 me, but in trainings -- whether the rules of  
20 professional responsibility apply, but obviously  
21 we -- in the civilian world, and I would say in  
22 any world where we have a criminal case, you

1 don't ever want to just be throwing it up to  
2 someone if you don't believe a crime has  
3 happened.

4 So is there a solution that checks the  
5 decision-making to ensure that cases that  
6 ethically should not be done -- I'm not talking  
7 difficult cases that are complex where we don't  
8 know what a jury would do. I'm talking about  
9 cases that do not have admissible evidence or do  
10 not have credible testimony, and "credible"  
11 meaning there is no testimony -- we don't believe  
12 the complainant and/or we don't have admissible  
13 evidence, and someone is throwing that up because  
14 they're afraid of not getting promoted.

15 Is there a check on that that you  
16 could recommend?

17 COLONEL NANCE: Well, I haven't  
18 thought of one. But I really believe in our  
19 commander's system. And I believe we are  
20 different. Military justice is different, and I  
21 believe that it should be different. I believe  
22 that the commander being involved in the system

1 is hugely important.

2 Will there be times when commanders  
3 make an unethical decision? I suppose so. But I  
4 think that happens in the civilian justice system  
5 as well. I mean, I have never worked in it, but  
6 I have paid attention to it. And I think it  
7 happens there as well.

8 My experience has been that -- and,  
9 again, we're not talking about the close  
10 call/flip a coin cases. We're talking about the  
11 unethical decision. I have not seen that, and I  
12 think -- and I have advised commanders about  
13 referral. I didn't spend my entire time as a  
14 military judge, although I would have liked to.  
15 The commanders take the decision seriously.

16 My experience has been that they take  
17 their duty to the system seriously, and though  
18 they may feel pressure at times to let the -- and  
19 I hope I didn't infer from my earlier comments  
20 that commanders were sending cases that ethically  
21 they should not have. But do they feel pressure  
22 from without and from the civilians that oversee

1 our military justice system sometimes? Do they  
2 feel pressure to send a case that maybe they are  
3 not, you know, sure about?

4 I think they do. But I don't -- I  
5 have not had the experience where they know a  
6 case is not a true case, not a case that has a  
7 chance in the world of success at trial, and they  
8 -- and they refer that case to trial knowing  
9 that. I haven't experienced that.

10 COLONEL GLASS: So I think any honest  
11 response to this question involves this  
12 disclaimer. When you're a judge, more than any  
13 other time in this process, you don't know what  
14 you don't know. You don't know what has gone on  
15 behind the scenes. You don't know if a -- well,  
16 you should know if a witness doesn't show, but  
17 you don't know what a witness was supposed to  
18 say.

19 So with that caveat, I think there are  
20 what I would call bulwarks against that in the  
21 system. The question is whether they work and  
22 whether those bulwarks are supported

1 sufficiently. So I will just give you -- so I  
2 certainly have sat in a courtroom as a judge  
3 thinking, how did this get here? I don't even  
4 see why we're here. Not he said/she said  
5 credibility call.

6 I would tell you extremely  
7 infrequently, and I don't know what happened in  
8 the SJA meeting with the commander, but I do know  
9 that when I have sat in classes -- so there is a  
10 process, at least there used to be a process in  
11 the Army where you have things that are called  
12 bridge the gap, which is after a trial tell  
13 people -- kind of mostly -- it's supposed to be  
14 technically what they did right or wrong.

15 That waxes and wanes in the service,  
16 but there is -- also, you are supposed to do  
17 something called gateway sessions where you train  
18 prosecutors and defense attorneys and talk about  
19 legal stuff. I have sat in those systems or,  
20 excuse me, in those classes and said, "Why are  
21 you applying a different standard" -- if you are,  
22 "Why are you applying a different ethical

1 standard to sexual assault cases than you would  
2 from just a general crimes case?"

3 More emotional, complicated case, I've  
4 got all that, but it's the same ethical standard.  
5 I have also sat in a room where I thought we were  
6 narrowly close to referring just to see what  
7 happens, and I think that expression -- I'm not  
8 -- in the use by Colonel Nance, but that  
9 expression in the system is problematic. That's  
10 not how the system works.

11 We don't just throw things up against  
12 the wall because there is a service member's life  
13 on the line. There is an alleged victim who has  
14 to come in and pay this price, which there is  
15 always a significant, difficult price for that  
16 person.

17 And I think you can do a couple things  
18 to try to make it better. You can vest people  
19 with experience, so that when they stand up and  
20 say, "Hey, this doesn't work" -- and I fully  
21 agree the commander -- it's a commander-based  
22 system, and it ought to be a commander-based

1 system.

2           You can train, right? The Army is  
3 really good at training, and the Army is really  
4 good at standards. We need to not lose what that  
5 standard is. I'm fine with the DOJ standard,  
6 right? Civilian Andrew Glass is fine with it.  
7 But if that's the standard, we need to train to  
8 that standard, and we need to tell people it's  
9 okay to walk away when you don't meet that  
10 standard.

11           And then some of this is just whoever  
12 is advising that commander, whether it's an SVP  
13 or an SJA, them having the moral authority to say  
14 in writing -- I never had a problem with saying  
15 in writing. Maybe it's just my lack of  
16 intellect. I don't know. But I was always one  
17 to say, "Sir, you shouldn't do this, and here is  
18 why."

19           And then some of this, with all due  
20 respect, falls to the politicians. Every time a  
21 decision doesn't go the way we want it to go, if  
22 there is a lynching or a cross-burning, or

1 whatever your chosen metaphor is, because the  
2 commander made a tough call, we've got to take a  
3 step back and understand that's what we pay  
4 commanders to do. That's ultimately what -- we  
5 vest them with that authority.

6 And so I think there are ethical  
7 protections involved. I think we need to train  
8 them more. It shocks me sometimes -- well, not  
9 anymore, but it used to shock me when I'd sit  
10 there with young captains and say, "What's your  
11 ethical standard?"

12 Real quick war story. We don't  
13 believe her. In a he said/she said, we don't  
14 think she is telling the truth. She has  
15 affirmatively lied to us in the past. How do we  
16 meet the ethical standard? How can we take that  
17 to a courtroom? If that's all there is, there's  
18 no forensics, there's nothing else. To me,  
19 that's -- I don't know if it's easy. It's never  
20 easy, but it's straightforward. That's not a  
21 case that goes to trial.

22 COLONEL MOORE: I would say, first of

1 all, as a staff judge advocate, I got the honor  
2 of working with commanders who, by and large,  
3 actually universally were some of the most  
4 impressive, loyal, and courageous people that I  
5 have known. And so, to me, the implication that  
6 they would fail to make the tough decision  
7 because of career implications, I have not seen  
8 any evidence to support that.

9 That being said, I believe, at least  
10 when I was a staff judge advocate, if the staff  
11 judge advocate in his advice to the convening  
12 authority said there is no probable cause to go  
13 forward, then that took the matter out of the  
14 convening authority's hands. He did not have the  
15 authority to refer over that recommendation. So  
16 there was at least that check in the system  
17 before going in.

18 Another thing that I always  
19 experienced -- and I have advised commanders not  
20 to go forward on charges, and we have decided not  
21 to go forward on charges. And one of the things  
22 that we always did was coordinate that decision

1 with the victim's counsel and with the victim.

2 Much like you don't see people suing  
3 their doctor for malpractice if the doctor has a  
4 good bedside manner, there is a lot to be said  
5 for having that relationship with the victim.  
6 And even if it's going to be a negative decision,  
7 that you thoroughly explain why you're doing that  
8 and what all of the thought process was. And I  
9 have never had that come back on a commander for  
10 doing that.

11 So that's the only comment I had.

12 Thank you.

13 CAPT PAYTON-O'BRIEN: Well, as a  
14 prosecutor, I can recall on occasion doing those  
15 memos saying, "I don't believe this occurred."  
16 That's my personal belief. Does that mean it  
17 didn't happen? I can't speak to that. I can  
18 just say what the evidence is telling me.

19 I also, though, believe that in the  
20 current system that because we do have some  
21 inexperienced or not overly experienced  
22 prosecutors handling sexual assault cases, their

1 personal belief that there is nothing here, or  
2 their personal belief that I don't find the  
3 victim credible, causes concern for whether or  
4 not they really can evaluate a case.

5 And does that make them then, if they  
6 make that expression, "I don't believe her; don't  
7 go forward," and then the government chooses to  
8 go forward, does that put that government counsel  
9 in an ethical quandary? I would suggest no.

10 I mean, there are certain cases -- I  
11 concur with Colonel Glass, yes, there are cases  
12 that came across the bench when I was on -- when  
13 I was on the bench that you did have to think,  
14 wow, how did this get through a 32? Did anybody  
15 ever talk to this person, this victim? Did they  
16 know what he or she was going to say when they  
17 came in here? How did it get here?

18 I was the fact-finder on a case that  
19 ended up at trial where I convicted, and then it  
20 came out in the press later that the convening  
21 authority had concerns about the case from the  
22 get-go. And the question is, well, then,

1 convening authority, if you had concerns, why was  
2 it at court-martial?

3 Why did you feel it necessary to throw  
4 it up at the law? If you believed, convening  
5 authority, that it shouldn't have been there, why  
6 did you send it? Because from my perspective as  
7 a court, there was sufficient evidence. What was  
8 it that caused your concern?

9 And sometimes it's that evidence that  
10 doesn't come into court, that we don't see. We  
11 don't know everything that is going on behind the  
12 screen. But convening authorities need to have  
13 that ability to say, "I'm not going to take it."  
14 Don't just throw it up there and let us try to  
15 figure it out or let members try to figure it  
16 out.

17 What's the solution for that? I'm not  
18 sure. I just know that commanders need to be  
19 able to make the hard calls. That's why we pay  
20 them the big bucks to do so. They are to make  
21 the tough calls. And sometimes they have a  
22 prosecutor that may not be giving them the

1 correct advice or good advice, and the staff  
2 judge advocate, the same thing, because of a lack  
3 of experience.

4 MS. GENTILE LONG: Thank you.

5 MS. BASHFORD: Judge Grimm?

6 HON. GRIMM: Thank you very much. I  
7 wonder if we could --

8 MS. BASHFORD: A little bit louder,  
9 please.

10 HON. GRIMM: -- take advantage of your  
11 -- can you hear me now? I hope you can hear me  
12 now. I'd like to take advantage of your  
13 experience to shift to another part of the  
14 process, namely sentencing.

15 We heard information not from judges  
16 we heard that active duty military judges were  
17 reluctant to speak to our committee because they  
18 felt that they should not be, because of  
19 appellate decisions, explaining a reasoning for a  
20 sentence that they imposed at a court-martial,  
21 that they should just simply announce the  
22 sentence and not explain the reason.

1                   When we look at the actual sentencing,  
2                   and we're trying to see whether it was  
3                   confinement or some other sentence that was  
4                   imposed, when the military judge was imposing a  
5                   sentence, the announcement of a sentence and the  
6                   reason for it is an enormous portion of the  
7                   sentencing process in the federal system.

8                   And because we have sentencing  
9                   guidelines that likely would not smartly be  
10                  transferable to the military, that are very  
11                  complicated and are an enormous portion of the  
12                  sentencing process in federal court, one thing  
13                  that they do is they require an explanation by  
14                  the court as to how the court evaluated a number  
15                  of factors to include the seriousness of the  
16                  offense and the prior history and characteristics  
17                  of the defendant and a sentence which is  
18                  necessary to serve the purpose of sentencing.  
19                  And there are a lot of other factors that go into  
20                  that as well.

21                  I have met with active duty military  
22                  judges and was requested to -- to talk about how

1 sentencing occurs in federal court, and there is  
2 much of what happens in federal court sentencing  
3 that would not be, in my judgment, good to be  
4 adopted by the military.

5 But one thing that does strike me as  
6 being important in the sentencing process where I  
7 live is that if you experience a concern, or a  
8 reluctance to comment on why it was that you were  
9 imposing a sentence, just because you were afraid  
10 that the appellate court -- not afraid, but you  
11 had gotten guidance from the appellate decision  
12 saying if you did that you were doing something  
13 wrong.

14 And, secondly, do you have any  
15 thoughts, now that you are retired, about whether  
16 or not the convening authority should have the  
17 ability to change a sentence when that sentence  
18 has been found by a court-martial and imposed by  
19 a military judge or by members?

20 COLONEL GLASS: Judge, this is Andrew  
21 Glass. So, first of all, with regard to the --  
22 going through the process, I think -- and I'm

1       sure you appreciate a little bit of it is that in  
2       terms of active duty judges speaking to  
3       sentencing, or speaking in this forum, is a  
4       concern that something you say may or may not be  
5       misconstrued as taking a position that is adverse  
6       to either the prosecution or the defense.

7                 With regard to the appellate issue, I  
8       can tell you back as a baby judge, there were so  
9       many times -- and this isn't directly responsive  
10      to your question, but there were so many times  
11      where I really felt like the -- in non-sex cases  
12      -- I felt like the accused really just needed a  
13      good butt-chewing and really needed to have  
14      somebody in a judicial robe tell them they're on  
15      the road to perdition, and that that would have  
16      as much impact, maybe that plus jail or that --  
17      and I will tell you in all candor, I have done it  
18      before in cases in which I didn't give jail time  
19      or a sentence that was necessarily going to  
20      quality for an appellate review, an automatic  
21      appellate review.

22                 I don't see, frankly, any real issue

1 with -- well, I don't see many issues with  
2 allowing judges or requiring judges to give some  
3 reason for their sentence, but, again, some of  
4 this goes back to how long have you been a judge  
5 and knowing not -- what not to say in that  
6 context, not stepping in it when you say  
7 something, and not being contrary to what you are  
8 -- we only have certain things we can do in  
9 sentencing, not being contrary to those things  
10 that you're allowed to do, not -- and so think  
11 about this.

12           You're junior lieutenant colonel,  
13 maybe just promoted, walked into the job and you  
14 haven't done justice in five years. And you've  
15 been trained, you've been to the judges course,  
16 you've been through all of these things. Are you  
17 -- and you have a different appellate system.

18           I think it bears mentioning that there  
19 is mandatory appeal, no accused has to pay for a  
20 transcript to be prepared, no accused -- at least  
21 on the first level of appeal -- has to pay for  
22 their attorney. Awesome -- awesome protections

1 for service members, but everything I do goes up.

2 And so what are the chances that in  
3 that system you want that junior lieutenant  
4 colonel to get up and say explicitly what  
5 happened. So that's one piece.

6 With regard to the convening authority  
7 changing the sentence, I believe convening  
8 authorities ought to have the ability to change a  
9 sentence. Simply put, I have -- as a defense  
10 counsel, when I was young, was able to mitigate  
11 sentences for individuals into, for example,  
12 non-felonies from felonies, where they got a low  
13 sentence because they -- it was a relatively  
14 mitigated case, and make a huge difference in  
15 those service members' lives.

16 I think sometimes, particularly at  
17 some of the warfighting divisions and corps, you  
18 will get outlier sentences that are too harsh and  
19 that need to be mitigated.

20 So I think the failure to have that  
21 ability to do that would be concerning. And I  
22 think if you want a fair system, it doesn't look

1 good if at Fort Lee Bob gets two years and at  
2 Fort Campbell, same set of facts, he gets 50.

3 And so I think that has always been a  
4 check on the system. And, again, I want to echo  
5 what I have said before and what other panel  
6 members have said, that we trust these folks with  
7 a heck of a lot of responsibility. And, yes,  
8 sometimes they, quote-unquote, "get it wrong" by  
9 public perception. But most of the time we trust  
10 them to get it right, and they do get it right.  
11 And so that's my perception of how that system  
12 should operate.

13 COLONEL NANCE: Judge Grimm, this is  
14 Jeff Nance. I would be really afraid of a system  
15 that would have judges explaining the reasons for  
16 their sentence in our current military justice  
17 system where we don't have sentencing reports, we  
18 don't have sentencing guidelines, and that sort  
19 of thing.

20 My fear would be, as Andy mentioned --  
21 well, let's put it this way. We would certainly  
22 increase the work of the appellate bar. I think

1       whether or not a judge said something that he or  
2       she shouldn't have said during explanation about  
3       their sentencing, we're going to have more  
4       appeals if we do something like that.

5                   Is that a reason not to do it? I  
6       don't know. I think that thought tells me that  
7       the chances of a judge saying something that is  
8       either wrong or could be construed as wrong in  
9       that process would increase. And so if we did  
10      something like that, I think it would be -- need  
11      to be very, very narrowly focused.

12                   Right now I do bond hearings in the  
13      courts that I practice in now. And when I --  
14      when I deny a bond or grant a bond, I say -- I  
15      find that the respondent would be a danger to the  
16      community because of this conviction and this  
17      arrest for this offense. Or I find that the  
18      respondent would be a flight risk because, and I  
19      leave it at that.

20                   So something along those lines would  
21      have to be implemented to prevent judges from  
22      saying things that they perhaps shouldn't say in

1 explaining their sentence.

2           You know, I guess everybody probably  
3 knows how I would come down on the ability of the  
4 convening authority to change the sentence. I  
5 believe in the commander system. I trust our  
6 commanders. And I think that they need to have  
7 that option, that escape valve option, to correct  
8 the -- what I will call the very rare mistakes  
9 that occur in cases before they get to them.

10           But the rarity of them doesn't  
11 diminish the significance of those mistakes. And  
12 having a convening authority who has the ability  
13 to say, "Hey, this was wrong, I'm reducing the  
14 sentence" is indispensable.

15           COLONEL MOORE: I would say with  
16 regard to articulating the basis for a sentence  
17 there has to be some standard against which that  
18 articulation would take place. If the standard  
19 is you are giving a sentence somewhere between no  
20 punishment and 30 years' confinement and a  
21 dishonorable discharge, there is really not any  
22 reviewable way that you are going to be able to

1 articulate how you arrived at that, in the  
2 absence of some standard that is already pre  
3 promulgated and that is out there.

4 Now, as judges -- if you give us a  
5 standard, we will be able to articulate why we  
6 are complying with that standard. We do that  
7 when we are dealing with challenges for cause.  
8 We know what the standard is for granting that  
9 challenge. We can articulate that standard. We  
10 can say why this fits within that standard.

11 But if the standard is just, you know,  
12 from no punishment to dishonorable discharge in  
13 30 years, then there is really not a framework  
14 for us to make those comments.

15 I will say, as much faith as I had in  
16 military juries to arrive at a finding of guilt  
17 or not guilty, in talking with military juries  
18 after trial they felt completely at sea when it  
19 came to the issue of sentencing, almost  
20 uniformly, just because of the lack of any real  
21 standard between that minimum and the maximum.

22 And so, as a judge, at least I had the

1 experience of having seen enough cases to have  
2 kind of an internal barometer, but really nothing  
3 more than that. And so, in the absence of  
4 standards, I don't know that we would be able to  
5 articulate the basis for the sentence in any  
6 meaningful way.

7 As far as the convening authority's  
8 ability to review and to modify the sentence, I  
9 think any system has to have somebody with the  
10 clemency power to take care of unforeseeable  
11 results. Many times what you get coming out of  
12 the back end of a court-martial has no  
13 resemblance to anything that anybody foresaw  
14 going in, and sometimes that is an unjust result  
15 and somebody has to have the power to correct  
16 that.

17 CAPT PAYTON-O'BRIEN: I'll start  
18 backwards. I'll start with clemency. When I sat  
19 on the Court of Appeals, we used to receive  
20 sentence disparity assignments of error  
21 regularly. And I know we occasionally would  
22 grant the assignment of error and grant some sort

1 of relief in sentencing, but that was rare.

2 Some of the language we would use is  
3 that that's clemency; we're not in the position  
4 to do clemency. That's not our job. That's the  
5 convening authority's job.

6 I don't think the convening  
7 authorities should just be limited to perhaps  
8 correcting errors, but to grant true clemency,  
9 and they don't have that ability in most cases  
10 now, to grant clemency. So, the defense counsel,  
11 where traditionally they could go to the  
12 convening authority and ask for clemency  
13 post-trial, there's really that limited power  
14 now. There's not much that the convening  
15 authority can give them in clemency.

16 And I would add that the clemency  
17 post-trial matters are submitted very quickly  
18 after trial. If your argument to the convening  
19 authority as a defense counsel is I want  
20 clemency, if you only have 10, 20, 30 days, maybe  
21 you could argue that clemency should be granted  
22 just as a matter of the type of case it was. But

1 if you're looking for some sort of post-trial  
2 conduct that was good on the part of the  
3 offender, there isn't any within the first month  
4 of trial. If they went to the brig, they don't  
5 have good conduct at the brig yet to rely on.  
6 Did they do something good for the government  
7 post-trial? Ten to 30 days doesn't give a good  
8 measure of what their assistance might have been.

9 So I do believe that the convening  
10 authority should have that power to be able to  
11 not only correct any mistakes, but also to just  
12 grant pure clemency because that traditionally  
13 was their role. That's where the clemency came  
14 from, not from the appellate courts.

15 When I was, I think to use Colonel  
16 Glass' analogy or statement, a baby judge, I  
17 would very rarely comment on what I gave as a  
18 sentence. When I became a little more seasoned  
19 after seven-eight years, I perhaps on more than  
20 one occasion would give those comments, but they  
21 were very limited, because, perhaps, I was  
22 concerned.

1           I sat on the appellate court. I can  
2 recall receiving records of trial going, ooh, why  
3 did the judge say that? And so, it was a bit  
4 concerning to be worried about what might be  
5 evaluated of what I said. And if I said  
6 something, was I going to be challenged in the  
7 next case because I made a comment about why I  
8 had adjudged a certain sentence? Maybe I should  
9 have been more deterred in some of the things I  
10 did say, but I did make comments about sentences  
11 on occasion, and some of those might have been in  
12 the cases that didn't reach appellate review  
13 because there was no record.

14           The members have no sentencing  
15 guidelines. We have no sentencing guidelines. I  
16 think we should have sentencing guidelines. I  
17 think saying to members, you can sentence up to  
18 30 years, 50 years, whatever it is, or even to a  
19 judge, from zero to 50, where do you come down?  
20 I know, as a judge, I kept a binder of every case  
21 I did and every sentence I awarded and what the  
22 charges were, so that I could look back and see

1 what have I done in prior cases.

2 Every case was treated individually,  
3 but I had a record of how I treated other cases,  
4 too. And if there were unusual sentencing  
5 matters, extenuation, mitigation, I'd make a note  
6 of that, but members don't have that. They have  
7 the prosecutor asking for 20, they have the  
8 defense counsel asking for six months, and they  
9 come down wherever they come down.

10 And so now, even in the appellate  
11 world, you see individuals convicted of sexual  
12 assault. Some have very great sentences. Some  
13 have very little sentence. How is that a fair  
14 system? How can an offender who maybe pleaded  
15 guilty, or maybe he didn't, but why is the system  
16 set up so that he's serving seven years and the  
17 guy in the cell next to him is serving two for  
18 almost the same exact offense? I think  
19 sentencing guidelines are appropriate.

20 MS. BASHFORD: I'm going to ask the  
21 panel if you would indulge and stay with us just  
22 for a few more minutes. We are a little bit past

1 11:00, but I think there are some more questions.

2 And I have one. We've been talking  
3 about sort of the upstream of the process, the  
4 cases that are getting referred to courts  
5 martial. I'd like to just shift a little bit to  
6 downstream.

7 When presiding as a judge with a  
8 member panel, have you been surprised at a  
9 verdict, that the members are acquitting when you  
10 would have found somebody guilty, particularly  
11 when there's issues of incapacitation by alcohol?

12 COLONEL MOORE: I would say not very  
13 often because, when you a try a case to a panel,  
14 as a judge, you approach it from an entirely  
15 different mindset. I very rarely engaged in the  
16 idea of what my result would have been because I  
17 have so many other things to deal with in  
18 instructing the panel and in ruling on all of the  
19 evidentiary objections. And I'm not sure it was  
20 particularly helpful. I also wanted to keep my  
21 mind open, so that nothing that went into my  
22 instructions came across as slanted in one way or

1 the other.

2 And so, I think when you're trying a  
3 case before a jury, your mindset is so different,  
4 that it's very rare that you would even make that  
5 calculation of whether they've got it right or  
6 wrong. I have many times, when I'd go talk to  
7 members afterwards, they would ask me if they got  
8 it wrong or if they got it right. And I'd say,  
9 if you went through the process and you believe  
10 in your verdict, then you got it right.

11 So, I would say the other thing is  
12 that, again, I think member panels do an  
13 extraordinary job of listening to evidence and  
14 applying the instructions and getting to the  
15 right result. So, it was very rare -- I mean,  
16 there were cases, and perhaps it's the court  
17 reporter who is the better barometer because  
18 there were cases where I'd ask the court reporter  
19 what he thought the result was going to be, or  
20 she. And they'd usually be within like 10  
21 percent one way or the other. So, they might be  
22 the better barometer.

1           But I was very rarely surprised by the  
2 findings. I was frequently surprised by the  
3 sentence, just because the sentences varied so  
4 greatly and because members had so little  
5 guidance on how to come down within that  
6 spectrum.

7           COLONEL NANCE: I'll be quick. I  
8 can't improve on anything Wes said there. I  
9 mean, that's my experience exactly.

10          COLONEL GLASS: So, I agree with what  
11 Wes said about how you listen to a case. And  
12 remember, we have no JNOV authority. If it meets  
13 the basic threshold of R.C.M. 917 really, which  
14 is what I'm listening for, there have been times,  
15 with that caveat, where I've thought, wow, how  
16 did they get there? Remember, you're talking --  
17 I don't know how many -- you're talking about  
18 very few in what seems like at least, maybe just  
19 because I'm aging, hundreds of cases.

20          And I would also mirror what Wes and  
21 Jeff said vis-a-vis sentence. The time where  
22 there's usually a point where you're like,

1 really?, is the sentence. And I would tell you,  
2 frequently, that's to the harshness of a  
3 sentence. I was known by the defense bar as a  
4 very harsh sentencer. And there were times where  
5 I would hear a sentence and think, wow! And on a  
6 very, very few occasions I actually wrote a memo  
7 to the convening authority, when they had that  
8 authority to change the sentence, saying that --  
9 I would say very fair; I think it's twice --  
10 where I would have sentenced much differently.  
11 But that's my observation.

12 CAPT PAYTON-O'BRIEN: I would agree  
13 with Colonel Glass on the sentence, but my wow  
14 was more the leniency in sexual assault cases of  
15 sentences. Members don't have any parameters  
16 other than what's being asked for by either side,  
17 and they come back completely away from anything  
18 that any side asked for, and less. And that  
19 sometimes was a surprise. But, then, again, they  
20 don't know what cases are, in our view or the  
21 prosecutor's or the defense counsel, worth. They  
22 just sentence, and I know they take their job

1 seriously because I've interviewed or discussed  
2 with members afterwards just their job and what  
3 they do. And they take their oath very  
4 seriously.

5 But I've had members also express  
6 concern about that was a really tough case. Yes,  
7 it was, from all sides. But did I ever think  
8 they got it wrong on a verdict? No, because I  
9 don't go into it from that perspective of what  
10 would I have done? And I've had counsel come to  
11 me afterwards, so what would you have done,  
12 Judge? It's irrelevant what I would have done  
13 and I didn't think of it from that perspective.

14 COLONEL NANCE: And I just had an  
15 alibi. I think one of the greatest strengths of  
16 the military justice system is our professional  
17 juries, essentially panels. I think they are  
18 smart and they take their duties seriously. They  
19 have tremendous experience. And my experience  
20 has been that the vast majority of the time, into  
21 the 90 percentiles, they're getting it right.

22 MS. BASHFORD: That I think, though,

1 brings us right back to the acquittal rate.  
2 Because if the members are getting it right --  
3 and I do disagree with Ms. Long -- I think these  
4 rates are pretty much unheard of in the civilian  
5 system. And I certainly know we brought really  
6 difficult cases and had much, much higher  
7 conviction rates. So if the members are getting  
8 it correct 90 percent of the time, then the  
9 problem seems to be back upstream, if you agree  
10 there is a problem.

11 COLONEL GLASS: Before, ma'am, so the  
12 question I would ask back, at least the  
13 rhetorical question is, how long have your  
14 prosecutors been doing that job? And the reason  
15 I go back to that is because I think it just  
16 matters. So, when you look at the most  
17 experienced prosecutor in the Army, I don't know  
18 what the number is, but it's five-seven years  
19 prosecuting cases. That's just not the way it is  
20 in district attorneys' offices, and that makes a  
21 difference, especially with these cases that are  
22 almost always -- well, that's an overstatement --

1 very frequently, almost like dormitory room, the  
2 analogy is dormitory room Saturday night, a lot  
3 of alcohol, little supervision, if any, and it's  
4 a he said, she said, and she may not or he,  
5 whoever the victim is, may not remember.

6 And so, I think what we're saying is,  
7 based on what we see come into the courtroom,  
8 based on the evidence that's developed and  
9 presented, generally, we think they do a very  
10 good job of reconciling some very difficult  
11 issues, and they take it very seriously. Almost  
12 always, if not the entirety of your panel,  
13 college-educated; the vast majority is  
14 college-educated, experienced people.

15 But the reason why I keep banging this  
16 drum is because, ultimately, to me, this part is  
17 not rocket science. This part really comes down  
18 to, when you're asking somebody to try some of  
19 the very, very hardest cases, often without  
20 quote-unquote objective evidence that's forensic,  
21 sometimes with, you're asking, that's a tough  
22 carry for Major Jones who is the experienced

1 prosecutor, even if they have highly-qualified  
2 experts to talk to.

3           And you all know this if you've tried  
4 cases. Some of that is just the field. Okay?  
5 What I've heard -- and pardon my horrible German  
6 -- referred to as fingerspitzengefühl, which is  
7 just the feel, the knowledge. I've been on my  
8 feet so many times arguing this issue where I've  
9 felt this is what's going on I need to change.  
10 Then, some of it is the develop people skills to  
11 be able to pull those difficult facts out of the  
12 victims.

13           And so, I don't think they're  
14 unreconcilable. I think they're very  
15 reconcilable. I think that some of it is -- and  
16 I would tell you, going back to a question you  
17 asked, ma'am -- as an SJA, I know that they  
18 turned down the cases because they said, nope, we  
19 don't want anything to do with this case. And  
20 some of that is just a fact. But I don't think  
21 that's the prevailing fact.

22           I think the prevailing fact is that,

1 as good as these young men and women are, that we  
2 don't keep them in these positions in the Army --  
3 I can't speak to anything else -- where they  
4 develop that feel, where they develop the ability  
5 to know this is a good case, this is how you  
6 present this evidence.

7 I'll give you a real quick anecdote  
8 because I think it matters. I had a case where a  
9 Special Victims Prosecutor came in and tried to  
10 introduce what were essentially outcry evidence,  
11 arguably from a victim. We don't have an outcry  
12 exception to the hearsay rule. The outcry  
13 evidence was an excited utterance. Puts on the  
14 alleged victim. She testifies and says, I called  
15 my best friend and I was upset and I cried, and I  
16 told him the whole story. When did you call?  
17 Things were so crazy I don't remember.

18 Okay. So, we all know that there's  
19 some exceptions for -- it could have been a day,  
20 a month, a week. Really good cross examination.  
21 I don't remember. We know there's exceptions for  
22 child victims extending out that time, but I have

1 no timeframe. So, how's it an excited utterance?  
2 How's it admissible? So I don't admit it.

3 A different witness testifies at  
4 trial. She's the best friend. She says, I  
5 talked to her the next day. Okay? Probably an  
6 excited utterance. Probably falls under it  
7 because she meets the other piece, and it was a  
8 late-night kind of assault.

9 The experienced Special Victim  
10 Prosecutor does not attempt to reintroduce that  
11 evidence. And when told about it in bridge the  
12 gap says, I didn't know I could use more than one  
13 witness, and kind of seems to imply that I should  
14 have sua sponte introduced the evidence, which  
15 kind of seems finger on the scales.

16 So, to me, that's why I keep hitting  
17 that. I think that that's the difference. I  
18 think that some of it is more difficult cases,  
19 and offline we can talk about some of those  
20 cases. But I think some of it is just it matters  
21 when you've spent time, reps matter.

22 COLONEL MOORE: I think perhaps the

1 difficult decision is, what is a healthy  
2 acquittal rate? I would submit zero is unhealthy  
3 because it means we're not taking the difficult  
4 cases. Eighty percent is probably unhealthy as  
5 well. What is the middle ground in there that is  
6 an indication we're still taking the tough cases,  
7 but we're not unnecessarily incurring all of  
8 these costs?

9           Because there are costs for everybody  
10 involved in prosecuting a court-martial. There's  
11 costs to the victim in going through the whole  
12 process of being interviewed, being cross  
13 examined at trial. There's costs to the accused.  
14 Airmen facing court-martial are among our highest  
15 suicide risks. And if we really care about that,  
16 we have to be thinking about incurring that cost  
17 as well when we go into the prosecution decision.

18           And so, if we're going to incur all of  
19 this cost, what is going to be enough to say it's  
20 worth those costs? I think we have to start with  
21 investigations. The investigations have to be  
22 more thorough. Investigators have to feel at

1 ease to ask the tough questions of alleged  
2 victims. I don't think that they always do.

3 I think especially in the last 10  
4 years or so there has been a real tendency for  
5 investigators to take statements at face value  
6 and to not ask the probing questions that are  
7 only going to get harder to explain as the time  
8 of trial approaches. So, better investigations I  
9 think is one thing, in addition to the trial  
10 counsel investigations.

11 The ability to read my own handwriting  
12 would be helpful.

13 (Laughter.)

14 But the other would be trust in the  
15 people who have the discretion, the prosecutorial  
16 discretion to go forward. I think that's been  
17 kind of a theme that has permeated everybody's  
18 testimony here today. It is that, whether it's  
19 the Staff Judge Advocate or whether it's the  
20 convening authority, we have to trust them. We  
21 have to accept that they are on occasion going to  
22 make bad decisions, and those decisions sometimes

1 are going to get public scrutiny. But that's the  
2 cost of any system. There are going to be bad  
3 decisions in any system. And overcorrecting for  
4 every bad decision on an anecdotal basis I don't  
5 think is the way to go forward.

6 So, when you talk about not having the  
7 evidence, I think developing the evidence --  
8 everything we're telling you is anecdotal, of  
9 course. And so, I think going back and looking  
10 at the evidence and the data to determine really  
11 what the next steps are is the best approach.

12 CAPT PAYTON-O'BRIEN: When you talk  
13 about going upstream, I think that upstream is  
14 even further upstream. As we know, a lot of the  
15 cases we see as judges, whether we were  
16 prosecuting them before, defending them now,  
17 involve the component of alcohol. And as I read  
18 investigations and I read records of trial, and I  
19 see how much alcohol is involved in these cases  
20 that ended up in some sort of sexual assault  
21 situation, I often wonder, how is this Service  
22 member getting to this point when we're supposed

1 to be training them about the effects of alcohol?

2 And training them, I know that with  
3 the sexual assault training we give to military  
4 members, sometimes they come in and we hear -- I  
5 know I heard from some of the staffers about they  
6 would train one drink is enough. You can't  
7 consent with one drink. And we spend, I think, a  
8 lot of time educating members that that is not  
9 the law. The law is not, if you have one drink,  
10 you can't consent. Because if that was the law,  
11 both the offender and the victim should be in  
12 court-martial because they both were drinking.

13 But we have to do better at that  
14 stage, whether it's the training of the military  
15 members. Intervention, when I see some of these  
16 records and I see some of these cases, I wonder,  
17 how did we get here and nobody intervened? Why  
18 did nobody intervene with this girl who was  
19 sloppy drunk and two males are taking her up to a  
20 room? Where were the supervisors? Where was the  
21 barracks petty officer who saw that? Why did  
22 nobody intervene?

1                   We talk about bystander intervention,  
2                   but is it really working? I would beg to say  
3                   that it might not be, this training that we're  
4                   giving them, and certainly the training, then,  
5                   not only when we talk about bystander  
6                   intervention, but when we tell them that you  
7                   can't have one drink and consent.

8                   Now in my practice, I have male  
9                   offenders say to me, alleged offenders, how come  
10                  I'm the one facing trial? I drank, but so did  
11                  she. So, why am I called the perpetrator, when I  
12                  would view her as being the aggressor? The  
13                  client's words, she's the aggressor. Why am I  
14                  called the offender?

15                  I can't answer that sometimes for him.  
16                  That just seems to be the way our process is set  
17                  up. Most of our offenders that are charged are  
18                  male. And I think that we need to educate better  
19                  way further upstream.

20                  MS. BASHFORD: We can take on last  
21                  question from General Schwenk, and then I'm going  
22                  to ask us to take just a 10-minute break, and

1 maybe start our lunch at 12:15, so we'll have  
2 more time.

3 BGEN SCHWENK: Okay, but my question  
4 is going to turn into two questions. And with  
5 all of the authority that I don't have, I'm going  
6 to make you whatever, assistant DAC-IPAD members,  
7 because in the 2020 National Defense  
8 Authorization Act, Congress asked the DAC-IPAD to  
9 issue reports on a couple of different issues.  
10 And two of the issues I would like to ask your  
11 thoughts on. So, any thoughts at all are  
12 helpful.

13 Okay. The first one has to do with  
14 victim impact statements. And I will read from  
15 the Joint Explanatory Statement of the conferees  
16 from conference. The conferees recognize the  
17 importance of providing survivors of sexual  
18 assault an opportunity to provide a full and  
19 complete description of the impact of the assault  
20 on the survivor during court-martial sentencing  
21 hearings related to the offense. The conferees  
22 are concerned by reports that some military

1 judges -- obviously not retired judges, it must  
2 be somebody else -- some military judges have  
3 interpreted R.C.M. 1001(c) too narrowly, limiting  
4 what survivors are permitted to say during  
5 sentencing hearings in ways that do not fully  
6 inform the court of the impact of the crime on  
7 the survivor.

8 Therefore, they ask us to do an  
9 assessment and issue a report whether the  
10 military judges are according appropriate  
11 deference -- their word -- to victims of crimes  
12 who exercise their right to be heard under 1001  
13 at sentencing hearings and appropriately  
14 permitting other witnesses to testify about the  
15 impact of the crime.

16 So, victim impact comments, please.

17 Thank you.

18 COLONEL GLASS: Sir, was that both  
19 questions or was that --

20 BGEN SCHWENK: No, that was one.

21 COLONEL GLASS: Okay. So, from my  
22 perspective, I have limited victim impact

1 statements in the past according to what the rule  
2 requires. I've just read the rule and applied  
3 the rule.

4 BGEN SCHWENK: Could you give an  
5 example?

6 COLONEL GLASS: I don't know that I  
7 can, in all honesty.

8 BGEN SCHWENK: But you know you've  
9 done it?

10 COLONEL GLASS: I know I've done it.

11 I also know that I've seen victim impact  
12 statements that were very, very effective and  
13 persuasive, and I've seen victim impact  
14 statements that were rambling and not very  
15 effective -- maybe all because of victimization.

16 I'm not trying to be insensitive to that. I'm  
17 just talking about as an advocate, as a former  
18 advocate in the courtroom, I've seen them work  
19 very well and I've seen them not work very well.

20 I've seen them be entirely in writing.

21 For me, that's okay, but that writing doesn't  
22 usually emote very much. There's not much

1 emotion to it.

2 But I guess, ultimately, the question  
3 whether I appropriately limit or whether judges  
4 appropriately limit victim impact statements, I  
5 mean, to me that's an unanswerable question  
6 because I don't know what they're talking about.  
7 When they're saying the rule means this and  
8 judges are interpreting this incorrectly, I'm not  
9 sure what the eaches of that is.

10 I would say that, in observing  
11 practice with victim impact statements as opposed  
12 to -- so, I'm not sure, I guess, what Congress  
13 envisions in terms of the breadth at which they  
14 can give a statement and what its purpose is,  
15 other than allowing them to tell their story,  
16 which I understand that purpose. That may or may  
17 not be as helpful for achieving a sentence as  
18 they may envision it.

19 I would say in terms of the  
20 effectiveness of them, my experience goes back a  
21 little bit to before we had that rule where  
22 victims would come in and talk about impact. And

1 I think that the effective impact statements  
2 before me have been very, very similar to the  
3 victim impact I heard before, sometimes crushing  
4 impacts on their lives and their ability to  
5 trust, et cetera. All of that is relevant and  
6 admissible under the current rule, but it was  
7 relevant and admissible under the former rule.

8 So, I'm not sure that answers. And I  
9 apologize. It's just because I'm struggling to  
10 try to figure out what exactly the question is.  
11 I know it's not your question.

12 COLONEL NANCE: Yes, sir. I have  
13 limited victim impact statements before. The  
14 occasions that jump to mind are situations where  
15 the victim impact statement included comments or  
16 references to evidence that I had previously  
17 excluded for it being unfairly prejudicial or for  
18 some other reason. And so, yeah, I have limited  
19 that before, and I don't think that's  
20 inappropriate.

21 Otherwise, there is an instruction  
22 that we would give. I don't know if it's still

1 in the benchbook because I haven't looked at the  
2 benchbook for a long time, but, thank goodness  
3 for that. But there is an instruction we give to  
4 the panel members about how they should consider  
5 this victim impact statement, and I think that's  
6 a good instruction. It was a product of a lot of  
7 thoughtful reflection by a lot of judges.

8 And so I trust everything else that I  
9 haven't ruled on previously as being inadmissible  
10 to be appropriately covered by that instruction.  
11 So members consider that as they should.

12 BGEN SCHWENK: So you're vouching for  
13 Colonel Glass that he only did it for evidence  
14 that he had excluded also?

15 COLONEL NANCE: I don't know.

16 BGEN SCHWENK: It must have been his  
17 reason.

18 COLONEL NANCE: It had to be a reason.

19 BGEN SCHWENK: Okay.

20 COLONEL MOORE: It just has not been  
21 my experience. I can't recall having limited a  
22 victim impact statement. I've found the victim's

1 legal counsel has done a very good job generally  
2 of preparing those and of modifying them, if  
3 there are rulings throughout the course of the  
4 proceedings. So, I can't recall a time when I've  
5 been in a situation where there was even an  
6 objection to a victim impact statement.

7 CAPT PAYTON-O'BRIEN: I recall making  
8 a ruling limiting in some capacity, but I don't  
9 recall what it was. I believe, if memory serves  
10 me right, it had to do with a recommendation for  
11 a particular sentence, and I limited it to that.  
12 And they took that out.

13 But I agree with Colonel Moore, I  
14 think the victims' legal counsel are doing a  
15 pretty good job at helping them prepare. I think  
16 the only concern towards the end of my time on  
17 the bench before I retired was the timing of it  
18 and when it was provided to the Government to  
19 have an opportunity to review. And sometimes  
20 that caused delay, because the Government was not  
21 privy to it until the moment the person was  
22 coming in and wanted an opportunity to have a

1 chance to object. But I don't recall any  
2 significant items that I had the victim extract  
3 out or would not consider. It seemed that they  
4 had pretty full range of options to give their  
5 statement.

6 BGEN SCHWENK: Thank you.

7 COLONEL GLASS: Sir, I do have one  
8 alibi, and I know you're trying to get done and  
9 we all want to take an appropriate break.

10 BGEN SCHWENK: No, my wife told me I  
11 should lose weight, so I'm not in any rush.

12 COLONEL GLASS: Yes, sir. So, I do  
13 want to note that the issues, as I reflect on it,  
14 involve notice, as required by the rule.  
15 Usually, that was cured, if it needed a cure,  
16 with some form of recess. Now in one instance I  
17 can recall an overnight recess. It was near the  
18 end of the day anyway.

19 The second did involve specific  
20 sentences, which our case law is very clear on, a  
21 victim recommending a specific sentence.

22 And then, the third was, it involved

1 the members in a matter that had been previously  
2 excluded that to reopen would constitute a  
3 mini-trial.

4 BGEN SCHWENK: Thank you very much.

5 Okay. The other one, as advertised:  
6 appointment of guardian ad litem for minor  
7 victims. This is from the House side. The  
8 Committee is concerned for the welfare of minor  
9 military dependents who are victims of an alleged  
10 sex-related offense. The Committee acknowledges  
11 the Department of Defense's continued efforts to  
12 implement services in support of Service members  
13 who are victims; and further, to expand some of  
14 these services to dependents who are victims.  
15 However, the Committee remains concerned that  
16 there is not an adequate mechanism within the  
17 military court-martial process to represent the  
18 best interests of minor victims following an  
19 alleged sex-related offense.

20 So they ask us for a report that  
21 evaluates the need for, and the feasibility of,  
22 establishing a process under which a guardian ad

1 litem may be appointed to represent the interests  
2 of a victim of an alleged sex-related offense for  
3 people under 18.

4 So, need for, and I guess the  
5 feasibility of, practicality of doing so. Thank  
6 you. Any thoughts?

7 COLONEL NANCE: Well, I realize that  
8 a guardian ad litem has a different role than a  
9 Special Victims Counsel. But, in the cases where  
10 I had child victims, the Special Victims Counsel  
11 would undertake to assist the family, the  
12 custodial parent, to assist the child. I've seen  
13 that happen before.

14 I think the need is probably a  
15 reasonable need. I think that, certainly, there  
16 are times when the custodial parent's interest  
17 might not dovetail with the child-victim's  
18 interest. And I've seen that happen before and  
19 had to, in my own mind, sort of worry about, you  
20 know, was the child's real interest, both  
21 personal interest and legal interest, being taken  
22 care of?

1 I don't know how we would do that. I  
2 haven't had a lot of time to think about how we  
3 would do that in a military justice system.

4 BGEN SCHWENK: Let me just say, in  
5 regards to both issues, our door is always open,  
6 our mailbox is always open, the email works. So,  
7 if you have thoughts later on about any of this,  
8 feel free to let us know and we'll include it in  
9 our records. Thank you.

10 COLONEL NANCE: Yes, sir.

11 COLONEL GLASS: Yes, I would echo what  
12 Jeff said and go a little further, I guess, with,  
13 who does it? I mean, are you going to retain a  
14 civilian lawyer, or are you going to take that  
15 new-to-the-JAG-Corps legal assistance attorney  
16 and teach them to do all of the other things,  
17 beyond being a victims' counsel, to be a guardian  
18 ad litem? And if it's not them, are we, then,  
19 going to take the prosecutor who's got four years  
20 of experience and tell them their next career  
21 position is to be a guardian ad litem? Or the  
22 defense attorney who ought to be defending that

1 next big case?

2 The problem really is in the details.  
3 You absolutely could augment your system by  
4 having a civilian attorney come in and do this  
5 work. I don't know that at most posts, camps,  
6 and stations, that there is -- I don't know. I'm  
7 going to stop with I don't know, because what I  
8 started to say is I'm not sure there's enough  
9 work to support just one full-time position as a  
10 guardian ad litem at a small post, camp, or  
11 station. At a bigger one, like at Ft. Bragg,  
12 there probably is. But they certainly could do  
13 some things that that junior legal assistance  
14 attorney or the Special Victims Counsel may not  
15 have the training to do.

16 What I've also observed in the  
17 courtroom is that the victims' counsel are doing  
18 their level best, and that they are doing the  
19 things you want them to do in terms of getting to  
20 know the child. To the degree those interests  
21 compete, though, again, you don't know what's  
22 happening behind the scenes.

1 COLONEL NANCE: I know that at a lot  
2 of places there are private, nonprofit  
3 organizations that provide guardian ad litem  
4 services for children. I wonder if there would  
5 be a way that the military could sort of come up  
6 with a cooperative agreement with some of those  
7 organizations in order to work hand-in-hand and  
8 maybe even provide them some funding to be able  
9 to help them help us provide that. I mean,  
10 that's just a thought that just occurred.

11 MS. BASHFORD: As you continue to  
12 think about this, please let Colonel Weir know if  
13 you have further thoughts.

14 I'm going to give us a 10-minute  
15 break, and then, we will work through discussing  
16 your testimony, which I truly appreciate. And  
17 we'll adjourn for lunch, then, at 12:15. So, 10  
18 minutes, but, then, back in seat, please.

19 (Whereupon, the foregoing matter went  
20 off the record at 11:43 a.m. and went back on the  
21 record at 11:55 a.m.)

22 MS. BASHFORD: Okay. We have 20

1 entire minutes to discuss the testimony that we  
2 heard today.

3 Mr. Markey, you were very quiet. Give  
4 us your thoughts.

5 SGT. MARKEY: Yes, I'll start it off.  
6 Thank you, Chair Bashford.

7 I think a lot of the information that  
8 we heard, a lot of the testimony that we received  
9 -- first, I want to thank the panel for taking  
10 time out of their second career to be with us  
11 today and their service -- is a lot of the same  
12 type of gaps and challenges that we've seen from  
13 some of the other testimony we received from  
14 folks that we have brought in to provide  
15 information.

16 I think everybody is concerned about  
17 improving the process. I think everybody is  
18 genuinely interested in ensuring that the process  
19 is fair and equitable, and that the individuals  
20 involved in the process have the knowledge,  
21 skills, and ability to do their jobs, that they  
22 have the resources and tools to be able to

1 perform the functions that they need to.

2 I think some of the information that  
3 was discussed about the Article 32, I think we  
4 have heard lots of different testimony, and  
5 really it's been all over the board about who  
6 thinks Article 32 is valuable and who thinks it's  
7 not as valuable as it could be or should be. And  
8 so that's an area that I know that we have had  
9 discussions and concern about.

10 Also, the preferral and referral  
11 decisions made by command authorities, we've  
12 heard various degrees of testimony about.  
13 Interestingly enough, today they felt that they  
14 were very strong in supporting that current  
15 process.

16 And I was trying to resolve the  
17 conflict of there was complete confidence in the  
18 ability to do that, and yet, the SJAs and other  
19 staff that are providing the legal information,  
20 decisionmaking process, and information for them  
21 to make the decision are typically transferred a  
22 lot, don't have a lot of experience, not much

1 training. And so, you kind of question the basis  
2 for the command to be able to make -- I don't  
3 want to say a really good decision -- but a  
4 decision based on facts, circumstances, and  
5 information that is brought to them.

6 So, those are the comments I had.

7 Thank you.

8 MS. BASHFORD: Ms. Cannon?

9 MS. CANNON: With regard to some of  
10 the areas that we discussed, I thought that there  
11 was kind of overwhelming support for the idea of  
12 a 32 being a valuable evidentiary process where a  
13 true vetting of the issues is gathered. And one  
14 of the participants, one of the judges was  
15 talking about the four criteria, which I think  
16 are criteria to consider. But, certainly, that  
17 is an underscoring of some of the things that we  
18 think are important about the Article 32 and I  
19 think supports what we want to be doing.

20 There are a number of things, but the  
21 only other one I'll address right now is the  
22 point that was raised with regard to experts, and

1 defense experts being a really important area  
2 where there has to be independence from the  
3 prosecution and funding independent from the  
4 prosecution. And I thought that was a valuable  
5 contribution. And also, they said experts for  
6 the court, which I thought was also -- that's  
7 kind of a good idea, it seems.

8 MS. GENTILE LONG: Thank you. So, in  
9 addition to some of the things that have been  
10 raised -- I might be reiterating a little bit of  
11 Mr. Markey's comments about the need for a  
12 process to support specialized, experienced trial  
13 attorneys to stay within the system and to,  
14 therefore, create a true Special Victims Unit  
15 within the military justice system of trial  
16 attorneys, of prosecutors who are truly able to  
17 bring a breadth of experience, along with the  
18 training and expertise that they may receive, and  
19 to be rewarded, or at least not to be penalized  
20 from a career perspective or to be moved around  
21 for the needs of the military, to really support  
22 people staying in the position. Because,

1       although there wasn't consensus, I heard enough  
2       of it that was very credible to me.

3                       And the second piece about  
4       investigations, I think, much like the Article  
5       32, perhaps through investigator training, there  
6       has not been enough nuanced training to help  
7       people understand how to be victim-centered while  
8       still thoughtfully and thoroughly fleshing out an  
9       interview, and following up on things that may be  
10      truly inconsistent or may appear that way, asking  
11      followup questions in a way that is consistent  
12      with good investigations without barraging a  
13      victim or, you know, abusing them.

14                      So, those are the things that stood  
15      out to me today, and we need to put resources in  
16      that.

17                      MS. GARVIN:   So, I won't reiterate,  
18      but I agree with most of what's been said.

19                      I believe it was Colonel Nance who I  
20      thought posited a good question back to us in the  
21      midst of an answer, which was, during the 32  
22      discussion, it was, ask what is the purpose,

1       which I know we're talking about, and determine,  
2       before changes are made, what is the purpose. Is  
3       it to get -- and this is paraphrased -- but to  
4       get more convictions or to pull back the curtain,  
5       or exactly what is the purpose?

6                So, before recommendations are made,  
7       I think it's a good reminder to us, as a  
8       Committee, and to other future committees, that  
9       always kind of being at a meta-level of what's  
10      the purpose of this in the grander analysis of  
11      military justice, and keeping that in mind. So,  
12      I wanted to flag that because I thought it was a  
13      very thoughtful answer amidst many thoughtful  
14      answers.

15               The other three things I wanted to  
16      flag is the experts support a very interesting  
17      idea, and one that has happened in some civilian  
18      courts, which I think is interesting. The  
19      recommendation explicitly articulated by one of  
20      the judges about sentencing guidelines is  
21      something that I think is maybe not on our near  
22      horizon of an agenda, but I know there's a lot,

1 but something to consider.

2 And then, there was consistency, at  
3 least in what I heard, that the SVCs and VLCs are  
4 doing a good job overall in what their job is,  
5 which is to help the victim and protect the  
6 victim, even though that might make the system  
7 less smooth at times. But it was articulated by  
8 all of them that they seemed to be doing their  
9 jobs well, which is to protect the rights of the  
10 victim. And I didn't want to lose that because  
11 in the commentary there was some, you know, that  
12 it could slow down the system, it could result in  
13 some delays, but there was also always the note  
14 that they're doing their job. And I think it's  
15 important to hear both of those pieces of that.

16 DR. SPOHN: May I respond? So, one of  
17 the things that the four of them emphasized is  
18 that the Services take cases to trial that the  
19 civilian world wouldn't. And I think they said  
20 that a number of times. And the question that I  
21 have is -- and that they didn't really answer, I  
22 don't think, is why is that? Is it because

1 they're referring cases to court-martial using a  
2 probable cause standard, which many civilian  
3 prosecutors' offices would not do? Especially in  
4 the arena of sexual assault, they would use  
5 something approaching a  
6 proof-beyond-a-reasonable-doubt standard before  
7 they would take a case to trial.

8 I know in Los Angeles that was their  
9 explicit standard in sexual assault cases, and  
10 they would not refer the case or take the case to  
11 trial unless there was some type of corroboration  
12 of the victim's allegations.

13 So, I mean, I think that's an  
14 interesting question, is, why might the Services  
15 be taking cases to trial that the civilian world  
16 wouldn't? And they sort of danced around it a  
17 bit with the talk about some sort of political  
18 pressure to prosecute these cases.

19 And the other thing that struck me --  
20 and we kind of ran out of time or I would have  
21 asked them -- is, the analysis of the yearly data  
22 shows that the acquittal rate is much higher for

1 cases that are tried by a panel of members than  
2 that it is by judges. And yet, the judges said  
3 that they felt that the panel members were making  
4 appropriate decisions, which there's a little bit  
5 of disconnect there. Although one question that  
6 we might ask is, are different kinds of cases  
7 going before a panel of members as opposed to  
8 going before a judge only? And that might be  
9 something that we can tease out as we start  
10 looking at some of the data.

11 MS. BASHFORD: It would be very  
12 interesting to see, in the cases that we've  
13 documented that alcohol is a factor, are those  
14 more likely to go before a panel of members or  
15 are they more likely to go before a judge? I  
16 just don't know the answer to that, but I bet we  
17 could find out.

18 MR. KRAMER: Go ahead.

19 MG ANDERSON: I don't have much to  
20 add. I agree with Meg regarding her comments  
21 about experts, that they need to be resourced, I  
22 think, across the defense, the prosecution, and

1 the court to have access to experts.

2 I was struck by one of the judges who  
3 commented that they're trying to read the DSM and  
4 understand medical information in a victim's  
5 file. And to me, that's a recipe for error, I  
6 think. So, I think the experts are really  
7 important.

8 And the second one is I was around  
9 when the sentencing guidelines were initially  
10 imposed in the federal courts. I was working at  
11 the Second Circuit at the time. And there was a  
12 great deal of resistance amongst the judges,  
13 which over time subsided a bit. But the fact of  
14 the matter was there was a huge disparity in  
15 sentencing. And then you add the fact that the  
16 panels are tasked with imposing, not imposing the  
17 sentence, but certainly recommending a sentence.  
18 And now, you've taken it down to another level  
19 where there's going to be a lot of opportunities  
20 for a great range of punishment.

21 And so, I think that's something to  
22 consider very seriously, is sentencing guidelines

1 or something maybe softer than the original  
2 version of the sentencing guidelines, but  
3 something that provides more guidance to a panel  
4 than here's the max and here is the minimum.  
5 Pick something in the middle of it. Pick  
6 something in that range.

7 MS. BASHFORD: Mr. Kramer?

8 MR. KRAMER: I, too, will try not to  
9 reiterate, although I think I've read something  
10 recently about disagreement about whether  
11 sentencing guidelines are too high in certain  
12 cases.

13 But, in any event, a couple of things.  
14 We still can't seem to get an answer of why the  
15 acquittal rate is so high compared to the  
16 acquittal rate in civilian courts on not only  
17 sexual assault cases, but any type of cases. And  
18 I can't understand why we can't get a better  
19 answer on just we take cases that civilians  
20 wouldn't take. I don't know how we would compare  
21 that to begin with, but it's troubling that we  
22 can't seem to get an answer to that.

1           The alcohol thing is also very  
2           troubling, although I have to say they give them  
3           training, and they talked about that. The same  
4           thing goes on at college campuses. They give  
5           them training about that, and routinely, alcohol  
6           is involved in many sexual assault cases on  
7           college campuses. So, that one is very  
8           troubling, but I'm not sure there is any answer  
9           to that at all. It's just a fact of life.

10           The final thing, the sentencing, they  
11           all seem to agree that it's a very bad idea to  
12           give reasons for sentences. And I would have  
13           thought just the opposite, both for the victim  
14           and for the defendant, that it seems to me  
15           important to give reasons for why the sentence  
16           being imposed is being imposed. So, that just  
17           kind of was strange. Without getting into the  
18           whole discussion about whether sentencing  
19           guidelines are appropriate, which I have strong  
20           feelings about, but it just seems to me it would  
21           give both parties some kind of idea of why.

22           MS. GARVIN: Just a quick comment

1 back. That was in my notes also, about that  
2 every single judge, I believe all four commented  
3 that they didn't want to put the reasons on the  
4 record. And the reason they gave was about  
5 appellate review, and maybe not saying something  
6 they shouldn't say, which flagged to my brain  
7 training moments to understand permissibility,  
8 but also the sentencing guidelines to understand  
9 range.

10 But if you're thinking about  
11 procedural justice, the more transparency there  
12 is at every step of the process, the more the  
13 accused and the victim, as well as the other  
14 system actors, can understand and have faith in  
15 the system. And so, I found those comments,  
16 while understandable, also a little disturbing  
17 through a procedural justice lens.

18 MS. CANNON: I would be curious to  
19 follow up on the pilot program that was pointed  
20 out by Colonel Glass when we were discussing  
21 staying in your position as a prosecutor or a  
22 defense attorney, and somehow there is a program

1 going on, a pilot program, in the Army. I'm not  
2 familiar with that. Maybe somebody here is. But  
3 I would like to know more about that program.

4 The other question that came up with  
5 regard to preliminary hearings, and going toward  
6 the usefulness of them today is how often is a 32  
7 waived by the defense as being unhelpful in any  
8 way. So, I would be curious about that  
9 statistic.

10 MS. BASHFORD: I think we've gathered  
11 that data.

12 MS. CANNON: You do have that one?  
13 Okay.

14 MS. BASHFORD: I don't know it off the  
15 top of my head, but we have it.

16 MS. CANNON: I could find it. Fine.

17 MS. GARVIN: If I may, on the 32 also  
18 -- and I guess this might be a transcript  
19 question for later -- but while there seemed to  
20 be consistency of, depending on the purpose, a  
21 more robust 32 that involves some, I believe,  
22 evidentiary ideas, I didn't hear any of them

1 articulating a return to the previous 32. In  
2 fact, I believe they all said the opposite of  
3 that, and included that they weren't asking for  
4 the cross examination of the victim. I at least  
5 heard one of the judges say that. So, it's about  
6 what I heard -- and I'd like to look back through  
7 the transcript a bit -- but it's about ensuring  
8 the defense can get witnesses in the room, other  
9 witnesses potentially, and have testimony, but  
10 perhaps not a return to the victim being in the  
11 space.

12 MS. TOKASH: I have a comment.

13 MS. BASHFORD: Ms. Tokash?

14 MS. TOKASH: Yes.

15 HON. GRIMM: And I have one after her.

16 I have one after her.

17 MS. TOKASH: So, I'll go first, Judge  
18 Grimm.

19 HON. GRIMM: No, please, please,  
20 please.

21 MS. TOKASH: Okay. I agree with Mr.  
22 Kramer that we need to get behind this alleged

1       notion that the military is taking cases that the  
2       civilians aren't. I heard from the judges today  
3       characterize what are considered hard cases or  
4       the military is taking hard cases. But I think  
5       we need to determine, is the military  
6       characterizing these cases as hard because of the  
7       facts, or because they don't have a prosecution  
8       standard that civilian prosecutors have?

9               So, by way of example, many Assistant  
10       United States Attorneys are taking to trial what  
11       they could characterize as hard cases involving  
12       sexual assault. For example, sexual assault on  
13       airplanes in flight, sex trafficking cases, child  
14       exploitation cases, but we still take them to  
15       trial because prosecutorial decisionmaking  
16       processes in the Department of Justice are  
17       evidence-driven.

18               And I was primarily struck by Colonel  
19       Glass' comment that the prosecution standards in  
20       the military and civilian systems are, I believe  
21       he said dramatically different, and that  
22       sometimes he found himself saying, how are we

1 here? Why are we here? If we are here, then  
2 something went really wrong with the case, or you  
3 didn't really consider that this case should see  
4 the inside of a courtroom.

5 And then, Colonel Nance followed on by  
6 saying we have to look introspectively and  
7 determine what is our -- that being the  
8 military's -- purpose, and that perhaps a higher  
9 standard will reduce the number of bad cases and  
10 acquittals. I think that this is so important,  
11 and I think that we need to keep examining this.

12 MS. BASHFORD: Judge Grimm?

13 HON. GRIMM: Thank you.

14 I have some very specific comments,  
15 but I want to start off by thanking the judges  
16 for their time. They made me feel very proud  
17 that the military could attract people of their  
18 dedication and thoughtfulness and service. So, I  
19 want to just express that.

20 A couple of observations. Number 1,  
21 a standard for bringing a case to trial, I agree  
22 with Ms. Tokash and the others who have commented

1 about that. This is critical. A standard that  
2 requires admissible evidence sufficient to move  
3 forward seems to me to be an essential  
4 clarification that we should consider and  
5 explore, number 1.

6 Number 2, a sentencing standard. What  
7 I heard was a reluctance on the part of some of  
8 our distinguished panelists to rush into an area  
9 and express a view without a standard, and that  
10 if there was a standard, that that could govern.  
11 My thoughts are it is essential to have a  
12 standard for a sentence that's imposed.

13 I share Mr. Kramer's concern about the  
14 guidelines approach, but there should be a  
15 standard, and every sentence, whether recommended  
16 by a panel or a judge, should meet that standard.  
17 And I think it is essential, as one of our  
18 colleagues said, for transparency to explain what  
19 the reason is. To simply go from nothing, a  
20 reprimand up to 30 years with no explanation  
21 seems to me to be disruptive for the system and  
22 invite criticism about the transparency, the

1 consistency of the system, and to the ultimate  
2 detriment of the phenomenal efforts that the  
3 military has made to try to get its arms around  
4 this issue.

5 Experience of attorneys, that is an  
6 important factor. I don't know how. I think  
7 there would be tremendous pushback by certain  
8 areas in the military to have career paths for  
9 prosecutors, but these are hard cases. And  
10 regardless of the standards, and if you make a  
11 standard to the admissibility of evidence, it  
12 highlights the need to have people with the  
13 experience to be able to do it. And it  
14 advantages no one to have inexperienced folks  
15 doing this because it's not fair for the victim,  
16 it's not fair for the defendant, the accused;  
17 it's not fair for the military.

18 Experts, something needs to be done to  
19 give equal access to experts to Government and to  
20 the defense and to the court, where needed,  
21 without going to some cadre of bean-counters who  
22 view this as being nothing more than a long and

1 demanding process to justify it.

2 Alcohol seems an enormously  
3 significant factor here, which should surprise no  
4 one, as Mr. Kramer said, because we have a  
5 phenomenally large population of young people in  
6 that same demographic as the college kids who not  
7 only is there alcohol present, but have, at least  
8 according to some of the information I've heard  
9 from sources outside of this panel, of this group  
10 and our Committee, where binge drinking is not  
11 just simply a phenomenon, but it is a goal,  
12 drink for the purpose of becoming so under the  
13 influence that you don't know what's going on.  
14 And that's a phenomenon that exists among this  
15 age group and it's a real problem because so much  
16 of this includes alcohol. And when alcohol is  
17 involved, it makes the facts more difficult as to  
18 whose version you believe.

19 And I think the guardian ad litem is  
20 an interesting idea, but I will tell you in the  
21 federal system we have a statute allowing for a  
22 guardian ad litem, but there is no funding. And

1 if you're going to require it, you have to have  
2 funding. Otherwise, all you're doing is creating  
3 an expectation that cannot be fulfilled.

4 MS. BASHFORD: Thank you. Ms. Long,  
5 very briefly.

6 MS. GENTILE LONG: Very briefly, just  
7 on the conviction rates. Because this is an area  
8 that we are steeped deep in, I really want to say  
9 it's certainly an area to spend time to look  
10 into. But there is no comprehensive evidence,  
11 and that that exists actually shows the civilian  
12 rate is much worse than what we're talking about  
13 here but every 2600 jurisdictions, each one of  
14 them has a different rate of prosecution and a  
15 different number of cases going forward.

16 We cannot look to the U.S. Attorney's  
17 Office. They simply do not do these cases. They  
18 don't handle the same cases that state and local  
19 do with the same volume, and they don't have  
20 jurisdiction to do it. The few that they do, and  
21 I mean sex trafficking as well, I think one of  
22 the challenges, when we work with them is just

1 knowing that they are prosecuting all of the  
2 cases that exist.

3 But I think this is one of the big  
4 questions across our country. Not only what is  
5 the actual rate of convictions, but how do we  
6 measure like-case to like-case. And I think that  
7 there are ways of doing it, but we haven't done  
8 it yet. So, I think people think they know what  
9 their conviction rate is, but when you look at  
10 the data, I don't think it's what they think that  
11 it is. So, I would just like to caution us to  
12 mark this as something to really look into and  
13 try and make the comparison.

14 MS. BASHFORD: Thank you.

15 DR. SPOHN: Just one thing.

16 MS. BASHFORD: Very, very briefly.

17 DR. SPOHN: I agree, and I think it  
18 also depends on whether you calculate convictions  
19 based on reports, you know, in the civilian  
20 world, based on arrests, or based on cases that  
21 are taken to trial.

22 In Los Angeles -- I just pulled up our

1 data -- there were five acquittals out of 5,000  
2 cases, 5,000 reports.

3 MS. GENTILE LONG: Five acquittals?

4 DR. SPOHN: Five acquittals out of  
5 5,000 reports, but there were only 600 arrests  
6 out of 5,000.

7 MS. GENTILE LONG: How many were  
8 tried?

9 DR. SPOHN: How many were tried?  
10 Well, I don't know how many were tried because  
11 some of them pled --

12 MS. GENTILE LONG: Out of the total  
13 disposition, how many like --

14 DR. SPOHN: Three hundred and ninety  
15 were convicted.

16 MS. GENTILE LONG: So, 190 out of  
17 5,000?

18 DR. SPOHN: Three hundred and ninety.

19 MS. GENTILE LONG: Three hundred and  
20 ninety out of 5,000?

21 DR. SPOHN: It depends on what your  
22 denominator is.

1 MS. GENTILE LONG: Right, but you have  
2 to care about that denominator of what is  
3 happening. What was that big number again?

4 DR. SPOHN: Five thousand thirty-one.

5 MS. GENTILE LONG: Five thousand  
6 thirty-one? So, does that mean that 4,000 of  
7 them are false? Like that's the question we have  
8 to get at, and this panel can do it or these  
9 smart people, but you have to get there first  
10 before we start doing it.

11 Sorry. Sorry, Chair.

12 MS. BASHFORD: Back at one o'clock.

13 (Whereupon, the above-entitled matter  
14 went off the record at 12:23 p.m. and resumed at  
15 1:06 p.m.)

16 MS. BASHFORD: Okay, we're going to  
17 get started with our afternoon session. I think  
18 we have -- Dr. Markowitz is here and we're just  
19 missing Ms. Long, but she'll be on route.

20 Do we have our, Meghan Tokash and  
21 Judge Grimm on the line?

22 HON. GRIMM: We're here.

1 MS. TOKASH: Yes, Meghan Tokash --

2 MS. BASHFORD: Okay, great.

3 MS. TOKASH: -- and Judge Grimm is  
4 here.

5 MS. BASHFORD: Great.

6 COLONEL WEIR: Good afternoon. I'm  
7 going to give a little bit of background, how we  
8 got to this point. Because that has not been  
9 made as part of the public record of the  
10 Committee.

11 So, about three weeks ago the Staff  
12 drafted a draft annual, this is the fourth annual  
13 report. And that report was sent out to the  
14 Committee Members for comment.

15 Comments were made and then those  
16 comments were then incorporated into the draft  
17 report that we have on the screen.

18 Yesterday we had an administrative  
19 preparatory session. In that session the  
20 designated federal official in the morning was  
21 Mr. Sullivan and in the afternoon was Mr. Gruber,  
22 to keep us straight according to the federal, the

1 FACA rules.

2 So, what I plan to do this afternoon  
3 is go through the report, similar to what we did  
4 yesterday. But it shouldn't take as much time  
5 because we covered technical edits yesterday, and  
6 those were edits where the Staff and the  
7 Committee Members made edits.

8 And those edits did not substantially  
9 change what was written. In most cases, or in  
10 all cases, it made it clear to the reader what  
11 was intended.

12 Yesterday there was several times  
13 where we had to stop what we were discussing  
14 because it needed to be discussed or deliberated  
15 in the public forum, in a public meeting today.  
16 So when we get to those points I will turn it  
17 over to the Chair, and then she will discuss, and  
18 handle that discussion.

19 And after you all come to a consensus,  
20 or don't come to a consensus, we'll have a vote  
21 for what is going to go into the final report.

22 So, we'll start with the table of

1 contents and Page 1, and the edits that were  
2 made, were approved by General Schwenk.

3 And if we move to Page 4, once again,  
4 those edits were approved yesterday because they  
5 didn't have any substantive change to the report.

6 Now we're on Page 6. And once again,  
7 we have no substantive changes to the reports,  
8 just technical edits.

9 Page 8 we added a staff footnote. And  
10 that was just to clear up what was going on in  
11 the paragraph that it was discussed.

12 Page 9, once again, General Schwenk  
13 approved the staff edits, and we added his  
14 information into the report.

15 On Page 10, we added a footnote to  
16 clear up any ambiguity in the previous, that that  
17 footnote clears up.

18 So we go to Chapter 1, which is on  
19 Page 11. And Chapter 1 is Findings and  
20 Observations Based on the Review of MCIO, those  
21 are Military Criminal Investigation  
22 Organizations, Penetrative Sexual Offense

1 Investigation of Investigative Case Files Closed  
2 in Fiscal Year 2017.

3 And so, we look at Page 11. General  
4 Schwenk had a comment. I think we approved, or  
5 yesterday we went over that comment and he had no  
6 further issues.

7 On Page 12 we have one technical  
8 change. And throughout the report you will see  
9 this change, so I'm not going to cover it every  
10 time we go over it, but we changed the word  
11 sexual assault to sexual offense.

12 So for consistency throughout the  
13 report, that's the term we'll use is sexual  
14 offense.

15 Page 13, we had more edits, which we  
16 took care of yesterday. Same with Page 14. And  
17 15.

18 We look at Page 16, this is the first  
19 instance where the Committee is going to have to  
20 discuss and deliberate. Ms. Garvin had a  
21 comment.

22 And I'll turn it over to the Chair to

1 discuss the language that should be in the  
2 sentence that's in the first full paragraph.  
3 While some victim's counsel agreed to do the  
4 follow-up interview, other counsel requested that  
5 the MCIO send written questions for the victim to  
6 answer, which is less than an ideal method for  
7 developing information.

8 MS. GARVIN: We felt the explicit  
9 statement of which is being valued. So what I  
10 was commenting on is, there are lots of ways of  
11 developing information.

12 And in a case-by-case analysis, there  
13 can be times when written questions are the most  
14 effective way for a particular person to respond  
15 to questions. But we're making a globalized  
16 statement here that it is always a less than  
17 ideal method for developing information.

18 And so my question was for whom, to  
19 what end. Those kind of things. And not  
20 necessarily factoring that in a case-by-case  
21 moment there are different ways of eliciting  
22 effective information for investigative purposes.

1        Depending on the person being interviewed and  
2        followed up with.

3                So my recommendation was that rather  
4        than at this relatively early phase in some of  
5        our work, putting that assessment in that we  
6        strike the clause. But again, I was not a part  
7        of the case review process so there might be  
8        strong feelings by the case review that that's a  
9        really important clause.

10               MS. BASHFORD: Well, my thought on  
11        that is that unless you're dealing with a witness  
12        with some type of disability, written questions  
13        don't, written questions then get sent some  
14        place. They get answered, they get sent back.  
15        Which really completely curtails the ability to  
16        do follow-up questions.

17               Mr. Kramer, if the Government told you  
18        you could only communicate with your client by  
19        written questions, do you think you would get a  
20        full sense of what had happened?

21               MR. KRAMER: No, obviously -- I mean,  
22        obviously you're correct that I would never think

1 of communicating with a client in writing.

2 MS. BASHFORD: What --

3 MR. KRAMER: As the primary.

4 MS. BASHFORD: Ms. Garvin, what if we  
5 added for the victim to answer, except in rare  
6 instances, is a less than an ideal method.

7 MS. GARVIN: So we're, the value that  
8 we're putting on here is less than ideal method  
9 for law enforcement to elicit what they perceive  
10 as the full story. Is that --

11 MS. BASHFORD: Yes.

12 MS. GARVIN: And the reason I'm  
13 flagging this is, right, so someone who is being  
14 asked questions, and again, was this that there  
15 would never be another moment for in person  
16 questioning, which of course we know because to  
17 trial there will be.

18 So, I get a first round of questions  
19 with you and then, let's say the SVC says, and  
20 I'm assuming that's where this came from, right,  
21 based on the paragraph it is, said, you know  
22 what, I'm not going to have them sit down for an

1 in person again because when they sit down with  
2 you, law enforcement, they actually start to have  
3 panic, their memory becomes confused and, in  
4 fact, they are going to give you a statement that  
5 is less accurate because of the way X, Y or Z has  
6 impacted them.

7 And this is true of defendants, too.  
8 I want to be clear about this that sometimes our  
9 interrogation tactics do not factor the way the  
10 brain is working in the moment. And so what we  
11 actually are eliciting is less accurate and  
12 useful information from persons being interviewed  
13 or interrogated. Whichever verb you want to use.

14 And so, either -- for my comfort I'd  
15 either want it to be, which is often less than  
16 ideal for developing information from a law  
17 enforcement perspective. That I would be  
18 comfortable with.

19 But then we're at least putting the  
20 lens on who is assessing that this is effective  
21 information.

22 MS. BASHFORD: With that friendly

1 amendment, which is often a less than ideal  
2 method for developing information for law  
3 enforcement, from a law, or for a law enforcement  
4 perspective, does anybody have any problem with  
5 that?

6 (Show of hands.)

7 MS. BASHFORD: So, as amended. Raise  
8 your hand if you're in favor. And Ms. Tokash and  
9 Judge Grimm, if you could simply say yes. Judge  
10 --

11 HON. GRIMM: Yes.

12 MS. BASHFORD: Ms. Tokash?

13 MS. TOKASH: Yes.

14 MS. BASHFORD: Okay, that's unanimous.  
15 Next?

16 COLONEL WEIR: Okay, thank you. We  
17 look at Page 17, those edits were handled  
18 yesterday.

19 Page 18, the Number 2 there under  
20 discussion. The last sentence in that paragraph  
21 says, the word swiftly is used and that seemed to  
22 cause some issues.

1           So, investigators need the ability to  
2 tailor the scope of an investigation to the facts  
3 of that case, including the ability to swiftly  
4 close investigations when appropriate.

5           There was some discussion, but once  
6 again, it entered into the realm of deliberation.  
7 So in abundance of caution, we decided to discuss  
8 it today.

9           So there was some talk yesterday,  
10 before we cut it off, about just deleting that  
11 word. So I'll turn it over to the Chair for  
12 discussion.

13           MS. BASHFORD: Does anybody feel  
14 strongly that the word swiftly needs to be in  
15 there?

16           I think what we were trying to address  
17 is the cases that really aren't making it out of  
18 the starting gate seem to go on for six months.  
19 But I think it would be fine if we say close when  
20 appropriate. Because when appropriate will vary  
21 depending on an investigation.

22           MS. CANNON: I think part of the thing

1 that we wanted to address was the speed. And so,  
2 I would just add a little twist to what you  
3 suggest to close the investigations quickly as  
4 practicable and appropriate.

5 MR. KRAMER: How about if we said, the  
6 ability to close investigations in a timely  
7 fashion?

8 MS. CANNON: I think that's fine too.

9 MS. BASHFORD: Anybody have any  
10 thoughts about Mr. Kramer's proposed amendment?

11 BGEN SCHWENK: You going to keep one  
12 appropriate?

13 MS. BASHFORD: In a timely fashion?

14 MR. KRAMER: No, I'm sorry. It would  
15 say, to swiftly to -- I'm sorry, the ability to  
16 close investigations in a timely fashion or  
17 timely manner.

18 MS. BASHFORD: And keeping in mind,  
19 closing an investigation can be referring it for  
20 prosecution as well. It doesn't mean closing it  
21 down with no action.

22 HON. GRIMM: Could you say timely and

1 appropriate fashion?

2 MS. BASHFORD: Say again?

3 HON. GRIMM: Timely and appropriate  
4 fashion. To capture the general --

5 PARTICIPANT: Timely and appropriate.

6 HON. GRIMM: -- suggestions.

7 PARTICIPANT: An appropriate fashion.

8 MR. KRAMER: Sure.

9 MS. BASHFORD: Okay. So Judge Grimm  
10 has proposed that we say, closing investigations  
11 in a timely and, I already forgot.

12 BGEN SCHWENK: Appropriate fashion.

13 MS. BASHFORD: Appropriate fashion.

14 Anybody have any problems with that? Okay. In  
15 favor?

16 (Show of hands.)

17 MS. BASHFORD: Everybody present is in  
18 favor. Judge Grimm, Ms. Tokash?

19 MS. TOKASH: Yes.

20 HON. GRIMM: Yes.

21 MS. BASHFORD: Okay, that's unanimous.

22 BGEN SCHWENK: Are Judge Grimm and Ms.

1 Tokash raising their hands when they say yes or  
2 are they --

3 (Laughter.)

4 HON. GRIMM: And we're standing.

5 (Laughter.)

6 BGEN SCHWENK: Thank you.

7 MS. TOKASH: Saluting.

8 COLONEL WEIR: Okay, turning to Page  
9 19.

10 MS. CANNON: May I inquire? On Page  
11 18, did we delete a portion of the sentence,  
12 before the one we just addressed where it said,  
13 shape the scope and nature?

14 PARTICIPANT: Yes, I believe we did.

15 BGEN SCHWENK: Yes. I believe  
16 yesterday we agreed that it would say, most case  
17 files revealed that investigators did not have  
18 discretion to pursue investigative steps that  
19 they deemed appropriate based on the facts of a  
20 particular allegation.

21 COLONEL WEIR: And then also, at the  
22 last paragraph on Page 18, we decided to delete

1 the agency that was mentioned.

2 So, turning to Page 19, I have a  
3 question mark next to Ms. Garvin's comment.

4 MS. GARVIN: That was removed  
5 yesterday. I withdrew it.

6 COLONEL WEIR: Okay, thank you. So,  
7 there is nothing further on Page 19.

8 Page 20, we made, those were technical  
9 edits made by the staff. The same with Page 21.  
10 The same with Page 22. 23. 24 and 25. 26 and  
11 27. 28 and 29. As well as Page 30.

12 Page 31, Ms. Garvin had a comment that  
13 raised deliberation. And so, it was in the  
14 second full paragraph there that starts, the DAC-  
15 IPAD acknowledges. And I'll turn it over to the  
16 Chair.

17 MS. BASHFORD: So, the sentence Ms.  
18 Garvin is concerned about is, the committee is  
19 most concerned -- the questioned sentence is, the  
20 committee is most concerned about those cases  
21 reviewed in which the victim's preference to go  
22 forward with the trial prevailed even though

1 there was insufficient inadmissible evidence to  
2 obtain and sustain that conviction. Can you tell  
3 us your concern?

4 MS. GARVIN: Yes. It's actually with  
5 that very word, concerned. It's literally over  
6 that verb.

7 Not having been a part of the case  
8 review working group, I am not sure at this  
9 juncture of our understanding of the cases that I  
10 am concerned. I am interested in further  
11 analyzing these cases and understanding whether  
12 there was a robust enough investigation that  
13 could have led to admissible evidence.

14 But at this juncture, based on the  
15 testimony we've heard and the pieces I've been  
16 personally privy to, I am not concerned. I am  
17 curious and I'm interested in further analyzing.

18 MS. BASHFORD: Thoughts from members  
19 of the committee.

20 MS. GENTILE LONG: I think that that's  
21 valid to raise since we have some thoughts about  
22 whether or not we were able to review the

1 complete record, even as given. So to flag it as  
2 something, we need to go use a term that  
3 indicates we want to go back and look.

4 First of all, to make sure. Because  
5 I think this does reach the conclusion that there  
6 was insufficient evidence as a matter of the case  
7 versus that what we reviewed did not meet the  
8 standard.

9 And we had talked about, and know this  
10 will implicate something else that we didn't  
11 always watch the reviews and there was other  
12 evidence we didn't see. We would just take the  
13 reports summarizing it. So I don't know what the  
14 verb is, though.

15 MS. BASHFORD: Any other comments,  
16 suggestions?

17 MS. CANNON: It seems appropriate, the  
18 amendment. I don't have a problem with that.

19 MS. BASHFORD: I'm not sure what the  
20 amendment was.

21 BGEN SCHWENK: Change concern to  
22 interest.

1 MS. GARVIN: In further, yes, in  
2 analyzing or further analyzing. Because I am  
3 interested in digging in. There is clearly  
4 something we need to look at that I don't feel  
5 like we've finished.

6 So the amendment was that the sentence  
7 would read, the committee is interested in  
8 further analyzing those cases.

9 MS. CANNON: Yes, I agree. I think  
10 that's more accurate for what we are trying to  
11 get to.

12 MS. BASHFORD: So with that amendment,  
13 is the committee, sorry, does the Committee  
14 endorse that amendment?

15 (Show of hands.)

16 MS. BASHFORD: Everybody here says  
17 yes. On the line?

18 MS. TOKASH: Yes, no problem.

19 HON. GRIMM: Yes.

20 MS. BASHFORD: Unanimously passes.

21 COLONEL WEIR: Okay, that was all that  
22 was on Page 31. If we turn to Page 32, there was

1 just technical changes that we handled yesterday.

2 Looking at Page 35, it was a Staff  
3 change. It's the first full paragraph there in  
4 blue. And the issue is halfway down in that  
5 paragraph. On Page 33, excuse me.

6 The implementation of the judge  
7 advocate consultation and vice provision of the  
8 new disposition guidance should be followed up on  
9 thorough site visits to ensure judge advocate  
10 advice is being conveyed to the initial  
11 disposition authority at a time and in an  
12 appropriate manner to inform the decision about  
13 what action, if any, to take on an allegation.

14 The troubling word was ensure. And so  
15 I think that was, I'll turn it over to the Chair  
16 to discuss what wordsmithing should be done to  
17 help the Committee in that paragraph.

18 MS. BASHFORD: I think ensure was,  
19 it's really not the job to ensure that the advice  
20 is, our job to ensure that the advice is being  
21 conveyed. I think it's more to see, to observe  
22 if the advice is being --

1 BGEN SCHWENK: Assess.

2 MS. BASHFORD: Assess. Assess is  
3 wonderful. Thank you.

4 BGEN SCHWENK: To assess whether.

5 MS. BASHFORD: If we move, if we take  
6 out ensure and just add assess, does the  
7 Committee think that that change is, that's  
8 appropriate?

9 PARTICIPANT: Yes.

10 MS. TOKASH: Yes.

11 HON. GRIMM: Yes.

12 MR. KRAMER: I think you have to have  
13 the word whether there to --

14 BGEN SCHWENK: Assess whether, yes.

15 MR. KRAMER: Whether.

16 BGEN SCHWENK: Assess whether --

17 MR. KRAMER: Whether.

18 BGEN SCHWENK: -- staff judge advocate  
19 advice is being conveyed.

20 MR. KRAMER: Right.

21 PARTICIPANT: Yes.

22 MS. BASHFORD: Okay. Okay, in favor?

1 (Show of hands.)

2 MS. BASHFORD: Okay. We already heard  
3 from Judge Grimm and Ms. Tokash.

4 COLONEL WEIR: So, just to make sure  
5 that the Staff is clear, meaning me, so the word  
6 ensure will be removed and the sentence, will  
7 site visits to assess whether judge advocate  
8 advice is being conveyed.

9 BGEN SCHWENK: Right.

10 COLONEL WEIR: Okay.

11 BGEN SCHWENK: And that's not, W-E-A-  
12 T-H-E-R, which you might think otherwise.

13 (Laughter.)

14 COLONEL WEIR: Thank you, sir.

15 BGEN SCHWENK: You're welcome.

16 COLONEL WEIR: And that was all the  
17 changes on Page 33. We looked at Page 34 and the  
18 Staff was going to add a footnote after that  
19 first paragraph. And we discussed that, so we'll  
20 add that into the final draft.

21 Turning to Page 35, there were no  
22 additional comments, those were technical edits,

1 which I mentioned earlier about conformity  
2 throughout the report.

3 So turning to page 36, under  
4 Observation 6, the sentence starts, the DAC-IPAD  
5 was troubled. To see in some cases, the comment  
6 was, was troubled. Was that the correct language  
7 to be used in that sentence.

8 And think this just is a wordsmithing  
9 change in that paragraph. So I'll turn it over  
10 to the Chair for discussion.

11 MS. BASHFORD: I know, Ms. Garvin, you  
12 suggested curious. I'm not sure that curious  
13 really captures what we thought when a  
14 preliminary hearing officer said, no PC, and yet  
15 charges were in fact referred.

16 MS. CANNON: How about, has concerns.  
17 Has concerns regarding this and could like to --

18 MS. GARVIN: Further analyze. I mean,  
19 if we could go back to that language is, I'm  
20 okay, potentially, even with the has concerns  
21 here, as long it's, would like to further  
22 analyze. Particularly in light of everything

1 we've heard about how these hearings are going  
2 and what's happening in them. I feel like it's  
3 just the next investigative moment for us.

4 So I'm not, I'm okay with, even in  
5 this situation, has concerns and would like to  
6 further analyze. I would be okay with that. I  
7 just don't want it to be a period, essentially,  
8 after the verb. Which grammatically it kind of  
9 is right now.

10 Sister Amadis, my 6th grade teacher,  
11 would be very happy that I'm focused on verbs  
12 right now.

13 BGEN SCHWENK: What's a verb?

14 (Laughter.)

15 MS. GARVIN: Conjunction junction.

16 MS. BASHFORD: So, let's see if this  
17 gets too wordy. The DAC-IPAD has concerns  
18 regarding cases where charges of specifications  
19 for a penetrative sexual offense were preferred -  
20 -

21 MS. GARVIN: When.

22 BGEN SCHWENK: That.

1 MS. BASHFORD: -- that the preliminary  
2 hearing officer determined were not supported by  
3 evidence establishing probable cause to believe  
4 the accused committed the offense, period. The  
5 DAC-IPAD will continue to investigate this issue.

6 MS. CANNON: Would it be more proper  
7 to use the word where as opposed to that? Where  
8 the preliminary officer, hearing officer.

9 MS. BASHFORD: I'm agnostic regarding  
10 that. I said, I'm agnostic regarding that.

11 MS. GARVIN: Yes, cases in which, I  
12 think.

13 MS. BASHFORD: So, cases in which  
14 charges and specifications?

15 MS. GARVIN: Yes.

16 MS. BASHFORD: Then continue on with  
17 that sentence. And then the DAC-IPAD will  
18 continue to investigation this issue.

19 MS. GARVIN: I would be fine with  
20 that.

21 BGEN SCHWENK: So can somebody read  
22 the whole thing as we've revised it?

1 MS. BASHFORD: The DAC-IPAD has  
2 concerns regarding cases in which charges and  
3 specifications for penetrative sexual offense  
4 were preferred, that the preliminary hearing  
5 officer determined were not supported by evidence  
6 establishing probable cause to believe that the  
7 accused committed the offense. The DAC-IPAD will  
8 continue to investigate this.

9 Although I -- but then you interrupt  
10 the next sentence which continues, the majority  
11 of these charges and specifications were not  
12 referred to court-martial.

13 (Simultaneous speaking.)

14 MS. GALLAGHER: -- would be put at the  
15 very end of the paragraph. And changed to, the  
16 DAC-IPAD will continue to investigate these  
17 issues because there are two more issues  
18 identified in the paragraph.

19 MS. GARVIN: And you would put that at  
20 the end of the paragraph?

21 MS. GALLAGHER: Yes.

22 MS. BASHFORD: Sounds --

1 MS. GARVIN: That works.

2 MS. BASHFORD: Yes.

3 MS. GARVIN: Yes, thank you.

4 MS. BASHFORD: Okay. All in favor of  
5 that amendment?

6 (Show of hands.)

7 MS. BASHFORD: Judge Grimm, Ms.

8 Tokash?

9 HON. GRIMM: Yes.

10 MS. TOKASH: Yes, no problems.

11 MS. BASHFORD: Okay. So that passes  
12 unanimously.

13 COLONEL WEIR: Okay, moving down to  
14 the, almost the bottom, the last sentence in that  
15 paragraph that we were just working on. After  
16 Footnote 110.

17 The CRWG reviewers express concern.  
18 That paragraph. It was determined yesterday that  
19 that was one long, almost non-understandable  
20 sentence. So what the Staff did was draft a  
21 potential, broke it down into more manageable  
22 pieces.

1                   So that sentence would read, CRWG  
2 reviewers express concern about cases referred to  
3 trial by general court-martial that the  
4 preliminary hearing officer had determined lacked  
5 probable cause to believe the accused committed a  
6 penetrative sexual offense.

7                   If such referrals were based on  
8 evidence not presented at the hearing, the  
9 benefits of the hearings adversarial process were  
10 lost.

11                   MS. BASHFORD: Is that a Staff edit?

12                   COLONEL WEIR: Yes.

13                   MS. BASHFORD: Okay. All in favor?

14                   MS. GARVIN: I'm sorry. I apologize,  
15 could you reread it, sir?

16                   COLONEL WEIR: Absolutely. So, case  
17 review working group reviewers express concern  
18 about cases referred to trial by general court-  
19 martial that the preliminary hearing officer had  
20 determined lacked probable cause to believe the  
21 accused committed a penetrative sexual offense.

22                   If such referrals were based on

1 evidence not presented at the hearing, the  
2 benefits of the hearings adversarial process were  
3 lost.

4 MS. GARVIN: Sir, that clarified it  
5 for me and now I have my notes that I can read  
6 from yesterday too. Sorry.

7 MS. BASHFORD: Okay.

8 MS. GARVIN: Thank you.

9 MS. BASHFORD: So all in favor of that  
10 proposed edit?

11 (Show of hands.)

12 MS. BASHFORD: Judge Grimm, Ms.

13 Tokash?

14 HON. GRIMM: Yes.

15 MS. TOKASH: Yes.

16 MS. BASHFORD: Okay, that's unanimous.

17 COLONEL WEIR: So all right, turning  
18 to Page 37. We took care of those edits  
19 yesterday. And Page 38, took care of that  
20 yesterday.

21 Turning to Page 39. Observation 8.  
22 There was some discussion about the observation

1       itself which states, many sexual assault cases  
2       are being referred to courts-martial when there  
3       is insufficient evidence to support and sustain a  
4       conviction.

5                   And I believe, Ms. Long, you had  
6       concerns about using the word many in that  
7       observation?

8                   MS. GENTILE LONG: I did, based on the  
9       limits of our review. So, my suggested language,  
10      I tried to revise by replacing many with, or  
11      inserting before many, based on information the  
12      CRWG reviewed in the investigative file. That's  
13      probably too clunky but basically saying, based  
14      on what we reviewed, we found this.

15                   But again, I think it's one of those,  
16      we probably need to look at it more deeply  
17      because we know our review is limited at times.  
18      That was my --

19                   COLONEL WEIR: So I believe that, let  
20      me see if I have this sentence right. Based on  
21      information reviewed, and that's before many. So  
22      it would be, based on information reviewed, many

1 sexual assault cases are being referred.

2 MS. GARVIN: Sir, what if it, and  
3 everyone, what if we did it the other way which  
4 is, many of the sexual assault cases that were  
5 referred by the working group.

6 MS. BASHFORD: What about, based on  
7 the CRWG's review, many sexual assault cases.

8 MS. GENTILE LONG: I just wanted to  
9 flag though, Chair, that to flag in there that  
10 our review is limited. Just so nobody draws a  
11 conclusion that it was true given we know we  
12 didn't look at some things.

13 That was my push back. But if I am  
14 the outlier I am happy to just be a dissenter on  
15 this.

16 MS. BASHFORD: Did we address what was  
17 in the case files earlier in the report that we  
18 did not either have access to or were able to  
19 review the tapes of the statements either --

20 COLONEL WEIR: What we stated --

21 MS. BASHFORD: -- provide a defense or  
22 the --

1 COLONEL WEIR: What we've stated  
2 earlier is that our review by the case review  
3 working group was we reviewed those  
4 investigations that were provided to use and  
5 based our analysis on the case file that was  
6 presented. That was reviewed.

7 MS. GENTILE LONG: But that's really  
8 not the full picture, because if we didn't watch  
9 the tapes, which we didn't, then we didn't review  
10 what was given to us.

11 BGEN SCHWENK: What if put a footnote  
12 on that and down in the bottom refer back to the  
13 pages where we actually addressed that point, and  
14 also the other point about the limitations based  
15 only on the investigative case files being  
16 gauged, whatever.

17 And then the one where I added that  
18 sentence about, we didn't know, we relied, I  
19 think we we said we relied on the investigators  
20 putting the key information into the summary.  
21 And we were up front about that. That's what we  
22 did.

1 MS. GENTILE LONG: Yes.

2 BGEN SCHWENK: So if we rely, if we  
3 footnote to those two pages, prior in the report,  
4 then anybody that looks at that and raises their  
5 eyebrows will look at the footnote, then they'll  
6 read the other stuff.

7 MS. GENTILE LONG: That's fine with  
8 me.

9 BGEN SCHWENK: Okay.

10 MS. BASHFORD: So the Staff will have  
11 to find that to footnote it. Is that fine with  
12 the Committee as a whole? Represented that way.

13 HON. GRIMM: Yes.

14 MS. BASHFORD: Ms. Garvin?

15 MS. TOKASH: Yes. Yes.

16 MS. BASHFORD: Okay, that passes.

17 MS. GARVIN: Ms. Tokash.

18 MS. BASHFORD: Oh, I'm sorry.

19 (Laughter.)

20 BGEN SCHWENK: It's almost like you're  
21 not here.

22 MS. GARVIN: Oh, my comments are

1 coming.

2 COLONEL WEIR: That was all the edits  
3 or deliberation on Page 39.

4 There was no -- on Page 40 it was just  
5 technical edits. Moving to Page 41, there was  
6 some comments about Observation 9. And Ms.  
7 Garvin had a comment, so I'll turn it over to the  
8 Chair for discussion.

9 MS. BASHFORD: Yes, Ms. Garvin, can  
10 you tell us what your concern was?

11 MS. GARVIN: Yes. The observation  
12 talks about that pretrial advice would be more  
13 helpful to, and this is quoting, to convening  
14 authorities if it included explanations of the  
15 staff judge advocates conclusions.

16 And that is, we had not yet, I didn't  
17 believe we have heard from convening authorities  
18 telling us that fact. This is us assuming that  
19 it would be more useful to them.

20 And I thought that clarification point  
21 might be useful so that it's not misconstrued as  
22 a testimonial statement based on facts. But

1 that's my recollection.

2 MS. BASHFORD: What I remember we saw  
3 a lot was a check box, the forms, that we have  
4 jurisdiction over the accused, the forms and  
5 specifications are correct and there was one  
6 more. There was like three checks.  
7 Jurisdiction, forms with specifications, oh, and  
8 probable cause. But it was like a check box.

9 So, again, we're basing it on what we  
10 saw in the file. Like, we have heard in  
11 testimony that there's a lot of oral advice  
12 that's not documented that's given.

13 But since it's not documented we don't  
14 know what it is. Thoughts?

15 MS. CANNON: Would the word could, as  
16 opposed to would, solve the problem?

17 MS. GARVIN: Absolutely.

18 MS. BASHFORD: So, instead of, instead  
19 of the very last sentence of Observation 9, we  
20 could say the Article 34 pretrial advice could be  
21 more helpful?

22 MS. GARVIN: Yes.

1 MS. BASHFORD: As amended, in favor?

2 (Show of hands.)

3 MS. BASHFORD: Ms. Tokash --

4 MS. TOKASH: Yes.

5 MS. BASHFORD: -- Judge Grimm?

6 HON. GRIMM: Yes.

7 MS. TOKASH: Yes.

8 MS. BASHFORD: Okay, that's unanimous.

9 And it's amended.

10 COLONEL WEIR: There was nothing else

11 on Page 41 that needed to have any discussion.

12 Turning to Page 42, Ms. Garvin had a comment that

13 needs to be discussed.

14 MS. GARVIN: Chair, do you want me to

15 --

16 MS. BASHFORD: Yes, can you explain

17 that please?

18 MS. GARVIN: So, my reading of the

19 final two sentences, and it mostly hangs on the

20 clause at the last sentence. So the last two

21 sentences read, better practices to provide,

22 sorry, three sentences, to provide written

1 explanations with further explanation as needed.

2 A written legal analysis and rationale  
3 could enhance further, could enhance fairness,  
4 due process and transparency in the military  
5 justice system. And then an em dash that says,  
6 benefits that do not seem to be outweighed by a  
7 need for confidentiality.

8 And it's that last, following the em  
9 dash, that benefits that do not need, that do not  
10 seem to be outweighed by a need for  
11 confidentiality, that I wasn't sure we had enough  
12 evidence to make that statement. But again,  
13 maybe the working group got more information that  
14 they could share to explain that piece.

15 MS. BASHFORD: Thoughts?

16 MS. CANNON: We could just omit it.  
17 I don't recall that specific point of  
18 confidentiality being discussed.

19 MS. BASHFORD: I believe it was  
20 discussed when, it was in a discussion about  
21 somebody tipping their hands.

22 BGEN SCHWENK: Right.

1 MS. BASHFORD: The prosecution said,  
2 well then the defense will know what we know and  
3 the defense is like, we already know where you're  
4 going and the prosecution already knows where the  
5 defense is going, something like that.

6 But if we could just put a period  
7 right after system and leave out anything after  
8 the dash, if that works?

9 MS. GARVIN: Yes.

10 MS. BASHFORD: All in favor of that?

11 (Show of hands.)

12 MS. BASHFORD: Judge Grimm --

13 MS. TOKASH: Yes.

14 MS. BASHFORD: -- Ms. Tokash?

15 MS. TOKASH: Yes.

16 HON. GRIMM: Yes.

17 MS. BASHFORD: Okay, that's  
18 unanimously adopted.

19 COLONEL WEIR: Let's make sure. So a  
20 written legal analysis and rationale could  
21 enhance fairness due to process and transparency  
22 in the military justice system, period.

1                   Now we're moving on to Chapter 2,  
2                   which is titled, Article 32 UCMJ Preliminary  
3                   Hearings and the Court-martial Referral Process.  
4                   There's nothing further on Page 42 or 43, 44, 45,  
5                   46, 47, 48, 49, 50, 51, 52.

6                   There were changes on 53 that we  
7                   discussed yesterday, and those were technical  
8                   edits. Same with Page 54, 55 and 56.

9                   Now, if you will please turn to Tab 5  
10                  in your materials. These are the charts that  
11                  would go with the Chapter. So what we needed you  
12                  all to do yesterday when we came to these charts  
13                  I said, it's a lot to digest in five seconds that  
14                  you're looking at them so take a look at them  
15                  tonight and determine whether or not you think  
16                  there are, if there are any changes that need to  
17                  be made to them.

18                  And we discussed some quick changes to  
19                  the charts, which was Figure 1. Where the 19, I  
20                  think that was General Schwenk, the 19 was  
21                  outside the box.

22                  And so the concurrence was that we

1 would just move the numbers inside the boxes to  
2 make it more understandable to the reader. And  
3 that was the only change on that chart. And we  
4 had agreed to that yesterday, I believe.

5 BGEN SCHWENK: Grade and rank.

6 COLONEL WEIR: Oh, right. Looking at

7 --

8 MS. CANNON: Excuse me. There was  
9 also a question with regard to the numbers on the  
10 left, zero up to 30. Given the nature of the  
11 numbers in the graphs.

12 BGEN SCHWENK: We were going to put a

13 --

14 MS. CANNON: That there is some --

15 BGEN SCHWENK: We were going to put  
16 something on the left-hand side that explained  
17 what that column meant. Like total cases or  
18 something.

19 MS. CANNON: It doesn't match up with  
20 the number, well, scale. Scale is off.

21 COLONEL WEIR: I think when you add  
22 nine and 19 it's two shy of 30, which is the

1 graph. The confusion, I think is when 19 was  
2 above it. Because we all looked at 19 and saw it  
3 in the middle of the 30.

4 I mean, if this chart is unclear, or  
5 doesn't add anything, we can certainly delete it.

6 MS. BASHFORD: I think if you put  
7 those top numbers into the column, it will take  
8 care of that. Because the lower numbers are in  
9 the column itself. So the nine below the 19 is  
10 in there. It's making it look as though the  
11 total is 19.

12 COLONEL WEIR: We will redraft or  
13 rework this slide and get it back out to you.  
14 But --

15 BGEN SCHWENK: I've seen cases just  
16 like this where they put the nine in the box, the  
17 19 in the box and they put 28 on top. So that  
18 everybody sees that it's there the total, 28.

19 COLONEL WEIR: Is that a change that  
20 everyone can agree to?

21 MS. BASHFORD: Yes.

22 COLONEL WEIR: Excellent.

1                   MR. KRAMER: I think it was good to  
2 think outside the box though.

3                   (Laughter.)

4                   COLONEL WEIR: So we'll make those  
5 changes to that chart.

6                   Looking at the chart on the next page,  
7 we looked at the dark gray and the light gray and  
8 the decision was made to merge those. It made it  
9 easier to read and more understandable since we  
10 were talking about dismissed by a convening  
11 authority. Is that everyone else's recollection  
12 to those charts?

13                  BGEN SCHWENK: Will we then use a  
14 medium gray for that?

15                  MS. GARVIN: Yes.

16                  BGEN SCHWENK: All right, never mind.  
17 I withdraw.

18                  COLONEL WEIR: So we'll make that  
19 change.

20                  And then the same with the following  
21 chart. It's just a reproduction of the chart  
22 that's Fiscal Year '17. And the next one is

1 Fiscal Year '18. So we'll make the same changes  
2 on those charts.

3 Any questions about the charts?

4 Great.

5 BGEN SCHWENK: Can we go back to the  
6 round circle chart? Down in the bottom right-  
7 hand.

8 It says dismissed by the GCMCA and  
9 dismissed by the SPCMCA. Did we yesterday say we  
10 were going to merge those two?

11 COLONEL WEIR: Yes, sir.

12 BGEN SCHWENK: Okay. So it's just  
13 going to say dismissed?

14 COLONEL WEIR: (No audible response.)

15 BGEN SCHWENK: Okay.

16 COLONEL WEIR: Okay. Turning back to  
17 Page 58. There were no changes.

18 Looking at Page 59, the first  
19 paragraph, there was some discussion about  
20 whether it should be DoD or SAPRO. Changing the  
21 wording there. So I'll turn that over to the  
22 Chair for discussion.

1 MS. BASHFORD: Yes. General Schwenk,  
2 what did you mean here?

3 BGEN SCHWENK: The sentence says, the  
4 DoD does not collect information on the legal  
5 outcome of cases in which the victim is the  
6 spouse of an intimate partner. Then it goes on  
7 from there.

8 And I just point out, DoD does collect  
9 information on the legal outcome of all cases and  
10 so it doesn't really matter who the victim is.  
11 DoD meaning the services as part of DoD.

12 And I believe the people from the, or  
13 Chuck was there from the data working group and  
14 he said that the DAC-IPAD gets their information  
15 that this refers to from the sexual assault  
16 prevention and response office, SAPRO, in the  
17 Department of Defense. And that SAPRO does not,  
18 the sentence is true for SAPRO, which is where we  
19 get our information from.

20 So it was my understanding that the  
21 proposal was, change DoD to SAPRO, and if there  
22 was a feeling on behalf of the Staff to explain

1 that, and that's where we get our information  
2 from, you would do so. So that's --

3 MS. BASHFORD: Thoughts? I'm not sure  
4 SAPRO is where we get all of our information from  
5 though.

6 DR. MARKOWITZ: Wasn't there an issue  
7 about FAP also not collecting that data?

8 BGEN SCHWENK: Right. Because --

9 DR. MARKOWITZ: So do we need to  
10 clarify that it's DoD, SAPRO and also the family  
11 advocacy programs?

12 BGEN SCHWENK: Yes, we can say SAPRO  
13 and FAP don't collect it. I mean, they'd have to  
14 go to their services and have them pull through  
15 all their records to get them.

16 DR. MARKOWITZ: Yes. I just want to  
17 make sure we're clarifying that.

18 BGEN SCHWENK: Okay.

19 MS. BASHFORD: I think the point is  
20 that for those years, 2012 to 2014, we don't have  
21 that information. We do have it for the  
22 following years.

1 COLONEL WEIR: That's correct, Chair.  
2 The reason, this is in the methodology of the  
3 working, the data working. How the data came  
4 out.

5 And so that's just explaining why the  
6 2012 to '14 data is not as accurate as the rest  
7 of the data that we've collected for the case  
8 adjudication report.

9 MS. BASHFORD: Why don't we just say  
10 then, the statistical data for Fiscal Years 2012  
11 through 2014, collected by the JPP, do not  
12 include the legal outcomes of cases in which the  
13 victim is the spouse or an intimate partner.

14 BGEN SCHWENK: Good.

15 MS. BASHFORD: And will not be  
16 included in the historical discussion to follow.

17 COLONEL WEIR: So the sentence that  
18 reads, the Department of Defense does not collect  
19 information would be deleted?

20 MS. BASHFORD: Yes. We would start,  
21 we would start out with, the statistical data for  
22 Fiscal Years 2012 through 2014, collected by the

1 judicial proceedings panel, do not include legal  
2 outcomes of cases in which the victim is the  
3 spouse or an intimate partner.

4 Then you continue on to, and will not  
5 be included in the historical discussion to  
6 follow. As amended, all in favor?

7 (Show of hands.)

8 HON. GRIMM: Yes.

9 MS. TOKASH: Yes.

10 MS. BASHFORD: That is passed  
11 unanimously.

12 COLONEL WEIR: If I could, if you  
13 could turn your attention to Tab 6. These are  
14 the charts that will go in the report.

15 And once again, the same discussion  
16 was had about giving you time yesterday evening  
17 to digest these charts. There's a lot of  
18 information there.

19 DR. SPOHN: That's the total number of  
20 cases?

21 For the first bar chart on Page 1, is  
22 that the total number of cases each year?

1 PARTICIPANT: Yes, ma'am. It's the  
2 total number of cases that we have in the  
3 database at this point.

4 DR. SPOHN: So do you need a title for  
5 that figure?

6 PARTICIPANT: There should be a title  
7 that would be actually in the text for the  
8 heading part.

9 DR. SPOHN: Oh, it will be in the  
10 text.

11 PARTICIPANT: Yes, ma'am.

12 DR. SPOHN: Okay. No, that's --

13 PARTICIPANT: There will be a table --

14 DR. SPOHN: That's not the right  
15 heading.

16 BGEN SCHWENK: On Page 59, down at the  
17 very bottom, it says, Figure 3.1, which I guess  
18 is that next figure.

19 Cases documented by the DAC-IPAD. So  
20 that's the lead in.

21 COLONEL WEIR: And the chart at the  
22 bottom of that page just breaks out, once again,

1 the percentages of service members in each  
2 service. And as a percentage of sexual assaults  
3 per service for the population.

4 And if you look at Page 60 it says,  
5 Figure 3.2, military service of the accused.  
6 Then, the following tables provide an overview of  
7 the cases involving penetrative sexual assault,  
8 sexual offense and contact offenses completed by  
9 the military services in Fiscal Year 2018.

10 Anybody have any questions or concerns  
11 about either of those charts on Page 1 of Tab 6?

12 Moving to the next page. Table 1,  
13 dispositions.

14 MS. BASHFORD: Colonel, I would just  
15 note that it seems on Page 62 we say Table 3.1.  
16 And, oh, I'm sorry, the difference between  
17 figures and tables.

18 COLONEL WEIR: Yes.

19 MS. BASHFORD: That was duplicative.  
20 Anybody have any comments, suggestions? Good.

21 COLONEL WEIR: Now on Page 66, there  
22 were no edits on Page 66. No edits on 66, 67, 68

1 or 69.

2 Looking at Page 70 we had some  
3 discussion. I want to make sure that we're,  
4 everyone is clear. It was on Paragraph 2 that  
5 starts, false allegations of sexual assault.

6 And we discussed that in the body of,  
7 there is, and I think Ms. Garvin highlighted the  
8 fact there should be, it should be consistent  
9 with what's in the body of the, when it refers to  
10 sexual assault. False allegations of sexual  
11 assault.

12 And I think, but I want to be sure, I  
13 think that we said it could be with the  
14 apostrophe on each side of that sentence or not.  
15 Quotes I mean.

16 MS. GENTILE LONG: And weren't you  
17 going to rename it consistent with Paragraph 1,  
18 inconsistencies --

19 DR. SPOHN: Yes.

20 MS. GENTILE LONG: Okay.

21 DR. SPOHN: Inconsistencies in  
22 defining, quote, allegations of sexual assault,

1 unquote.

2 COLONEL WEIR: Is everyone comfortable  
3 with that technical change?

4 MS. BASHFORD: Yes. All in favor?

5 (Show of hands.)

6 MS. TOKASH: Yes.

7 HON. GRIMM: Yes.

8 MS. TOKASH: Yes.

9 MS. BASHFORD: Judge Grimm?

10 HON. GRIMM: Yes.

11 MS. BASHFORD: Okay, that's unanimous.

12 MS. TOKASH: Yes.

13 COLONEL WEIR: All right. There was  
14 no changes on 71. If we look to Page 72, if you  
15 could go to Tab 7. And these are charts that  
16 deal with the incidents of collateral misconduct.

17 So what you see in Table 1 is broken  
18 down by service. And then what type of action  
19 was taken.

20 And then further in Table 2, it's also  
21 broken down by service and then the type of  
22 alleged misconduct. And also broken further down

1 into the number for each type of collateral  
2 misconduct and then as a percentage of the total  
3 of collateral misconduct.

4 BGEN SCHWENK: Is there somewhere  
5 where we explain the difference between, quote,  
6 accused, unquote, and accused, underlined? As we  
7 use in Table 4.1.

8 COLONEL WEIR: Could you say that  
9 again, sir?

10 BGEN SCHWENK: Okay. In Table 4.1 in  
11 the left-hand column, the second one down says,  
12 number of service members quote, accused,  
13 unquote, of collateral misconduct. Same in the  
14 third one down.

15 But the fourth one down says, accused,  
16 underlined. And the next one on the next page,  
17 which I guess is the fifth one down, says  
18 accused, underlined.

19 So we have a tie score. Two with  
20 quotes and two with accused. And I'm wondering,  
21 do we mean something different, is that why we  
22 did that? Do we need to explain it or -- there

1 must be a reason.

2 MS. BASHFORD: It doesn't seem that it  
3 matters much which way it is, it should just be  
4 consistent across the table.

5 MS. CARSON: I think I can explain it.  
6 The reason it's accused in quotes in the first  
7 two is because that's the way the term was used  
8 initially in the report.

9 And then it wasn't carried through and  
10 it was underlined in the next two because the  
11 next two are just getting the percentages of,  
12 first, just the accused, and the second, the  
13 accused to receive an adverse action is sort of  
14 our emphasis.

15 So I would suggest here, we could take  
16 it out. There's nothing wrong with just taking  
17 it all out, having it all one way or the other.

18 MS. HAM: And it's both the first time  
19 the body of the report explains that accused, of  
20 course, is a technical term in the military. So  
21 the services define that differently for purposes  
22 of providing numbers so it was less than thought.

1 MS. CARSON: So it's not important of  
2 them, however, for consistency you want it --

3 MS. BASHFORD: Any thoughts on it,  
4 Meg?

5 MS. GARVIN: I think the quotations  
6 are relatively important in light of the  
7 disparate definitions. And so, for consistency  
8 if they could all be quotes, I think that  
9 triggers recognition of disparate definitions as  
10 opposed to underlining, which is pure emphasis.

11 MS. BASHFORD: That's administrative,  
12 we don't need to vote on that. That's fine.

13 MS. GENTILE LONG: I have a  
14 substantive question. On Table 4.2, false  
15 report, I think we also need to indicate, because  
16 as it reads it would read like what one would  
17 think is a false report, but based on the  
18 inconsistent definitions, I don't know if we just  
19 footnote that table back to the page where we  
20 talk about it or if you need to put it in  
21 quotations.

22 It says, as defined by each military

1 service, but even a footnote maybe would just --

2 MS. CARSON: You want it in  
3 quotations?

4 MS. GENTILE LONG: Or just the  
5 footnote back to where you talk about it in the  
6 report.

7 SGT. MARKEY: Jen, just out of  
8 curiosity, it calls it false allegations, and  
9 then this says false report.

10 MS. GENTILE LONG: I know, but I think  
11 this is the same data. Unless this is, this  
12 table is different data, but I don't recall  
13 hearing any testimony about a true false report.  
14 A clean false report.

15 COLONEL WEIR: When we were going  
16 through the collateral misconduct report, the  
17 drafts that we received from the services, and  
18 then we brought that to the attention of the  
19 Committee, you all discussed that their  
20 definitions of what a false allegation, a false  
21 complaint wasn't clear.

22 And I recall if a victim made an

1 allegation, and then there was a cross complaint,  
2 remember that discussion. There was some --

3 MS. GENTILE LONG: Where some of the  
4 third party made it --

5 COLONEL WEIR: Right.

6 MS. GENTILE LONG: -- and then the  
7 victim said it wasn't, that was a false report?

8 COLONEL WEIR: Right. And so, based  
9 upon what you all discussed, we decided to not  
10 include that as collateral misconduct. Because  
11 it wasn't clearly defined.

12 MS. GENTILE LONG: So then this thing  
13 in there is a true/false report in that table?

14 MS. BASHFORD: No. I think it's as  
15 each service defines it.

16 MS. GENTILE LONG: Defines it.

17 MS. BASHFORD: Which is very  
18 different. I think we also thought that if it's  
19 a true/false report it's not collateral  
20 misconduct, it is misconduct.

21 MS. GENTILE LONG: Right.

22 MS. BASHFORD: So that's why I think

1 we're not including them, counting them.

2 MS. GENTILE LONG: But am I missing  
3 something because it's in the table? I mean,  
4 it's in that table.

5 COLONEL WEIR: It depends on how you  
6 want to capture that information. What you  
7 decided that, it wasn't, as the Chair said, it  
8 really wasn't collateral misconduct. And then  
9 there really wasn't a clear definition what that  
10 meant across the services.

11 And so, the decision was made that you  
12 all would not put it in the collateral report as,  
13 I mean, collateral misconduct report as  
14 collateral misconduct. But you would note, which  
15 we did in the false allegation paragraph we  
16 talked about.

17 So we can either leave it in if you  
18 think it's helpful or just delete that section  
19 right there in the graph.

20 MS. BASHFORD: It seems to me, since  
21 we're not counting it, we could probably just  
22 delete that last block. Thoughts?

1 Delete the last block? Favor?

2 (Show of hands.)

3 MS. TOKASH: I say delete it.

4 MS. BASHFORD: I'm sorry?

5 MS. TOKASH: Delete it. Ms. Tokash.

6 MS. BASHFORD: Judge Grimm?

7 HON. GRIMM: I agree.

8 MS. BASHFORD: So that passes, with  
9 Ms. Tokash dissenting.

10 BGEN SCHWENK: No, she said agrees.

11 MS. BASHFORD: Oh, I'm sorry, I  
12 thought she said she dissents. Okay.

13 COLONEL WEIR: She said delete it.

14 MS. BASHFORD: Oh, okay.

15 MS. TOKASH: I said delete it. I  
16 agree.

17 (Laughter.)

18 COLONEL WEIR: And I --

19 MS. BASHFORD: So it passes  
20 unanimously.

21 COLONEL WEIR: And I believe the  
22 Paragraph 2 on Page 70 fully discusses your

1 concerns that you had so I don't think it's,  
2 based upon that I don't think it's relevant.

3 Any discussion on Table 3? And that's  
4 just a breakout of what was the result of the  
5 collateral misconduct versus what they received  
6 as a result of committing collateral misconduct.

7 MS. BASHFORD: Any opposition,  
8 thoughts, comments? Moving on.

9 COLONEL WEIR: And then the next chart  
10 is a pie chart. I don't know whether this is  
11 helpful to you all or to the reader but that's  
12 something you can --

13 MS. CARSON: This is the exact same  
14 information as Table 1. So the question for you  
15 is, do you prefer Table 1, do you prefer this  
16 Table 1 or the first Table 1 or do you --

17 There are just two ways, and then the  
18 graphic design are presenting the same  
19 information.

20 MS. BASHFORD: Personally, I find the  
21 pie chart with the wedge coming out very  
22 confusing, but that may just be me. So I defer

1 to the Committee as a whole.

2 COLONEL WEIR: My recommendation is  
3 you go with Table 1, not the pie charts, because  
4 it's consistent the way the other charts are laid  
5 out by service.

6 MS. BASHFORD: In favor of the table,  
7 not the pie?

8 (Show of hands.)

9 (Laughter.)

10 MS. BASHFORD: Judge Grimm, Ms.  
11 Tokash?

12 HON. GRIMM: Yes, I mean, you can have  
13 your pie but you can't eat it too.

14 MS. TOKASH: I agree.

15 MS. BASHFORD: Okay, unanimously  
16 passes.

17 COLONEL WEIR: If you go to Page 75,  
18 there were no edits there. Page 76, 77, 78, 79,  
19 80, 81, 82, 83. And that ends the collateral  
20 misconduct.

21 Chapter 5, Military Installation Site  
22 Visits and Member Observations of Sexual Assault

1 Courts-Martial in 2020. Chapter 5 is just a  
2 chapter we added in here to discuss the site  
3 visits and the court-martial observation.

4 So we're on Page 84. And there was a  
5 Staff edit on Page 85 where we took out the dates  
6 when we would be going to those places. And we  
7 discussed that yesterday.

8 And that seemed to be what everyone  
9 wanted to do was just take the dates out. And  
10 the staff edit was approved.

11 And then we looked -- Page 86, no  
12 changes. And that brings us to the end of the  
13 review of the draft report.

14 And at this time I believe the Chair  
15 can take over and we'll have a vote on the  
16 acceptance of the report that as amended, with  
17 your amendments and changes.

18 MS. BASHFORD: I so move that we  
19 accept the report.

20 DR. MARKOWITZ: Second.

21 MS. BASHFORD: All in favor?

22 (Show of hands.)

1 HON. GRIMM: Aye. Yes.

2 MS. TOKASH: Aye. Yes.

3 MS. BASHFORD: Okay, it unanimously  
4 passes.

5 COLONEL WEIR: Okay, ma'am, what we'll  
6 do next as a staff --

7 BGEN SCHWENK: Wait, time out. I just  
8 want to say, on behalf of all the members, thanks  
9 to the Staff for putting this together.

10 PARTICIPANT: Absolutely.

11 BGEN SCHWENK: I don't believe we  
12 wrote one percent of this or less. Point  
13 something percent. Even with all of our edits.

14 And so, I thought it was another great  
15 job for another year. And I recommend that your  
16 contracts be extended for another year.

17 (Laughter.)

18 COLONEL WEIR: Thank you.

19 HON. GRIMM: Agree.

20 COLONEL WEIR: Well, you don't realize  
21 how much you did help because what we do to write  
22 the report is we go back and look at the

1 transcripts and the conversations that you all  
2 have had when you're discussing these issues.  
3 And so you'll look at the footnotes and you'll  
4 see where you're footnoted.

5 And a lot of the information contained  
6 is stuff that you said and did. So, I think  
7 that, so the way forward, the Staff will make  
8 those changes, we will get that all out to you.

9 Just so you have a comfort level that  
10 we did make the changes. And then we will send  
11 that to the printer and out to the various  
12 organizations that get the draft report.

13 Secretary of Defense and the members  
14 of the Senate Armed Services Committee and House  
15 Armed Services Committee are the folks that get  
16 this.

17 So, while I'm up here and I don't have  
18 to move, I just want to let you know what's going  
19 to happen on the 18th. The Chair is having an  
20 office call with the Secretary of Defense. So  
21 she will have the opportunity to discuss the fine  
22 work that you all are doing as a Committee.

1           He's received some of the read ahead  
2 materials to brief him on what you all are doing,  
3 and some talking points. So that's going to  
4 happen on the 18th.

5           And part of the 2020 NDAA, which  
6 Colonel Pflaum may talk about, is that you all,  
7 the DAC-IPAD has been extended for five years.  
8 So, that requires decisions on your part.

9           And we'll get back to you individually  
10 as to whether you want to continue in this  
11 excellent mission to make the military justice  
12 system better. So that will be forthcoming.

13           But if you want to, are willing to,  
14 and what's good about this is you all know what  
15 the time involvement is. And now I know some of  
16 you are retiring, you'll even have more time to  
17 involve yourself with this worthwhile goal.

18           So, the Staff would like to thank you  
19 for your input and the ease of this. Really, the  
20 ease working with you all is amazing.

21           I came in at the tail end of some  
22 other committees where they didn't have the

1 cohesiveness and the discussions that you all are  
2 having. And that's vital for the Staff to be  
3 able to work and put together a product that you  
4 all are vitally important to help us do that.

5 So thank you once again. And we're  
6 not done for today, but -- oh yes, you voted on  
7 the report.

8 MS. BASHFORD: Yes, we did. The only,  
9 depending on the date of the transmittal letter  
10 to the Secretary of Defense, there would be one  
11 other edit in the introduction where you have to  
12 insert the word former, if it's after March 20th.

13 COLONEL WEIR: Yes.

14 MS. BASHFORD: If it's before, you're  
15 aces.

16 COLONEL WEIR: I don't know if you are  
17 all aware, but I don't think she'll mind me  
18 telling you that the Chair is retiring after 40  
19 years in the Manhattan DA's Office.

20 And so once again, she'll have a lot  
21 of time to cruise, fly around the United States  
22 and observe courts-martial and site visits. So

1 we'll make that edit when we go --

2 MS. BASHFORD: As needed.

3 (Laughter.)

4 MS. BASHFORD: We're scheduled for a  
5 break but we've really only been back for an  
6 hour, so if people don't mind, why don't we forge  
7 through with Mr. Hines and the site visit.

8 MR. HINES: This will be a brief  
9 update. I'm not going to rehash what we covered  
10 at the last meeting.

11 Just to let you know that the site  
12 visit planning is proceeding. The staff is  
13 putting together question packets on the various  
14 topic areas that you will be questioning the  
15 practitioners and the various stakeholders that  
16 you're going to meet with on the trips.

17 We have at least four Committee  
18 Members now going on each trip, which is very  
19 good, a very good participation rate. So we're  
20 very appreciative of your willingness to take  
21 time out of your busy schedules to go on these  
22 trips.

1                   And we've been working closely with  
2                   our Service Representatives to line up our local  
3                   points of contact on the ground, onsite, so that  
4                   we can facilitate our movement, do all those  
5                   little logistical things that people don't think  
6                   about.

7                   And the Service Representatives have  
8                   been very responsive and very good at giving us  
9                   the names of those people on the ground. And  
10                  that's a continuous process and will proceed as  
11                  we go through.

12                  So unless there are any questions,  
13                  that's really the extent of my update.  
14                  Everything's proceeding fine. We haven't --  
15                  actually, there is, there was one development  
16                  that I should probably let you know about.

17                  The Navy did notify us that that  
18                  portion of the Europe trip that includes meeting  
19                  with the Navy, as we had the trip set, the Navy  
20                  folks were going to have to drive seven hours to  
21                  meet us.

22                  And so what we decided, we weren't

1 going to ask them to do that. So that group is  
2 going to go ahead and go on down from the first  
3 installation down to the Navy, because at Naples,  
4 they have a very robust, not only operational  
5 presence there, but legal presence there as well.

6 There's a RLSO there. That's where  
7 the Navy Judge In-Theater sits and has their  
8 courthouse.

9 And that's about it. Are there any  
10 questions about any of the site visits? I know  
11 that --

12 MS. CANNON: I don't understand --

13 MR. HINES: -- I've talked to some of  
14 the members --

15 MS. CANNON: -- what you just said.

16 MR. HINES: -- including Ms. Cannon,  
17 about your personal travel and that's something  
18 we can talk about and handle, she's not the only  
19 one, but we can handle offline with our staff.  
20 And that's how we're going to --

21 BGEN SCHWENK: What is the -- Glen,  
22 what's the process for determining what questions

1 we're going to ask each particular group at each,  
2 if we're going to do this, I thought originally  
3 we were talking about the idea of coming up with,  
4 like, five questions --

5 MR. HINES: Sure.

6 BGEN SCHWENK: -- for the trial  
7 counsel, five questions for the defense counsel,  
8 five questions for each group, that everybody  
9 would ask, so that when we got back and you guys  
10 compiled it, you'd have answers from across the  
11 board.

12 And so the question then is, out of  
13 the 50 million questions we could ask trial  
14 counsel, for example, what are the five that are  
15 the most important to us, to make sure we all  
16 ask?

17 So I just wondered if we have a  
18 process to figure that out.

19 MR. HINES: Yes, sir. Yes, sir. We,  
20 as a staff, are working on that issue right now,  
21 and have been working on it.

22 And it's just a process of soliciting

1 everyone's ideas, so that we can come to what we  
2 call question packets, which was very similar to  
3 what we used for the Judicial Proceeding Panel.

4 And those tend to get refined after  
5 you do a couple of site visits. You find that  
6 there are some questions that are maybe better  
7 than others and some topics that are more robust  
8 for discussion than others.

9 And so the staff is working on that.  
10 And it's our intent to route that around to get  
11 your input, so that we have a final product when  
12 we get out there.

13 I've also had discussions with Dr.  
14 Wells about -- because there has been, there's a  
15 concern presented that you need to make this as  
16 objective a feedback as we possibly can. So  
17 we've been talking with Dr. Wells on how to  
18 refine the questions and even use instructions  
19 that are part of every site visit, so that when  
20 you get that information back, you can put it in  
21 a form or a format that's more objective and less  
22 susceptible to being called anecdotal, if you

1 understand. Does that answer your question, sir?

2 BGEN SCHWENK: Yes, thank you.

3 MR. HINES: Yes, ma'am?

4 MS. CANNON: I didn't understand what  
5 you meant about Europe, since there are two  
6 locations in Europe. One is Germany, one is  
7 Italy.

8 MR. HINES: Yes, ma'am, good question.  
9 We had such positive response on that particular  
10 trip that we determined, with the Staff Director  
11 and the Deputy, that we were not going to have  
12 everyone go to both sites. And so we've got  
13 basically half of the members going to Germany  
14 and half going to Italy.

15 BGEN SCHWENK: So when they come back  
16 from Naples talking about the admiral's villa  
17 that they had their meeting in, overlooking the  
18 bay in Capri and everything, you're not going to  
19 be on that one.

20 (Laughter.)

21 COLONEL WEIR: Just for --

22 BGEN SCHWENK: You're going to Germany.

1 COLONEL WEIR: -- for that site visit,  
2 for Italy, if you signed up for that, if you  
3 signed up for the site visit to go to Italy, that  
4 seven-hour trip that Glen was talking about,  
5 we'll probably fly, but that's going to take an  
6 extra day of travel, which we didn't anticipate  
7 doing.

8 So I would look at your calendars and  
9 make sure you have the additional day or two to  
10 make that trip. Because one of the things we're  
11 trying to do on these site visits is make it a  
12 little as possible impact on the units we want to  
13 talk to. And clearly having folks drive seven  
14 hours is not, so we're going to just travel all  
15 day and then get those folks the next day, so  
16 that we're not impacting them.

17 MR. HINES: And I don't think -- it's  
18 not going to cause, shouldn't cause too much of a  
19 problem, because that trip is the week of July  
20 26, and it was already scheduled to end on  
21 Thursday. And so if we had to add one more day,  
22 it would still be -- it wouldn't be going over

1 into the following weekend or the following work  
2 week. Any other questions on the site visits --

3 SGT. MARKEY: Glen, I just had one.

4 HON. GRIMM: This is --

5 MR. HINES: -- before I turn it over?

6 SGT. MARKEY: In addition to developing  
7 the questions that we want to present --

8 MR. HINES: Yes.

9 SGT. MARKEY: -- are -- have we  
10 identified specifically which components of the  
11 system that we're -- who are we going to talk to  
12 in particular, what disciplines they are? And  
13 that we're going to have a representative sample  
14 of those at the sites?

15 MR. HINES: Yes, Mr. Markey. So each  
16 day, we'll have, much like our public meetings or  
17 our prep meetings, there will be an agenda that  
18 we prepare.

19 And then in addition to the agenda,  
20 each of those sessions will be with a different,  
21 the term I use is stakeholder. So trial counsel  
22 will be in one session, defense counsel in

1 another, VLC, if we meet with the VLCs,  
2 investigators, commanders, convening authorities.

3 In the two training bases, there will  
4 also be a period where we're going to meet with  
5 recruits or trainees in entry-level training.

6 So we're working with the Service Reps  
7 to make sure that we get the right people for  
8 each panel, but we also get a sufficient number  
9 of them, and hopefully a sufficient number of  
10 them with the requisite level of experience that  
11 will be of the most value for you when you're  
12 speaking with them.

13 MS. BASHFORD: Thank you very much.

14 HON. GRIMM: Could I ask a question?

15 Well I just did.

16 MS. BASHFORD: Judge Grimm?

17 HON. GRIMM: Could I ask another  
18 question, just one followup on the trip? Would  
19 it be possible to have you circulate a little  
20 chart perhaps that has the dates of the trips,  
21 the people that you have as indicating a desire  
22 to attend, and maybe a point of contact, if the

1 individual members have some questions about  
2 travel arrangements, to get some background  
3 information?

4           Some of us, myself included, our  
5 schedules may have shifted, as a result of work  
6 exigencies that created situations that didn't  
7 exist before. And I just want to have the most  
8 recent information about these site trips to  
9 confirm availability, if that's possible.

10           MR. HINES: Yes, Your Honor. If I  
11 heard you correctly, were you just asking about  
12 the current schedule of when the trips are and  
13 which members and which staff are going to be  
14 attending each trip?

15           HON. GRIMM: Correct. And then maybe  
16 a point of contact, so that if we have questions  
17 about travel arrangements, for example, we could  
18 contact and get some information on that.

19           MR. HINES: Yes, sir. Our staff will  
20 be putting together your travel. So I'll  
21 absolutely get you that information as soon as  
22 possible.

1 HON. GRIMM: Thank you so much.

2 MR. HINES: You're welcome.

3 MS. BASHFORD: Thank you. Unless  
4 anybody minds, why don't we forge ahead? Which  
5 would be Colonel Pflaum with the 2020 NDAA.

6 MS. GALLAGHER: If you wanted to hear  
7 just a very, very brief update on your court-  
8 martial observations, I can provide that.

9 MS. BASHFORD: Great.

10 MS. GALLAGHER: Yes. The court-martial  
11 observations are still ongoing. Holidays slowed  
12 us down a little bit, but we had two more members  
13 attend courts-martial since the last meeting.

14 We are now into some of the members  
15 attending second courts-martial, of a different  
16 Service. And everyone is finding the experience  
17 very valuable.

18 I just sent out a list of over 80  
19 courts-martial that are sexual assault courts-  
20 martial scheduled to take place between now and  
21 really June. And some people have already  
22 responded with the dates they may have available.

1 If everybody else can take a look at that and  
2 just get with me on that. If there's no  
3 questions, that's it.

4 MS. BASHFORD: Okay, thank you.  
5 Colonel Pflaum, welcome.

6 COLONEL PFLAUM: Thank you very much,  
7 it's great to be back. If you recall, I  
8 testified before this group back in August, as  
9 part of the initial hearings that we conducted  
10 back in August.

11 But by way of introduction, I'm  
12 Colonel Pat Pflaum, I'm the Chief of the Criminal  
13 Law Division for the Office of the Judge Advocate  
14 General for the United States Army.

15 And I've been asked to provide an  
16 update or sort of an overview of the key  
17 provisions of the 2020 National Defense  
18 Authorization Act.

19 And I'll hit several items that of  
20 course impact this body directly, and some of  
21 which have already been mentioned in the earlier  
22 hearings, but also some other provisions that are

1 in the Act that may be of interest to this group  
2 as it looks at the investigation, prosecution,  
3 and defense of sexual assault in the Armed  
4 Forces.

5 For, I guess, the larger audience, I  
6 won't, of course, hit every item that's in the  
7 2020 NDAA. It's a comprehensive document that is  
8 of course the, it's the 1,000-page statutory  
9 provisions that provide the authorization for the  
10 Department of Defense writ large. These are only  
11 the provisions that basically address military  
12 justice, and specifically sexual assault, in the  
13 Armed Forces. So with that, next slide.

14 The first section that is worth noting  
15 is of course Section 535, that extends the DAC-  
16 IPAD from its initial five-year charter to 10  
17 years. So congratulations, you've been extended  
18 until 8 February 2026, where previously the  
19 expiry was 18 February 2021.

20 The next item of interest is Section  
21 550, that actually appoints a new Defense  
22 Advisory Committee. This one is the Defense

1       Advisory Committee on the Prevention of Sexual  
2       Assault. So this charter of this committee is  
3       that it shall advise the Secretary on the  
4       following.

5                   The prevention of sexual assault,  
6       including rape, forcible sodomy, other sexual  
7       assault, and other sexual misconduct involving  
8       members of the Armed Forces, as well as the  
9       policies, programs, and practices of the  
10      Department as it relates to the prevention of  
11      sexual misconduct.

12                   And so the key note here is that there  
13      are of course going to be matters of joint  
14      interest with both of these bodies. And the  
15      statute actually requires coordination between  
16      these two separate Defense Advisory Committees.  
17      Next slide.

18                   The next section that is important and  
19      specifically addresses the DAC-IPAD is a  
20      requirement to conduct an assessment of racial,  
21      ethnic, and gender disparities in the military  
22      justice system.

1           So this statutory provision actually  
2 has two portions of it. The first is a task to  
3 the Department of Defense, and it requires the  
4 Armed Forces to record the race, ethnicity, and  
5 gender of the victim and the accused.

6           It also requires the Department to  
7 gather any other demographic information about  
8 the victim and the accused as the Secretary  
9 determines to be appropriate.

10           And then it also requires the Services  
11 to include this data in a report that the Armed  
12 Services each produce each year under Article  
13 146a that basically records the data of courts-  
14 martial each year. It's been called,  
15 colloquially, it's called the CAF report, but  
16 now, it is called the Article 146a report.

17           But then that will then drive a task  
18 to the DAC-IPAD, which requires an assessment of  
19 three things, two of them are listed here on the  
20 slide.

21           But a review and assessment by fiscal  
22 year of the race and ethnicity of members of the

1 Armed Forces accused of penetrative sexual  
2 assault or contact sexual assault offenses in an  
3 unrestricted report. Then the next is the same  
4 assessment, review and assessment by fiscal year  
5 of the race and ethnicity of members of the Armed  
6 Forces against whom charges were preferred.

7 And then the final task that's not  
8 listed on the slide, but is in the statute, is an  
9 assessment of the race and ethnicity of those  
10 members of the Armed Forces who were convicted of  
11 a penetrative sexual assault or other contact  
12 sexual assault offenses.

13 And then it requires a report from the  
14 DAC-IPAD informing the Secretary of Defense and  
15 the House Armed Services Committee and the Senate  
16 Armed Services Committee setting forth the  
17 results of those reviews and assessments.

18 And again, the portion of this  
19 provision is to record this data and then  
20 determine if there are any disparities that  
21 require action by the Department of Defense or by  
22 Congress. Next slide.

1           Outside of this statute, there are two  
2 tasks -- there are actually three, I'll address  
3 the third a little bit later, but General Schwenk  
4 brought it up earlier today.

5           But there are two assessments in the  
6 conference report to the National Defense  
7 Authorization Act. So this is outside the  
8 statutory language, but it's included in the  
9 report of the conferees from the HASC and SASC on  
10 the National Defense Authorization Act.

11           And the first is a task to the DAC-  
12 IPAD to conduct an assessment of other justice  
13 programs -- for example, mediation or restorative  
14 justice programs -- that might be appropriate to  
15 assist the victim of alleged sexual assault,  
16 particularly where that sexual assault may not  
17 have proceeded to a criminal prosecution.

18           So in essence, an assessment of other  
19 programs that might assist victims in the  
20 process.

21           The next is an assessment under RCM  
22 1001(c) of victim impact. So as you may already

1 know, and of course, General Schwenk brought this  
2 up earlier, RCM 1001(c) affords victims a special  
3 right to provide input to the court-martial with  
4 respect to two items: victim impact and also  
5 mitigation. They can do this in one of two ways.  
6 They can do it through a sworn statement or an  
7 unsworn statement.

8 And the conferees are concerned that  
9 some of the military judges have interpreted this  
10 rule too narrowly, and as a result it's limiting  
11 what survivors are permitted to say during  
12 sentencing hearings in a way that doesn't fully  
13 inform the court of the impact of the crimes on  
14 the survivors.

15 So what the conferees have asked the  
16 DAC-IPAD to do is to conduct their own assessment  
17 as part of their review of courts-martial cases  
18 to determine whether this may be the case.

19 There's also a third task in the  
20 conference report that's related to guardians ad  
21 litem, and I'll talk about that a little bit  
22 later, with respect to a separate study the

1 Department of Defense has to conduct with respect  
2 to guardians ad litem.

3 Next is a series of provisions that do  
4 not have any specific task to the DAC-IPAD, but  
5 may be of interest. And these result to victim  
6 notification. And so the first is Section 536,  
7 that is a special statutory provision that  
8 requires the DoD to establish procedures to  
9 enable the return of personal property that's  
10 been collected from a victim as part of a sexual  
11 assault forensic examination.

12 And so currently, those procedures may  
13 not be as clear or as formalized as the statute  
14 would or as Congress would like, and so, they've  
15 directed the Department of Defense to establish  
16 procedures by which a victim can seek return of  
17 personal property and also, too, making sure that  
18 they're informed perhaps of the consequences that  
19 the collection of that personal property may have  
20 on their case.

21 Next is Section 538, which requires  
22 the notification of the victim of each

1 significant offense in the prosecution of the --  
2 in the military justice system or the military  
3 justice process and the processing of their case  
4 specifically.

5 It requires two things, additionally.  
6 It requires documentation in the case file of the  
7 victim notifications. And also, too, it  
8 specifically also requires documentation of a  
9 victim's preference, whether they prefer their  
10 case to be handled through the military justice  
11 system or the civilian system.

12 Next is it requires status updates,  
13 specifically as a case makes its way through the  
14 system. And so the commander, as the commander  
15 who is making determinations, they must  
16 periodically notify the victim of the status of a  
17 final determination on further action and on  
18 their case.

19 So basically, again, it requires  
20 status updates to the victim on the case, as it  
21 proceeds to final determination, whether that  
22 final determination be court-martial or non-

1 judicial punishment under Article 15 in the  
2 Uniform Code of Military Justice, another  
3 administrative action, or no action at all. So  
4 again, statutorily requiring victim notification.  
5 Next slide.

6 The next two sections that I'll  
7 address, I've consolidated them into sort of one  
8 bullet, but two sections that basically by  
9 statute increase the manpower allocated to the  
10 investigation and victim assistance in sexual  
11 assault cases.

12 And so the first is a requirement that  
13 Military Criminal Investigative Organizations  
14 increase their number of defense forensic  
15 examiners by at least 10 over about the next --  
16 by at least 10, since the number that was in  
17 existence on 30 September 2019. So a statutory  
18 increase of ten defense forensic examiners.

19 Next is an increase in number of  
20 sexual assault investigators. And so that  
21 doesn't, the statute doesn't prescribe a specific  
22 number, but what it does prescribe is a standard.

1                   And so the standard is that Military  
2 Criminal Investigative Organizations are to have  
3 enough investigators such that they can process  
4 their cases to the extent practicable within six  
5 months from the report. Or I should say, the  
6 initiation of the investigation.

7                   DR. MARKOWITZ: Colonel Pflaum, excuse  
8 me?

9                   COLONEL PFLAUM: Yes, ma'am?

10                  DR. MARKOWITZ: Can you just clarify  
11 the MCIOs will increase the number of defense  
12 forensic examiners or digital forensic examiners?

13                  COLONEL PFLAUM: I'm sorry, you're  
14 exactly right, it's digital forensic examiners.

15                  DR. MARKOWITZ: Okay.

16                  COLONEL PFLAUM: Yes, DF --

17                  DR. MARKOWITZ: Two different things.

18                  COLONEL PFLAUM: -- or DFES, right.

19                  DR. MARKOWITZ: Okay.

20                  COLONEL PFLAUM: Yes, I misspoke there,  
21 thank you, ma'am.

22                  Finally, it requires an increase of

1 VWLs, Victim/Witness Liaisons, across all the  
2 Services. In essence, the Services are directed  
3 to fill all of their shortages. So there may be  
4 allocations out there that aren't filled for one  
5 reason or the other, and that the Services are  
6 required to fill their shortages by 19 December  
7 2020.

8 Next is Section 540C, that requires  
9 the Secretary of Defense to establish a policy to  
10 ensure timely disposition of sexual assault  
11 prosecution decisions, most importantly a  
12 decision not to prosecute a particular case.

13 And so that policy is required by June  
14 of 2020. And again, the policy is designed to  
15 ensure timely disposition of those non-  
16 prosecutable sexual related offenses.

17 The next three sections that I'd like  
18 to address address training. And so these three  
19 provisions are statutory provisions that direct  
20 the Department of Defense to conduct specific  
21 training.

22 The first is to initial disposition

1 authorities, IDAs. So the statute requires  
2 specific training for initial disposition  
3 authorities. And those are the authorities that  
4 were established in an April 2012 Withholding  
5 Policy from the Secretary of Defense.

6 So you may be familiar that the  
7 Secretary of Defense withheld disposition of  
8 certain types of sexual offenses to O-6s with the  
9 special court-martial convening authority power.  
10 And so this requires specific training for these  
11 initial disposition authorities that basically is  
12 designed to train them on the exercise of their  
13 disposition authority.

14 Next is Section 540B, which directs  
15 specific training on the role of commanders in  
16 the military justice system. And so commanders  
17 across all of the Services are instructed to, are  
18 required to receive uniform training on the role  
19 of commanders in all stages of the military  
20 justice process.

21 That training is to include  
22 investigation, prosecution, victim and assistance

1 rights, retaliation prevention, healthy command  
2 climate to facilitate reporting, and any other  
3 matters that the Secretary of Defense may deem as  
4 appropriate.

5 That training is also required to  
6 include best practices, and the Department is  
7 also required to conduct periodic surveys to  
8 identify those best practices, and then, again,  
9 incorporate them into the training.

10 And again, all the Services are  
11 different in terms of how they train their  
12 officers and their commanders, but the statute  
13 requires the Secretary to ensure, to the extent  
14 practicable, uniformity across all of the  
15 Services.

16 Finally, a section on this, with  
17 respect to training, is Section 540D. The  
18 Secretary of Defense is to establish and develop,  
19 or to develop and issue a comprehensive policy to  
20 reinvigorate the prevention of sexual assault.

21 And so this is complementary to the Defense  
22 Advisory Committee that the statute creates.

1 This also directs the Secretary to establish  
2 policy to reinvigorate prevention.

3 And so that's -- the policy is  
4 designed to include education and training and  
5 programs designed to encourage and promote  
6 healthy relationships, empowerment of  
7 noncommissioned officers, fostering of social  
8 courage to promote intervention, processes and  
9 mechanisms to address behavior on the continuum  
10 of harm, prevention of alcohol abuse, and any  
11 other matters that the Secretary deems  
12 appropriate.

13 And so within 180 days after the  
14 issuance of that policy -- so that policy is  
15 required by 17 June 2020. Within 180 days after  
16 that, the Secretaries of each of the Services  
17 have to have their own policy. Next slide.

18 These next three provisions are those  
19 that I best categorize as affecting the  
20 prosecution of sexual assault. And so the first  
21 is Section 540J, that requires a pilot program  
22 for defense investigators. You heard that

1 mentioned by one of the panel members earlier,  
2 that the statute requires each of the Services to  
3 conduct their own pilot program.

4           There are two specific aspects of  
5 those that are worth mentioning. And the first  
6 is that the programs are supposed to be as  
7 uniform as possible across all of the Services.  
8 But also, too, by statute, it requires that a  
9 defense investigator may not speak to a victim of  
10 an offense, except through a request made through  
11 the Special Victims Counsel or another counsel,  
12 if the victim does not have their own Special  
13 Victim Counsel.

14           So that is one sort of aspect of the  
15 program that, as the Services are conducting  
16 their pilot programs, that will be required as a  
17 part of this new statute. And then after the  
18 pilot program, the statute requires a report  
19 after three years on those.

20           And I will note that the Army has  
21 already begun a program to institute defense  
22 investigators, and it will hire 12 over -- and

1 it's in the process of hiring 12 right now.

2 Next is Section 543. And so Section  
3 543 amends 10 USC 1567a. So just -- I apologize,  
4 and I'll send a corrected copy back, but it's  
5 1567a, Subparagraph A. And so what Section 1567a  
6 does is require notification to law enforcement,  
7 to local law enforcement, when a commander issues  
8 a military protective order, when either the  
9 victim or -- when either party, I will say, to  
10 the military protective order lives off of the  
11 military installation.

12 So it requires notice. This provision  
13 requires that notice to take place within seven  
14 days of the issuance. It also establishes a  
15 reporting requirement that the Services will  
16 track the number of military protective orders  
17 issued and the number that are reported to  
18 civilian authorities.

19 Section 550 is an additional provision  
20 to protect disclosures that are made as part of  
21 the Catch a Serial Predator or Catch a Serial  
22 Offender Program. So this is a program under the

1 Department of Defense whereby victims who have  
2 made a restricted report can still provide  
3 details with respect to their offender or the  
4 offense to law enforcement to enable the  
5 investigation of serial offenders.

6 So this provisions provides two  
7 protections back to victims who choose to  
8 participate in this program. And the first is  
9 that anything that a victim says or discloses as  
10 part of this program is protected from disclosure  
11 under the Freedom of Information Act.

12 BGEN SCHWENK: Is there such a program  
13 now?

14 COLONEL PFLAUM: There is such a  
15 program now, yes. It has been started. I don't  
16 recall the exact specific date, but it is in  
17 effect right now. Next is -- Section 550 also  
18 makes clear that anything that a victim says as  
19 part of this disclosure with respect to this  
20 program does not affect the status of their  
21 restricted report. Again, it protects their  
22 restricted report even though they choose to

1 participate in this program. Next slide.

2           So this is Section 541. So these  
3 provisions address basically the victim, I want  
4 to say, legal counsel that's provided to victims.  
5 And so first, Section 541 makes clear that  
6 Special Victims Counsel or Victims Legal Counsel  
7 must assist, consult and assist victims within  
8 incidents of retaliation.

9           So they are to assist victims in  
10 understanding their rights, assist victims in  
11 filing any complaints, and also assist victims  
12 through any other resulting military justice  
13 proceedings.

14           This provision, Section 541, also  
15 directs, by 20 December 2024, that staffing  
16 levels for Special Victims Counsel or Victims  
17 Legal Counsel are such that, to the extent  
18 practicable, the average client load is 25 cases  
19 for these counsel.

20           Section 542 mandates that a Special  
21 Victims Counsel or Victims Legal Counsel will be  
22 made available to a victim within 72 hours of

1 notification, or I'm sorry, 72 hours of the  
2 request absent exigent circumstances.

3 So the statute gives authority to the  
4 Secretaries to articulate what those exigent  
5 circumstances are, but basically, again, mandates  
6 that the Special Victims Counsel be made  
7 available within 72 hours.

8 And if the Secretary determines that  
9 a Victims Legal Counsel cannot be available  
10 within that 72 hours, that the Secretary ensure  
11 that the counsel be provided to the victim as  
12 soon as possible.

13 Section 548 is a new statute, and I'll  
14 address this also later in the reporting  
15 provision. But what this does is expand the  
16 availability of counsel to domestic violence  
17 victims.

18 And so as long as the domestic  
19 violence victim is otherwise entitled to legal  
20 assistance under 10 USC 1044, that's the statute  
21 that authorizes legal assistance, they would also  
22 be entitled to counsel. That leaves to the

1 Services the ability to determine whether that  
2 will be provided out of the Service's legal  
3 assistance function or the Special Victim Counsel  
4 function.

5 However, what it does also require is  
6 a report back to Congress, actually coming up  
7 very quickly, within 120 days of the passage of  
8 the statute, which would be in April, on how the  
9 Services are going to implement this, what  
10 resources they may need, what training or other  
11 statutory provisions may be necessary to expand  
12 and to make this program happen.

13 But it also specifies that these  
14 counsel are to receive special legal training in  
15 the legal issues commonly associated with  
16 domestic violence offenses. And also, too, it  
17 directs, to the extent practicable, that they  
18 serve as counsel in this role for not less than  
19 two years. It also makes clear that this  
20 relationship is to be an attorney-client  
21 relationship, versus some other type of  
22 relationship.

1                   Finally, Section 550C makes clear that  
2 when a counsel is assigned as a Special Victim  
3 Counsel, that they're to receive special training  
4 on the local laws that are applicable in the  
5 jurisdiction in which they practice.

6                   What this is designed to facilitate is  
7 the educated and informed advice that they may  
8 give to a victim on whether to elect the handling  
9 of their case through the military justice  
10 process or through the civilian jurisdiction.

11                   And so that training must include  
12 victim rights, prosecution of criminal offenses,  
13 sentencing for conviction of criminal offenses,  
14 and protective orders. Again, the local laws  
15 that address those four items.

16                   MS. BASHFORD: Can I just make one  
17 comment --

18                   COLONEL PFLAUM: Yes, ma'am.

19                   MS. BASHFORD: -- about that? It takes  
20 a fair amount of time to learn all of those  
21 things about a local jurisdiction. People get  
22 transferred from installation to installation. I

1 just also note, you could have soldiers in Fort  
2 Dix come to Manhattan for the weekend. So  
3 knowing New Jersey law, to the extent you can  
4 learn it that quickly, is really not going to  
5 help you very much. I think it's well-  
6 intentioned, but it's not an easy task, is what  
7 I'm trying to point out there.

8 COLONEL PFLAUM: Yes, ma'am, thank you  
9 very much. No, and I think it will be incumbent  
10 on the Services to look at those nuances of this  
11 election and make sure that we tailor our  
12 programs appropriately.

13 MS. GARVIN: Sir, if I may, just a  
14 quick question also? That training on the law  
15 and policies, with regard to the state systems,  
16 that doesn't expand the SVC/VLC's role to  
17 representing in those systems, does it? It's  
18 just if the survivor, the victim goes that route  
19 and prosecutions that route, then the SVC and VLC  
20 is not representing in that system still,  
21 correct?

22 COLONEL PFLAUM: That's right. I --

1 MS. GARVIN: Okay.

2 COLONEL PFLAUM: -- do not -- yes. I  
3 do not read it that way. Again, it's solely to  
4 assist the Special Victim Counsel in advising  
5 their client in making an informed decision as to  
6 which process to choose. Next slide.

7 The next eight provisions over the  
8 next two slides are reports that the Department  
9 of Defense is required to provide back to  
10 Congress on various aspects of the military  
11 justice system. So the first one is a  
12 recommendation as to the establishment of a  
13 separate sexual harassment punitive article. So  
14 currently under the military justice system,  
15 sexual harassment is generally punished in one of  
16 two ways -- I'll say addressed in one of two  
17 ways.

18 The first is through Article 93 of the  
19 UCMJ, which is a provision that prevents cruelty  
20 and maltreatment to subordinates. The second way  
21 is through violations of any applicable Service  
22 regulations or policies that address sexual

1 harassment.

2           What this provision is asking the  
3 Department of Defense to do is to provide an  
4 assessment on whether, for lack of a better word,  
5 the pros and cons, the issues involved in an  
6 actual separate UCMJ article that would address  
7 sexual harassment.

8           Next is Section 540F, and if I may  
9 editorialize, I think this is the most  
10 significant study that the Department of Defense  
11 has to conduct, both in scale and in consequence.  
12 But what this is is an assessment of the  
13 feasibility and advisability of an alternative  
14 military justice system for felony level  
15 offenses, where an O-6 judge advocate with  
16 significant criminal litigation experience  
17 outside the chain of command of the accused makes  
18 preferral or referral decisions.

19           So that is a very comprehensive study  
20 that also, by the statutory terms, requires an  
21 assessment of other military justice systems  
22 throughout the world. And that is -- the

1 Department of Defense has been given 300 days to  
2 conduct that study.

3 Next is Section 540H. And this is the  
4 study to assess the feasibility and advisability  
5 of establishing or expanding a policy that's  
6 currently applicable only within the Air Force,  
7 with respect to what's called Safe to Report.

8 And so what this would do is provide  
9 immunity to victims who may have engaged in  
10 collateral misconduct during or predicating their  
11 sexual assault, or also if there was collateral  
12 misconduct discovered within the investigation of  
13 the sexual assault. What this provision would do  
14 would be to provide immunity to victims who  
15 report with such collateral misconduct.

16 Of note, though, a bill has been  
17 introduced in both the House and the Senate  
18 within the past two weeks that would create this  
19 provision by statute. Next is Section 540 -- and  
20 so --- and that would be considered as part of  
21 the 2021 National Defense Authorization Act.

22 Next is Section 540K. And the purpose

1 of this study is to conduct an assessment as to  
2 the feasibility and advisability of expanding the  
3 protections available to victims who make  
4 restricted reports. In other words, when a  
5 victim makes a restricted report, that restricted  
6 -- they can only make that restricted report and  
7 have it remain restricted to certain individuals.

8 What this is -- requires the  
9 Department of Defense to assess the feasibility  
10 and advisability of expanding that. In other  
11 words, victims could make restricted reports to  
12 other particular members.

13 For example, one of the questions by  
14 statute that we're asked is whether they might be  
15 able to make a restricted report to law  
16 enforcement. So they make a report to law  
17 enforcement, but say that they want the report to  
18 be restricted.

19 And also, too, to members of their  
20 chain of command or a military sponsor. And so  
21 again, they could make those reports, and they  
22 would still be considered restricted for purposes

1 of that policy.

2 BGEN SCHWENK: Or a third party.

3 COLONEL PFLAUM: I'm sorry?

4 BGEN SCHWENK: Or a third party.

5 COLONEL PFLAUM: Yes, and the third  
6 party, as I understand the statute, is that if a  
7 third party were to report a sexual assault, that  
8 the victim themselves isn't reporting the third  
9 party is making that, then the victim could still  
10 ask that that be a restricted report.

11 Next -- and what's important also on  
12 this one is that, as DoD is conducting this  
13 study, that DoD is required to consult with the  
14 DAC-IPAD on this. That report is due in June of  
15 2020.

16 The next is Section 540L. And what  
17 this provisions asks or what this provision asks  
18 DoD to study -- actually it asks both DoD to  
19 study, as well as the DAC-IPAD to study the  
20 feasibility and advisability of establishing a  
21 guardian ad litem program. And General Schwenk,  
22 you mentioned this earlier in the discussion with

1 the judges.

2 The military, the DoD study is  
3 basically limited to determining whether a  
4 guardian ad litem program would be appropriate  
5 for military dependents who are victims or  
6 witnesses in a crime under the UCMJ.

7 So that requires a couple things by  
8 the statutory terms that we're asked to look at  
9 is what -- if the victim is under 12 or if the  
10 victim has a mental impairment or incapacity in  
11 some way, shape, or form.

12 The next -- what the DAC-IPAD though  
13 is required to study -- and by the way, I will  
14 say that DoD has a year to provide our study, the  
15 DAC-IPAD only has six months to conduct its  
16 study. But what the DAC-IPAD is directed to  
17 study is the advisability of providing a guardian  
18 ad litem upon the report of any sexual related  
19 offense for any victim who has not attained the  
20 age of 18.

21 So it would be a much broader, sort of  
22 broader group of folks that would be entitled to

1 a guardian ad litem under the DAC-IPAD study.

2 MS. GARVIN: May I ask a clarifying  
3 question? The DAC-IPAD though is just victims  
4 not witnesses, and DoD is victims and witnesses?

5 COLONEL PFLAUM: That's the way I  
6 understand it.

7 MS. GARVIN: Okay.

8 COLONEL PFLAUM: Yes, ma'am. Next is  
9 540M. This is not a Department of Defense study,  
10 it's actually a GAO study. But it is noteworthy  
11 that the Congress has tasked the Comptroller  
12 General of the United States -- again, likely it  
13 would be the GAO that conducts this study -- but  
14 it's a report on the implementation of the  
15 statutory requirements on sexual assault  
16 prevention and response in the military over the  
17 period of 2004 to 2019.

18 So this is, again, a very  
19 comprehensive study governing 15 years' worth of  
20 statutory and policy changes that have occurred  
21 in the sexual assault arena during that time.  
22 Section 542 directs a study on the feasibility

1 and advisability of establishing and maintaining  
2 civilian positions to support Special Victim  
3 Counsel or Victims Legal Counsel.

4 And so in those Services that don't  
5 have, by policy, civilians assigned to, in  
6 essence, as paralegals or other legal assistants  
7 to help their Victim Legal Counsel or Special  
8 Victim Counsel, this asks a study as to whether  
9 that might be appropriate to maintain continuity  
10 of representation, in the representation of  
11 victims, and also the preservation of  
12 institutional knowledge when it comes to  
13 assisting victims in this capacity.

14 Next is Section 548, which I mentioned  
15 earlier, but again, to the extent that -- well  
16 the statute does require the Services to provide  
17 counsel to domestic violence victims.

18 This requires the Services to report,  
19 well actually DoD to report how the Services are  
20 going about the implementation, any additional  
21 resources that might be necessary, and any  
22 additional law or policy changes that are

1 required to implement that.

2 And then finally, I'll end with the  
3 mention of the change to Article 37. And that,  
4 previously, that section was previously called  
5 unlawfully influencing the action of the court.  
6 Under the new statutory title, it's called  
7 command influence.

8 This is the most significant to the  
9 unlawful command influence statute since 1968.  
10 There's been quite a bit of case law that's  
11 evolved since then, but it's the most significant  
12 statutory change.

13 A couple key points from this that are  
14 worth mentioning, for your awareness, is that it  
15 now protects preliminary hearing officers, and  
16 Special Victims Counsel has been previously, I  
17 won't say excluded, but not specifically  
18 mentioned in the statutory protections against  
19 unlawful command influence. And it provides two  
20 significant expansions that had previously not  
21 been included in this statute.

22 And the first is, it allows for -- it

1 expressly authorizes statements regarding  
2 criminal activity and offenses that do not  
3 advocate for a particular disposition or a  
4 particular court-martial finding or sentence, or  
5 do not relate to a particular accused.

6 So in essence, a commander could talk  
7 about -- it authorizes commanders to talk more  
8 freely about criminal offenses in their  
9 formation, with the intent to dissuade or deter  
10 those types of offenses. It makes it clear that  
11 that, in and of itself, is not unlawful command  
12 influence.

13 BGEN SCHWENK: So this puts into  
14 statute the old crimes not criminals, or yes,  
15 crimes not criminals, process not results?

16 COLONEL PFLAUM: Yes. You may --

17 BGEN SCHWENK: It's now in statute?

18 COLONEL PFLAUM: -- have heard it as  
19 lawful command emphasis, as the counterbalance to  
20 unlawful command influence, but yes, sir, I think  
21 that's accurate.

22 Next, it also allows more, it also

1 specifically allows more communication between  
2 superior and subordinate authorities, in  
3 discussing military justice matters, as long as  
4 the superior does not direct a specific  
5 disposition or substitute the subordinate's  
6 discretion. So again, it allows a subordinate to  
7 see counsel and mentorship, but still protects a  
8 case from a superior commander directing a  
9 particular disposition.

10 The next major expansion of this  
11 article is that it requires an accused to show  
12 prejudice to receive relief. In essence, the  
13 violation must materially prejudice a material  
14 right of the accused in order to obtain relief  
15 under Article 37, which is, again, a change to  
16 the current state of the law.

17 And so with that, I appreciate your  
18 patience. I ran through a number of provisions  
19 of the 2020 NDAA, I hope it wasn't too dry or too  
20 much of a recitation of the statutory language.  
21 But again, I tried to identify those that  
22 specific address the DAC-IPAD, as well as other

1 provisions that, again, may be relevant to you as  
2 it address the investigation, prosecution, and  
3 defense, and I would also say, victim support  
4 through the military justice process.

5 So with that, I'm able to answer any  
6 questions, if you have any, or I'll yield the  
7 floor.

8 DR. MARKOWITZ: Yes, I have --

9 HON. GRIMM: So it seems like --

10 DR. MARKOWITZ: -- a quick question.

11 Related to Section 538, notification of  
12 significant events, does that include submission  
13 of kits, analysis of the kit, things like that,  
14 or is this just strictly related to  
15 investigatory, like the actual investigation and  
16 moving it through the actual process?

17 COLONEL PFLAUM: I read this to solely  
18 address process, and as it moves through sort of  
19 each step of the process. I don't know if the  
20 drafters were thinking of sort of what I would  
21 call investigative steps that are outside of the  
22 normal flow of a case, but it is certainly a

1 point worth noting.

2 DR. MARKOWITZ: So USACIL is not  
3 considered part of the calculus right now, where  
4 538 is concerned?

5 COLONEL PFLAUM: That is my  
6 understanding, --

7 DR. MARKOWITZ: Okay.

8 COLONEL PFLAUM: -- but I'm willing to  
9 stand corrected if I'm wrong.

10 DR. MARKOWITZ: Okay, thank you.

11 MS. BASHFORD: Judge Grimm, did I hear  
12 that you had a comment or question?

13 HON. GRIMM: No, I was just going to  
14 say, it doesn't sound like Congress is very  
15 concerned about this area that we're dealing  
16 with. That was sarcastic.

17 MS. BASHFORD: Oh, okay. I'm sorry,  
18 Judge Grimm, did you have a comment or no?

19 HON. GRIMM: No, no, no, no, I was just  
20 observing that there's obviously a great deal of  
21 Congressional interest in this area that we are  
22 looking at.

1 MS. BASHFORD: Okay. Well --

2 MS. TOKASH: I heard you, Judge Grimm.

3 MS. BASHFORD: Meghan, do you have a  
4 comment?

5 MS. TOKASH: I don't --

6 HON. GRIMM: No, that's all right.

7 That's --

8 MS. BASHFORD: Okay.

9 HON. GRIMM: -- all right. It's too  
10 hard to hear, it was just an observation that  
11 there's obviously a lot of Congressional interest  
12 in this area that we are focusing on.

13 MS. BASHFORD: Okay.

14 BGEN SCHWENK: We got it, Judge Grimm,  
15 thank you.

16 MS. BASHFORD: Colonel Pflaum, thank  
17 you so much. I hope you have an enormous wall  
18 calendar for all of these due dates, and I hope  
19 you don't plan to sleep.

20 (Laughter.)

21 COLONEL PFLAUM: Thank you, ma'am.

22 Thank you very much.

1 MS. BASHFORD: We're just going to take  
2 a brief like stretch in place break while the  
3 staff arranges for our public comment.

4 (Whereupon, the above-entitled matter  
5 went off the record at 3:05 p.m. and resumed at  
6 3:09 p.m.)

7 MS. BASHFORD: Welcome, Jennifer  
8 Elmore, is that correct?

9 MS. ELMORE: Yes.

10 MS. BASHFORD: Thank you very much for  
11 coming to speak with us. I know you've made a  
12 request for public comment, and we look forward  
13 to hear what you have to say.

14 MS. ELMORE: Thank you so much. I  
15 realize I am what stands between you and being  
16 adjourned, so I will be brief as I can be.

17 MS. BASHFORD: Take all the time you  
18 want.

19 MS. ELMORE: Thank you. I would like  
20 to thank the esteemed members of this Committee  
21 for the opportunity to be here today before you.

22 My name, as you shared, is Jennifer

1 Elmore, and I am a survivor of sexual assault,  
2 military sexual assault committed by my father, a  
3 now retired United States Army Major General.

4 For the past five years, I've lived  
5 and am still living as a victim through the  
6 investigation, the prosecution, and the defense  
7 of my sexual assault, first through the military  
8 justice system, and now through the civilian  
9 justice system.

10 Today though I'm not here as an  
11 individual, but as a representative for a broader  
12 group of military sexual assault survivors known  
13 as Survivors United. We are a group that has  
14 come together to provide a room for voices of  
15 victims and their experiences navigating the  
16 military justice system.

17 It is because of those firsthand  
18 experiences that we are well-equipped and eager  
19 to be active participants in creating fair and  
20 comprehensive change.

21 We are more than our stories. We want  
22 more than just to be told, we are sorry for what

1 you've experienced. We want to be as actively  
2 sought after and respected for the contribution  
3 we can make to improvement as are so many others  
4 -- legislators, experts, judges, prosecutors,  
5 defenders -- who are committed to the building of  
6 a system which is fair and functional.

7 One way in which we've sought to  
8 participate is through ongoing conversations with  
9 legislators on specific concerns, observations,  
10 and ideas that are based on our experiences.

11 Last year, we spoke with legislators  
12 on specific topic of sentencing and the  
13 restrictions placed on victims in that process.  
14 The restrictions severely limit what a victim may  
15 include in their victim impact statements, as  
16 well as how those statements are delivered.

17 Specific experiences we've had  
18 include: redlining of statements before being  
19 given, not being allowed to complete the  
20 statement in delivery, being cut off by judges,  
21 the inability to say anything about our  
22 preference or desire for sentencing.

1           While I have not yet had a chance to  
2 give an impact statement, I was close enough in  
3 the Article 32 process to have been asked to  
4 begin preparing my thoughts. Preparing myself  
5 for that moment to sit in a room with my father,  
6 look him in the eye, and tell him the impact of  
7 his actions was of extraordinary importance. To  
8 have been restricted as to what I could or could  
9 not have said was a re-enactment of the very  
10 message of insisted silence of my perpetrator.

11           What we know anecdotally we strongly  
12 believe represents a common experience of  
13 survivors of military sexual assault that get to  
14 this stage in the process. We do not, however,  
15 have the data to support that belief. We hope as  
16 this Committee continues to gather informing data  
17 in many areas, that this specific topic would be  
18 included in those efforts.

19           Victims are watching this process.  
20 They are making the determination of whether or  
21 not it is safe to come forward. Is the process  
22 fair? A victim having the freedom to speak

1 freely at sentencing is the one way that they can  
2 know -- or one way they can know the answer is  
3 yes.

4 In closing, I'd like to share with you  
5 the appreciation for various members of Survivors  
6 United who have had the opportunity to come  
7 before you in the past. Personally, I have  
8 experienced the results of the hard work by you  
9 and others in -- hard work for the Armed Services  
10 in making improvements. I did want to share a  
11 story of a life experience with the prosecutor in  
12 my case.

13 In the first meeting with the  
14 prosecutorial team, without my having said  
15 anything, I walked into a room and they knew the  
16 impact of being in a room filled with members of  
17 the Armed Services in uniform, and they showed up  
18 in civilian clothes. It was profound --  
19 profoundly kind.

20 By the time we got to the preliminary  
21 hearing, and I was to go before the judge and be  
22 cross examined and give a testimony, uniforms are

1 required. And the fancy ones, not the  
2 comfortable ones. And I was standing nervously  
3 in the hallway and the Army Captain, main  
4 prosecutor, came up to me and silently whispered  
5 to me, with her hand over her Army badge and  
6 said: this is your Army, we choose you.

7 Thank you for the work you are doing  
8 to put the broader facts together that allow for  
9 real change to happen. We look forward to  
10 working with you on an ongoing basis. Thank you.  
11 And I'm happy to take questions.

12 HON. GRIMM: Thank you.

13 MS. BASHFORD: Thank you, Ms. Elmore.  
14 Does anybody have questions for her?

15 BGEN SCHWENK: So one of the areas that  
16 you're concerned about having victims restricted  
17 is a specific sentence recommendation, or however  
18 specific they want to be. Is another -- we  
19 heard, remember, I asked -- I don't know if you  
20 were here, but I asked the judges earlier for  
21 their thoughts and read them the statute.

22 And one of the other areas they said

1 they had limited victims testimony was when there  
2 is a piece of evidence that the judge, during the  
3 trial, ruled was inadmissible, and the victim --  
4 to the victim, it was a significant matter that  
5 they wanted --

6 MS. ELMORE: Yes.

7 BGEN SCHWENK: -- because it helped  
8 explain the impact of --

9 MS. ELMORE: Yes.

10 BGEN SCHWENK: -- the offense on them.

11 MS. ELMORE: Yes.

12 BGEN SCHWENK: Is that something else  
13 that you think we should look at?

14 MS. ELMORE: Absolutely.

15 BGEN SCHWENK: Okay.

16 MS. ELMORE: I have a very passionate  
17 answer to that, just because the completion of my  
18 experience with sexual assault spans over a  
19 period of 15 years. And so the totality of those  
20 experiences sets the context for any one  
21 experience. And so the importance of evidence  
22 being admitted more broadly than just what

1 otherwise might make sense is incredibly  
2 important, in my opinion, in these cases.

3 BGEN SCHWENK: Okay. Do you have any  
4 other -- if you do now know of other categories,  
5 that's great. Please let us know what they are.

6 MS. ELMORE: You shouldn't have asked  
7 me that, I have a list of 20 back here.

8 (Laughter.)

9 BGEN SCHWENK: Well then could you give  
10 us or give the staff a list, and --

11 MS. ELMORE: Yes.

12 BGEN SCHWENK: -- that way, there are  
13 specific things that we can then talk to people  
14 about --

15 MS. ELMORE: Yes.

16 BGEN SCHWENK: -- because we're about  
17 to go on site visits and --

18 MS. ELMORE: Yes.

19 BGEN SCHWENK: -- and ask people in the  
20 field and talk to Special Victims Counsel and  
21 Victims Legal Counsel and --

22 MS. ELMORE: I'd be happy to.

1                   BGEN SCHWENK: -- that would help us as  
2 we step forward. And so --

3                   MS. ELMORE: I'd be very happy to.

4                   BGEN SCHWENK: -- thank you very much  
5 for being here, I --

6                   MS. ELMORE: Thank you.

7                   BGEN SCHWENK: -- appreciate it.

8                   MS. BASHFORD: Mr. Kramer?

9                   MR. KRAMER: Thank you for being here,  
10 I had a question. You were here all day, I --

11                   MS. ELMORE: About halfway through the  
12 day --

13                   MR. KRAMER: Okay.

14                   MS. ELMORE: -- so I missed the judges'  
15 testimony.

16                   MR. KRAMER: So I have -- okay. The  
17 judges told us that they don't give reasons at  
18 sentencing for why they have imposed the  
19 sentence, they just say evidently a term of  
20 years.

21                   And I thought, both for the defendant  
22 who's been convicted and the sentence is imposed,

1 as well as the victim, --

2 MS. ELMORE: Yes.

3 MR. KRAMER: -- that they would want to  
4 know the reasons the judge imposes the sentence.  
5 I'm just curious if -- obviously from the  
6 victim's viewpoint -- if you would want to hear  
7 the reasons why the judge imposed the sentence,  
8 or if just --

9 MS. ELMORE: Or acquitting.

10 MR. KRAMER: -- the ultimate sentence?  
11 Yes.

12 MS. ELMORE: It is something we've had  
13 a lot of sentiment about and have experienced  
14 firsthand, and it is very frustrating for there  
15 to be silence on either side, whether it's a  
16 conviction, acquittal, or for that matter, any  
17 judgment that is made.

18 One of our group members, in fact, had  
19 a full acquittal in her case and has nothing to  
20 point to as to why that was the case and really  
21 is shut down even in asking the question. Right?  
22 There's no dialogue. So extraordinarily painful.

1                   And again, back to my comment about  
2 victims watching, I know one of the things that  
3 Department of Defense and the Armed Services are  
4 focusing on are getting accurate numbers of how  
5 many -- what exactly is the extent of this  
6 epidemic? And I believe it is.

7                   I believe people are watching. And I  
8 -- the facts come together and for victims that  
9 see these things, where I'm going to really put  
10 myself out there and incur a huge cost to tell a  
11 story, and I know my chances are one direction or  
12 the other of there ever becoming a conviction,  
13 and then not to have an explanation is very heavy  
14 on the side of not saying anything.

15                   MS. BASHFORD: Ms. Tokash, did you have  
16 a question?

17                   MS. TOKASH: I didn't have a question,  
18 I just wanted to say thank you very much for  
19 coming in to speak to us today. We really  
20 appreciate it.

21                   HON. GRIMM: And this is Paul Grimm,  
22 Chair, if I could have one comment to add to echo

1 entirely what Ms. Tokash said.

2 In the federal courts, I know that  
3 there are statutory victims' rights that have  
4 been enacted by Congress in the last few years.  
5 And it is very frequent to have both written  
6 submissions in federal court that are provided in  
7 sentencing.

8 And that it is not at all infrequent  
9 for me to read from, if not the entirety,  
10 sometimes unfortunately I get dozens of them, and  
11 reading from all of them is not possible, but to  
12 help the defendant understand the impact of the  
13 conduct.

14 And also an opportunity to speak in  
15 person. And whether or not the victim chooses to  
16 do it or not, it has been my personal observation  
17 that the ability of the victim to have their  
18 experience shared with the defendant is something  
19 that is instructive not only to the defendant,  
20 but also -- even if the outcome is a lesser  
21 sentence than what the victim might have hoped  
22 for -- helps them understand.

1                   And I have been enormously impressed  
2 by the grace and dignity of the victims under  
3 these circumstances, and sometimes, quite  
4 candidly, their forgiveness.

5                   MS. BASHFORD: Thank you.

6                   MS. CANNON: Thank you for being here.  
7 I believe you mentioned that you testified, if  
8 I'm not correct, correct me, but you testified at  
9 a 32 hearing?

10                  MS. ELMORE: The preliminary hearing --

11                  MS. CANNON: Right.

12                  MS. ELMORE: -- before the 32.

13                  MS. CANNON: Yes. And how did you feel  
14 about that? Because we're looking into questions  
15 about that, and we want to know your feelings  
16 about that.

17                  MS. ELMORE: My -- the advice and  
18 counsel that I was given prior to the preliminary  
19 hearing was that much work had been done to  
20 protect victims from having to testify at the  
21 preliminary hearing.

22                  In this particular case, the advisors,

1 the prosecutorial team felt it was very important  
2 for the judge to hear from me in the preliminary  
3 hearing. And so it was my choice to either take  
4 the protection that I'm afforded or to testify,  
5 and I chose to testify.

6 And it was -- there's a lot to say.  
7 It was extraordinarily difficult, and I've had a  
8 vision in years gone by that that moment of  
9 sitting in a courtroom and being allowed to  
10 answer questions truthfully would make a  
11 difference and fix something.

12 And it was important, but then to be  
13 subject to cross examination and having judgments  
14 made on different aspects and different  
15 activities, that for me were devastating, some  
16 thrown out, some kept in, and know that my  
17 testimony was having a lot to do with what was  
18 given validity and what wasn't, was a learning  
19 experience.

20 MS. CANNON: One of our concerns is if  
21 you don't testify at the preliminary hearing, and  
22 it does go to court-martial, you have no idea and

1 it's kind of like --

2 MS. ELMORE: Yes.

3 MS. CANNON: -- a blind side, in --

4 MS. ELMORE: Yes.

5 MS. CANNON: -- some respects. So

6 given that --

7 MS. ELMORE: I would have been better  
8 prepared for the 32, had we made it there.

9 MS. CANNON: Okay, thank you.

10 MS. ELMORE: Yes.

11 MS. GARVIN: Thank you for being here;  
12 it's good to see you. I want to make sure I  
13 understood part of your statement. You mentioned  
14 that one of the things that some of your members  
15 have experienced is, I think you talked about  
16 redlining or --

17 MS. ELMORE: Yes.

18 MS. GARVIN: -- cutting out, which  
19 certainly used to happen in the civilian system a  
20 couple of decades ago. But you're saying some of  
21 your members actually --

22 MS. ELMORE: Yes.

1 MS. GARVIN: -- have had people  
2 redline?

3 MS. ELMORE: That's correct.

4 MS. GARVIN: Okay, thank you.

5 MS. BASHFORD: Thank you very much for  
6 --

7 MS. ELMORE: Thank you so much.

8 MS. BASHFORD: -- coming and sharing  
9 your experience, it will be very helpful to us as  
10 we continue our work in this area.

11 MS. ELMORE: Thank you --

12 MS. BASHFORD: Thank you.

13 MS. ELMORE: -- so much, I appreciate  
14 it. Thank you.

15 MS. BASHFORD: Colonel Weir, do you  
16 have any last matters?

17 COLONEL WEIR: I just want to draw your  
18 attention to the next public meeting is May 15th,  
19 but I know the working groups have had some  
20 conversations about meeting before or in-between  
21 that public meeting.

22 BGEN SCHWENK: No.

1 COLONEL WEIR: There's some more work  
2 to be done. So the staff will be contacting you  
3 to take care of that.

4 Next week, I'll shoot out an email  
5 that gives you almost the next year and a half's  
6 dates that have been selected for the public  
7 meetings, but they're going to fall roughly in  
8 the same months.

9 I just want to emphasize the  
10 importance of these courtroom or court-martial  
11 observations, because what we envision as a  
12 staff, you've heard a lot of information about  
13 what transpires in a courtroom. So when you all  
14 go out and observe courts-martial, observe  
15 courts-martial from different Services.

16 And then what we would like to have,  
17 if not everybody, a large number of the  
18 Committee, that has gone and witnessed two,  
19 three, four, however many you can fit into your  
20 schedule, and then come back and have a  
21 discussion about what you saw, the good, the bad,  
22 not specifically pointing out Prosecutor Weir was

1 horrible, but generally what you saw in those  
2 courts-martial.

3 I think the members who have seen  
4 trials already have a frame of reference when  
5 they're listening to what the military judges are  
6 talking about. And so I think that's vitally  
7 important.

8 Remember, for the site visits, you all  
9 can submit questions about what you think is  
10 important. So if you are a former high speed  
11 investigator, that would be the person who would  
12 submit questions for investigators.

13 (Laughter.)

14 COLONEL WEIR: So what we will do is  
15 gather all those questions up in a format, and  
16 there will be prosecutor questions by the various  
17 types of folks we want to talk to. And then  
18 we'll try to come up with a, I won't say a one to  
19 whatever it is, number one's the most important,  
20 but we'll try to get those questions in some type  
21 of order that makes sense, as far as trying to  
22 make sense out of the site visits.

1                   And I think it's important that, as  
2 was pointed out by Glen, that Dr. Well says these  
3 site visits can have research, analysis can be  
4 done on those questions. And so it would make  
5 sense to have all the same questions asked, or  
6 refined as we go to various installations.

7                   Ma'am, that's all I have.

8                   DR. SPOHN: Just for planning purposes,  
9 the site visits, you have them listed for three  
10 days. Is that two days of travel and one day of  
11 site visit, or is that a three-day site visit?

12                  COLONEL WEIR: That's including travel.

13                  DR. SPOHN: Including travel. Thank  
14 you.

15                  MS. BASHFORD: Mr. Sullivan?

16                  MR. SULLIVAN: This meeting is closed.

17                  (Whereupon, the above-entitled matter  
18 went off the record at 3:26 p.m.)

19  
20  
21  
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