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

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

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

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

We are going to begin by taking
attendance. General Anderson?

MG ANDERSON: I'm here.

MS. BASHFORD: Ms. Cannon?

MS. CANNON: Here.

MS. BASHFORD: Ms. Garvin?

MS. GARVIN: Here.

MS. BASHFORD: Mr. Kramer?

MR. KRAMER: Here.

MS. BASHFORD: Ms. Long?

MS. GENTILE LONG: Here.

MS. BASHFORD: Mr. Markey?

SGT MARKEY: Here.

MS. BASHFORD: Dr. Markowitz?

DR. MARKOWITZ: Here.

MS. BASHFORD: General Schwenk?

BGEND SCHWENK: Present.

MS. BASHFORD: Dr. Spohn?

DR. SPOHN: Here.

MS. BASHFORD: Judge Grimm, by telephone?

HON. GRIMM: Telephonically here.

MS. BASHFORD: Great.
Ms. Tokash, by telephone? Ms. Tokash?

MS. TOKASH: I'm here.

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

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

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

We will begin today's meeting with a panel of retired military judges. The Committee has not previously had the opportunity to hear the perspectives of military judges who have presided over sexual assault cases. On today's panel, we will hear from two retired Army judges,
a retired Navy judge, and a retired Air Force
judge. And the Committee looks forward to
hearing from each of you.

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

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

Next, the Army's Chief of Criminal
Law, Colonel Patrick Pflaum will provide the
Committee with a presentation on the fiscal year
2020 NDAA provisions that affect the DAC-IPAD and
military justice. The DAC-IPAD Staff Director
has informed me that an individual has made a
request to provide a public comment at today's
meeting. We will hear the comment after Colonel
Pflaum's presentation.
If a member of the audience would like to make a public comment, please direct your request to the DAC-IPAD Staff Director, Colonel Steven Weir. The comment may be heard at the discretion of the Chair, and written public comments may be submitted at any time for Committee consideration.

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

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

CAPT PAYTON-O'BRIEN: Good morning. Thank you for this opportunity. My name is Bethany Payton-O'Brien. I'm a retired Navy Judge Advocate and military judge. I spent approximately nine years on the bench between the
Prior to becoming a military judge, I attended the judges course in Charlottesville. While I was on the bench, I attended various training, some focused on sexual assault, other training such as evidence, scientific evidence, courtroom security, and drug cases. But other than that, during the course of my career, I spent five years prosecuting sexual assault cases. Thank you.

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

COLONEL NANCE: Hi. I'm Jeff Nance. I retired after 30 years in the Army. Twenty-five of those years was -- I was involved with military justice in some form or fashion,
and more than 13 as a military judge.

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

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

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

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

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

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

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

MS. BASHFORD: Thank you very much for
being here. This Committee has in the past heard
from -- we have heard from victims, we have heard
from accused, we have heard from victims'
counsel, we have heard from defense attorneys,
and we have heard from prosecutors and
investigators.

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

(No response.)

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

CAPT PAYTON-O'BRIEN: You don't always
have to start with me, but thank you. Feel free
to jump in, gents.
The VLC program really changed sexual assault cases, in my view. Prior to VLCs being involved -- and I look back at even my time in prosecuting these cases -- it was a free-for-all against the victim where oftentimes the victim, male or female, seemed to be sort of dragged through the mud.

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

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

As a judge, cross-examination often was the opportunity for defense counsel to really
point out how they prepared with the prosecution and completely refused to talk with the defense. I think that's a disadvantage to the government, to their case, if the victim has never had that opportunity and refuses to, as is their right.

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

I will mention that I am -- I now have my own practice. I am a criminal defense attorney. Sexual assault cases are something I defend, and it can be difficult on both sides, if that opportunity is not there for victim interviews, understanding that it's their right, but I think that it would help if they -- for the
process -- would have interviews with counsel on both sides, because then it looks as if -- and I saw this as a judge -- it looks as if they have something to hide. And we know they don't in most cases, but perhaps they do.

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

Thank you.

HON. GRIMM: Could I ask a question?

This is Paul Grimm.

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

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

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

As she said, it does have an impact on credibility. It certainly can be woven by a good defense counsel into a narrative that is not supportive of the victim. But, by the same token, the VLCs can advise and the victim can decide to testify. I have seen that happen to great effect as well, and to engage in interviews. And so I have seen both.
But by and large, I think it has been a positive development. I know as a staff judge advocate, in the early days of the program when they were coming directly out of my manning, it was a difficult transition. But I think the transition proved to be worth it.

MS. BASHFORD: Colonel Nance?

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

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

And so not understanding the criminal court process, they would sometimes give advice
that didn't necessarily advance the ultimate goal of that victim. That said, as time went on, I believe that the training got better, the lessons learned were implemented in the training, and the advice got better, and things sort of evened out. That was my experience.

Andy?

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

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

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

Prosecutors and defense counsel trying
these cases, which are always narrow, complicated
cases, often involving complicated discovery
issues, complicated expert issues, you can't be
doing this for the first time. You just can't,
and do it well. And when the evidence is close,
ultimately what that can result in is an acquittal, sometimes when it wouldn't otherwise be an acquittal.

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

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

The contracting process to get expert
witnesses does not work in the Army. It just doesn't. It can take forever. It can result in circumstances where you have much more delay than you would otherwise have to do because of trial dockets.

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

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

And it has gotten better, but in the context of the entire system, it has created
challenges that are kind of unforeseen
challenges.

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

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

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

HON. GRIMM: Yes. Is that better?

MS. BASHFORD: Not really.

HON. GRIMM: Is that louder?

MS. BASHFORD: No, Judge.

HON. GRIMM: Can you hear me?

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

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

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

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

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

MS. BASHFORD: Yes.

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

And one of the things that we, as a
group, have been trying to do is to try to come up with an explanation for why that may be. And there are many factors, no doubt.

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

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

And I wonder whether or not there is some correlation between the lack of experienced prosecution and people who develop expertise over a length of time that then allows them to teach others and carry that forward when it is a correlation between that and what might be the
low conviction rate.

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

   HON. GRIMM: You did a good job.

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

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

   The overriding factor is Ms. Tokash
used to be an SVP in the army. There are a ton
of SVPs who used to be SVPs in the Army. Ton is -- there are not that many SVPs in the Army, but people who like to try cases like to try cases.

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

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

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

So when you look at, why is this, there are -- I think to fix this you have to
break some -- you have to break some china. You have to recognize that most of the trial advocates I know -- and you can certainly informally talk to people.

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

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

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

In 2000 -- and I can't remember if
Jeff was on the same panel -- but I sat on a blue-ribbon panel. I love blue-ribbon panels. But we had these conversations in 2000, and not much has changed.

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

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

We need people with military justice experience as SJAs. You don't need that much experience. I've been an SJA. I can tell you in an hour what you need to know to be an SJA and advise people.
It helps if you can answer nuanced questions, but guess what? You can call Mr. Nance, if he's a civilian working for you, and say, hey, how does this work, because that's how this society works, right? We reach out to expertise.

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

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

Another piece of china that you might consider is we believe that the province of
military justice is only green-suiters or whatever the color of the suit is now. The suit has changed it seems like 30 times since I was in. I'm just happy I don't have to buy the PT uniform anymore.

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

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

The analogy to me is really a Navy analogy. We're trying to turn a battleship going full speed. I think it requires more drastic
change, a greater commitment to changing how we approach prosecution and defense work. And it requires money. It always requires money.

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

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

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

The Air Force does cases more expeditionary at the various bases as opposed to centralized, which some of the other services do, which makes that assignment a particularly grueling one as a surrogate counsel, and I think
we lose some really good litigators just to the
fact that that's also happening at a point in
their personal lives when they are trying to have
families. And so they have to make some choices
there as to what they pursue.

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

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

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

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

I think the pendulum has swung and is in the process probably of recentering on the prosecutorial judgment on whether cases should go to trial. For a long time, it was a swinging to almost everything needs to go to trial. And if it recenters a little -- and I think that could happen in conjunction with the special victims counsel, giving realistic advice to victims about what the process is going to put them through and what the likelihood of ultimate success would be -- I think that pendulum should recenter. It
should probably recenter somewhere with a greater
total number of prosecutions than before it started to
swing, but somewhere less than it is now.

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

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

But I do believe that there is an
incredible amount of pressure on commanders with
respect to sexual assault cases. And as a human
being, their inclination is to say, let's send it
to trial and let the judge and/or panel members
decide.

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

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

COLONEL GLASS: Well, and just to dovetail on that, I agree with all of that. I
agree it should be a commander-based system. If it comes out of the commander's hands, I don't think the military justice system is what it is, which is an effective -- if used properly, an effective tool for not just justice but also for good order and discipline.

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

I don't know ethically that that's an appropriate case to take to trial, just under the
rules of ethics. And that's where we end up. That's why the case does not get referred, because we're moving in that conversation, which many of you have had with staff judge advocates, we're moving in that conversation to a referral decision, where I finally just say, sir, if you refer this case, you need to get a different SJA, a different set of prosecutors, because it is not ethical to try it.

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

I will tell you, I've sat in another seat where I'm the judge and that just hasn't happened, where there is just no way the government had a good faith basis to bring that case to trial. And the problem is, front of the mind, back of the mind, with all due respect to the general officers here, little generals want to be bigger generals, generally. They want to get promoted. It's a promotion-based system. It's how we gauge success.
It's hard when there are what are perceived sometimes as unfair shots against their friends to sit there and say, I'm not going to push this to trial, recognizing that five, six years later, three, four, years later, sometimes less, there will be an implication that will change your career.

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

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

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

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

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

I joined the Navy to try cases. That's what I wanted to do. And so I spent my first two tours trying cases, despite the urgings
of my seniors and my detailers to get out of litigation. You won't get anywhere. You're not going to make captain.

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

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

And back then it was -- may not have been followed in every case, but at least the commander had a letter to rely on that was a prosecutorial merits memo is what they call them now, it seems, in the Navy. But we would tell them, don't go forward, and here's why. They often would choose to go forward anyway.
Okay. I will tell you my -- I had a losing record as a prosecutor, because, back to what I said earlier, we tried everything. So now what I would say is I think -- and echoing what I've heard up here -- some of the commanders don't have the ability to make that tough call. Should it go forward? Should it not? Because of some of the potential ramifications to them.

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

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

We don't have many of those anymore.

A lot of that goes the administrative route or
the non-judicial punishment route. So you're not having the opportunity for litigators to really try cases. And then in certain areas right now, even in the Navy, there aren't enough prosecutors.

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

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

A year is a long time, both to an alleged victim and to the sailor who is facing
potential action in the future. It is a grueling job to be a prosecutor, or it can be. It can be also very professionally rewarding.

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

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

So I retired in 2017 because I was told there was nothing more for me in military justice. So if we're telling the judges after so much time that they have to leave, and we're telling the prosecutors they can't try cases, or
even the defense counsel that they can't
litigate, we lose good people.

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

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

So we may be -- we may have to look
at, how do we select who is in charge of those
various offices?
Thank you.

COLONEL MOORE: My experience with cases --

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

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

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

And so, in that regard, having the greater latitude to take some of the tougher cases to trial is not a bad thing. I think it's
a good thing that we're taking some of those cases. Should we be taking everything that we are taking to trial now? I don't think so.

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

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

I believe that being a staff judge advocate made me a better military judge, because, as a staff judge advocate, you are working with commanders, you are working in the trenches, you get a better feel for what is actually out there going on in the Air Force.
I also believe that the best way to train the next generation of new prosecutors is in that staff judge advocate office, because as a lieutenant colonel staff judge advocate, I was getting in the new lieutenants, fresh out of law school who were raring to try cases, and the best way to develop them into the litigators is to have former litigators in that staff judge advocate's office to train them up and to show them how it's done.

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

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

MS. CANNON: Thank you for your comments. Regarding the question of commanders making the ultimate decision and some of the competing interests that they might be troubled by, including ethical issues, we have discussed among ourselves here on the DAC-IPAD the issue of the preliminary hearing and how that is, or has
been at times, a vetting process for cases where there is actual evidence introduced and where you can see what a case looks like.

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

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

First, the general court-martial convening authority can send the case to a binding 32 for any offense, not limiting it to sexual assault offenses. Otherwise, the default is to the current Article 32 standard.
the investigating officer would need to be an
active duty or reserve component military judge
or a full-time magistrate judge. More on that in
a minute.

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

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

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

I think that these -- this concept of
a full-time magistrate judge that would be a
senior O-4, they would be -- they would -- as
opposed to our current part-time military
magistrates, they would do nothing but magistrate
duties and do 32s. They would supervise the
part-time military magistrates, and they could
help the actual military judges with important
rulings on controversial motions, or whatever.

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

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

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

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

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

One of the things you are going to
hear over and over again, to use a sports
analogy, is, you know, my son is swimming in
regionals today, hopefully doing great. He
doesn't get to be good unless he gets reps. But
we expect trial advocates and military judges to
be good without getting repetitions. Okay? That
0-4, whatever we're calling them chief
magistrate -- gets some time in the saddle where
they get to make decisions.

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

I think one of the questions that we
were told might be asked of us was, how about
judges doing preliminary hearings? And the
problem is, when I'm -- when I was at Fort Drum,
I don't have the time, and there is one of me,
you know, and if you're going to say, bring a
reservists, reservists have life issues, too. They are not always going to be available. And some of the other issues that you're concerned about -- timing, and how things move through the system, again, experience. Those become issues as well.

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

COLONEL GLASS: Right.

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

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

I think it did add value, and I think
if a military judge is making a no probable cause
call, then there is no reason that that should
not be binding, at least as -- at least subject
to the opportunity to come back and present
additional evidence.

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

What I see, though, as the problem
with the preliminary hearing currently is it's
almost a foregone conclusion, because the
government's obligation is to walk in -- and
while I agree with the probable cause standard,
how they are meeting it generally in the Navy is
to walk in with an investigation and give it to
the preliminary hearing officer and say, here you
go. No cross-examination of witnesses. No
testimony. They just drop a paper case on the
preliminary hearing officer.
So back to some of my earlier statements about alleged victims not testifying, many witnesses aren't testifying. Most witnesses aren't testifying, because the government's position has been in most cases is we don't have to bring in testimony because it's cumulative with that report.

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

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

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

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

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

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

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

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

Thank you.

MS. BASHFORD: Ms. Tokash, and then

Ms. Long.

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

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

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

MS. BASHFORD: That's better.

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

So, in other words, are the military services really seeking harder cases because of the facts, or is the military labeling them hard because the military doesn't have a prosecution
standard akin to federal civilian prosecutors?

        COLONEL MOORE: I'll take the first

shot at that one. I think that higher standard
would actually remedy the observations that
Colonel Payton-O'Brien has about the pro forma
nature of the Article 32 investigation.

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

        And so I think that's the question is,
do you want someone to look at the case just
based on what's there, what's minimally necessary
to establish probable cause? If so, status quo,
continue as we are. If you think you need more
information, if you think you need to evaluate
witness credibility, well, that doesn't go into
probable cause, really. In that case, you're
going to need to have a higher standard, and
maybe the Department of Justice standard does
make sense.

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

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

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

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

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

Experienced defense counsel --
experienced defense counsel, experienced
prosecutors did not give me that fact. That's
if done intentionally, that's an ethical
violation. I don't think it was done
intentionally, so there was no ethical follow up.
But it's an ascertainable fact.

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

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

Ultimately, if those SVPs go on to be
older SVPs, they are better going to be able to
inform a system, inform commanders, and make that
system work.
COLONEL NANCE: And I would just sort of agree with what has been said so far about the standard and just sort of refer back to what I said earlier about, what is our purpose? And if our purpose is to get more convictions on sexual assault cases, then having a higher standard will reduce the number of bad cases that judges hear or panels hear, and reduce the number of acquittals in sexual assault cases.

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

MS. BASHFORD: Ms. Long?

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

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

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

My question is on the Article 32. And since a lot of you also have civilian experience, you know that preliminary hearings in the civilian world are definitely more than what you have described the current Article 32 as, by not necessarily a full and open discovery piece where defense witnesses are called, although they can be. Can you envision a system -- a process in the Article 32 where it is different than it is now?
It's not a paper, but it also isn't a full hearing basically where you are determining issues that are not necessarily relevant at the probable cause standard and maybe would be then determined by the SJA if there was admissible evidence or other things to go forward?

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

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

Because victims decline, as is their right, to be present at the 32 -- and I've seen some that do come in. They are willing to do it. But then, when you use a paper case, when it's
the agent's interpretation of what was said
summarized in a report, which may or may not have
some sort of -- I think there was just a change
in the volume.

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

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

But if that's the only person that
comes in -- and I've been part of civilian
processes where at a preliminary hearing the only person that came in was the police officer. At least there was some testimony that while I understand it's not a full discovery avenue for the defense, it's also just an opportunity to see what is there and present some of perhaps defense evidence that might go to that determination of probable cause.

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

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

But to claim that any witness who testifies -- and this seems to be, at least from my perspective now, what is happening is the government claims anybody who testifies, if their name is in the report and they have given a
statement, then their testimony would be cumulative.

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

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

And I think if they had that opportunity, it would be a more thorough investigation, at least for that credibility or that -- that determination by the commander who has to make that call when they receive a report,
if a probable cause standard was met, you know,
but -- and we see those recommends, yeah, met,
but don't go forward and here's why, or go
forward but know you're going to lose.

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

Thank you.

COLONEL MOORE: I think, again, the
standard will drive behavior. If the standard is
probable cause, I don't think any prosecutor is
going to show any more of his cards than he has
to to meet that standard. And so if you think
that more needs to be done, that more needs to
come out, then the answer is to raise the
standard, or to change the rules of admissibility
at the Article 32 investigation perhaps.

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

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

COLONEL MOORE: You can probably change the underlying rules as well. And so, for instance, Captain Payton-O'Brien mentioned the cumulativeness standard. And so maybe you tighten that up and you have a broader definition of what is -- or a tighter definition of what's
before, I would have found him in contempt.

Military courtroom is what that gentleman did

the good reasons that we don't have TV in a

I joked with Jeff that if I -- one of

be on TV today.

there is a public benefit to this being able to

certain critical portions. But I think we think

that these hearings would be closed at the -- at

there is a public benefit -- and I understand

COLONE GLASS: So I think we think

I don't see how that's a negative thing.

And I don't know, I'm a simple guy.

available to make an informed decision.

decision about referred has the most information

information, so that the person who makes the

Attache 32 hearing would be useful in providing

COLONE GLASS: I think a more robust

"witness." "

Prosecutor and saying, I want to hear from this

little bit more comfortable standing up to the

altogether or you have military judges who feel a

cumulative or you estimate cumulative as a basis

COLUMEL NANCE: I think a more robust
Okay? I know he's doing his job, but my point is
-- my point is that we believe that this has a
public benefit to being out there.

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

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

Then the other piece. If a judge
doesn't have comfort standing up to a prosecutor,
whatever the rules, and making sure something is
fair -- let me say that a little more positively. The judges here at this table have -- would have no trouble saying, "Nope, we're going to hear this case." Or, "Nope, I'm going to allow some latitude."

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

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

MS. BASHFORD: Mr. Kramer?

MR. KRAMER: I'm sorry to switch topics for a second. I wonder what you think of
the ability of defense counsel to obtain experts
and the procedure they have to go through to do
that and whether that should be changed?

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

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

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

          COLONEL GLASS: So I agree with all of
that. I would just say this -- and I think this has changed -- I am not conversant with what is going on in the Army in terms of the Trial Defense Service. But sometimes you need an expert to be able to establish you need an expert, right?

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

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

And so, yeah, absolutely. I think -- I think -- I want to echo what Jeff said. There needs to be a pot of money that the defense can
go to, and I think now with investigators also,
so that you can establish that kind of baseline
case for that additional assistance.

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

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

And to that extent, having Trial
Defense Services in charge of it does make sense.
You're still, as a judge, going to have those
circumstances where the individual defense
counsel doesn't agree with his boss' decision,
but I think you're going to see a lot fewer of
those than you do disagreeing with the prosecutor
as he advised the convening authority on granting that expert.

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

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

And as defense counsel, we all have sort of that group of experts we can reach out to just to, you know, have that five-minute conversation. Do you think there is something
there? They won't charge us. But then in order
to do the evaluation, they need to be appointed,
and convening authorities resist.

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

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

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

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

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

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

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

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

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

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

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

Do I believe they were effective?

Well, I think that sometimes is expert-specific.

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

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

And I see it in transcripts I read, and I saw it when I was a judge. I mean, I won't tell you my age, but I can tell you that my 16- and 18-year-old kids are way more proficient on the iPhone than I am. I hand it to them. "Hey, screenshot this for me. I'm not sure what to
So if I'm a judge and I have that difficulty, we can imagine that maybe some of the counsel do as well. But do I think they're being used effectively? I think for the most part yes. But is it a fair playing field? I would say no.

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

I know as a defense counsel when I seek experts I often do get the response back from the government that says, "You were a judge advocate for 23 years. You were a judge for nine. You don't need an expert. You're fully versed in this." But I can't testify, so they tend to miss that part that I need a consultant to help me who may turn into an expert. But they
are denying because of the experience level of just the counsel.

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

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

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

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

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

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

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

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

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

COLONEL GLASS: So I just want to echo what other panel members have said. I think discernment matters, right? So discernment of
not just, do I need an expert, but what are the
consequences to the timeline of my case if I call
an expert because often you are going to get a
kind of concomitant defense request for, you
know, an opposite expert.

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

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

I have had instances in sexual assault
cases where experts have been almost dispositive
because of the -- because, you know, it just
strikes me always with young counsel, judges like
to learn. You know, sitting -- those of you who have been judges, sitting on the bench every day can get kind of dry, and so learning and developing an understanding of how this works, a good expert is a good educator. And so that certainly has been interesting.

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

And it is at least striking to me to see the contrast of all you want versus we can't figure out getting this expert to trial to give both sides an adequate opportunity. It rarely, in my experience -- and the others can certainly correct me -- it rarely, in my experience, looks fair, for Dr. Jones to come in and testify for the government. And if any of you are Dr. Jones,
I apologize. Dr. Jones to come in and testify for the government and there be nothing on the other side.

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

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

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

So, really, just want you to share your experiences with 412 and 513, and particularly as the SVCs and VLCs have been involved in those. What have you seen hopefully post-2015 when they were amended? But, if not,
that's okay, too.

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

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

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

I would say generally that victim's counsel in the Army, in my experience, are really
good on 412. And I don't know if it's because they've been collaborative with the government but are really good at saying "me, too." I don't get a lot of new, nuanced arguments about -- or I didn't get a lot of 412 or 513 from victim's counsel where I said, "Huh, that changes the landscape."

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

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

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

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

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

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

So I lived with and experienced myself
and struggled with the implementation of the
rules as they changed and, you know, sort of
coming to an understanding of what was required
and how logistically to go about it.

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

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

So that was always my fear. I mean,
maybe that was a good thing because it made me
more vigilant in reviewing those things. But it
really was a burden as a military judge to try to
have to go through that in the midst of a hotly
contested trial when I had a lot of other things
to do.

So, yeah, I mean, I think that,

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

Wes?

COLONEL MOORE: I agree with Colonel

Nance. 513 made the job of reviewing

psychotherapist patient records immensely more
difficult. Sometimes you have to do the
difficult, and so the other side of that is I
think we do a much better job of protecting those
confidential records than we did before.

I think the default position before

513 was release everything, subject to a
protective order, and then we'll just fight
whether it comes out during trial or not, and
without much consideration to the fact that that
is a victimization, in and of itself, of
somebody, because so many of those records turn
out to be irrelevant.

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

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

But I echoed many times Colonel
Nance's feeling of inadequacy to be doing this,
just from the terms of knowing what you are
looking at and making the right call, so you have
to have your own DSM out and looking at things like that.

COLONEL NANCE: That's malpractice.

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

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

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

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

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

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

That's not helpful. I mean, seeing a therapist was not necessarily what you needed.
You needed to know if she had a mental health disorder.

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

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

That's too late in the game for that issue to be now vetted. I mean, it's very late in the game because it comes up in a victim's statement during sentencing. And while in the old days we would look at 513 records for -- and I think I did this. I'm certain others did as
well. You would look for prior inconsistent statements. Of course, that's not what we do now. We look for the mental health disorders.

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

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

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

MS. BASHFORD: Ms. Long?

HON. GRIMM: This is --

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

HON. GRIMM: Yeah. I --

MS. GENTILE LONG: I want to go back
to an issue that came up -- I think both Colonel
Glass and Colonel Nance raised it -- about
command decision and cases going forward that may
not -- that the command or someone may not
actually believe there is a credible claim or
that the person did it, which I -- is something
that when you said it is concerning.

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

Sometimes we have had arguments about
whether the rules of professional -- not you and
me, but in trainings -- whether the rules of
professional responsibility apply, but obviously
we -- in the civilian world, and I would say in
any world where we have a criminal case, you
don't ever want to just be throwing it up to someone if you don't believe a crime has happened.

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

Is there a check on that that you could recommend?

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

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

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

My experience has been that they take their duty to the system seriously, and though they may feel pressure at times to let the -- and I hope I didn't infer from my earlier comments that commanders were sending cases that ethically they should not have. But do they feel pressure from without and from the civilians that oversee
our military justice system sometimes? Do they
feel pressure to send a case that maybe they are
not, you know, sure about?

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

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

So with that caveat, I think there are
what I would call bulwarks against that in the
system. The question is whether they work and
whether those bulwarks are supported
sufficiently. So I will just give you -- so I
certainly have sat in a courtroom as a judge
thinking, how did this get here? I don't even
see why we're here. Not he said/she said
credibility call.

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

That waxes and wanes in the service,
but there is -- also, you are supposed to do
something called gateway sessions where you train
prosecutors and defense attorneys and talk about
legal stuff. I have sat in those systems or,
excuse me, in those classes and said, "Why are
you applying a different standard" -- if you are,
"Why are you applying a different ethical
standard to sexual assault cases than you would
from just a general crimes case?"

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

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

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

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

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

And then some of this, with all due respect, falls to the politicians. Every time a decision doesn't go the way we want it to go, if there is a lynching or a cross-burning, or
whatever your chosen metaphor is, because the commander made a tough call, we've got to take a step back and understand that's what we pay commanders to do. That's ultimately what -- we vest them with that authority.

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

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

COLONEL MOORE: I would say, first of
all, as a staff judge advocate, I got the honor
of working with commanders who, by and large,
actually universally were some of the most
impressive, loyal, and courageous people that I
have known. And so, to me, the implication that
they would fail to make the tough decision
because of career implications, I have not seen
any evidence to support that.

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

Another thing that I always
experienced -- and I have advised commanders not
to go forward on charges, and we have decided not
to go forward on charges. And one of the things
that we always did was coordinate that decision
with the victim's counsel and with the victim.

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

So that's the only comment I had.

Thank you.

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

I also, though, believe that in the
current system that because we do have some
inexperienced or not overly experienced
prosecutors handling sexual assault cases, their
personal belief that there is nothing here, or
their personal belief that I don't find the
victim credible, causes concern for whether or
not they really can evaluate a case.

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

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

I was the fact-finder on a case that
ended up at trial where I convicted, and then it
came out in the press later that the convening
authority had concerns about the case from the
get-go. And the question is, well, then,
convening authority, if you had concerns, why was it at court-martial?

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

    And sometimes it's that evidence that doesn't come into court, that we don't see. We don't know everything that is going on behind the screen. But convening authorities need to have that ability to say, "I'm not going to take it."

Don't just throw it up there and let us try to figure it out or let members try to figure it out.

    What's the solution for that? I'm not sure. I just know that commanders need to be able to make the hard calls. That's why we pay them the big bucks to do so. They are to make the tough calls. And sometimes they have a prosecutor that may not be giving them the
correct advice or good advice, and the staff
deremic\[
judge advocate, the same thing, because of a lack
\] of experience.

MS. GENTILE LONG: Thank you.

MS. BASHFORD: Judge Grimm?

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

MS. BASHFORD: A little bit louder, please.

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

We heard information not from judges
we heard that active duty military judges were reluctant to speak to our committee because they felt that they should not be, because of appellate decisions, explaining a reasoning for a sentence that they imposed at a court-martial, that they should just simply announce the sentence and not explain the reason.
When we look at the actual sentencing, and we're trying to see whether it was confinement or some other sentence that was imposed, when the military judge was imposing a sentence, the announcement of a sentence and the reason for it is an enormous portion of the sentencing process in the federal system.

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

I have met with active duty military judges and was requested to -- to talk about how
sentencing occurs in federal court, and there is
much of what happens in federal court sentencing
that would not be, in my judgment, good to be
adopted by the military.

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

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

COLONEL GLASS: Judge, this is Andrew
Glass. So, first of all, with regard to the --
going through the process, I think -- and I'm
sure you appreciate a little bit of it is that in terms of active duty judges speaking to sentencing, or speaking in this forum, is a concern that something you say may or may not be misconstrued as taking a position that is adverse to either the prosecution or the defense.

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

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

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

I think it bears mentioning that there is mandatory appeal, no accused has to pay for a transcript to be prepared, no accused -- at least on the first level of appeal -- has to pay for their attorney. Awesome -- awesome protections
for service members, but everything I do goes up.

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

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

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

So I think the failure to have that
ability to do that would be concerning. And I
think if you want a fair system, it doesn't look
good if at Fort Lee Bob gets two years and at Fort Campbell, same set of facts, he gets 50.

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

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

My fear would be, as Andy mentioned -- well, let's put it this way. We would certainly increase the work of the appellate bar. I think
whether or not a judge said something that he or she shouldn't have said during explanation about their sentencing, we're going to have more appeals if we do something like that.

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

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

So something along those lines would have to be implemented to prevent judges from saying things that they perhaps shouldn't say in
explaining their sentence.

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

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

COLONEL MOORE: I would say with regard to articulating the basis for a sentence there has to be some standard against which that articulation would take place. If the standard is you are giving a sentence somewhere between no punishment and 30 years' confinement and a dishonorable discharge, there is really not any reviewable way that you are going to be able to
articulate how you arrived at that, in the absence of some standard that is already pre promulgated and that is out there.

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

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

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

 And so, as a judge, at least I had the
experience of having seen enough cases to have
kind of an internal barometer, but really nothing
more than that. And so, in the absence of
standards, I don't know that we would be able to
articulate the basis for the sentence in any
meaningful way.

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

CAPT PAYTON-O'BRIEN: I'll start
backwards. I'll start with clemency. When I sat
on the Court of Appeals, we used to receive
sentence disparity assignments of error
regularly. And I know we occasionally would
grant the assignment of error and grant some sort
of relief in sentencing, but that was rare.

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

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

And I would add that the clemency
post-trial matters are submitted very quickly
after trial. If your argument to the convening
authority as a defense counsel is I want
clemency, if you only have 10, 20, 30 days, maybe
you could argue that clemency should be granted
just as a matter of the type of case it was. But
if you're looking for some sort of post-trial
conduct that was good on the part of the
offender, there isn't any within the first month
of trial. If they went to the brig, they don't
have good conduct at the brig yet to rely on.
Did they do something good for the government
post-trial? Ten to 30 days doesn't give a good
measure of what their assistance might have been.

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

When I was, I think to use Colonel
Glass' analogy or statement, a baby judge, I
would very rarely comment on what I gave as a
sentence. When I became a little more seasoned
after seven-eight years, I perhaps on more than
one occasion would give those comments, but they
were very limited, because, perhaps, I was
concerned.
I sat on the appellate court. I can recall receiving records of trial going, ooh, why did the judge say that? And so, it was a bit concerning to be worried about what might be evaluated of what I said. And if I said something, was I going to be challenged in the next case because I made a comment about why I had adjudged a certain sentence? Maybe I should have been more deterred in some of the things I did say, but I did make comments about sentences on occasion, and some of those might have been in the cases that didn't reach appellate review because there was no record.

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

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

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

    MS. BASHFORD: I'm going to ask the panel if you would indulge and stay with us just for a few more minutes. We are a little bit past
11:00, but I think there are some more questions.

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

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

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

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

So, I would say the other thing is that, again, I think member panels do an extraordinary job of listening to evidence and applying the instructions and getting to the right result. So, it was very rare -- I mean, there were cases, and perhaps it's the court reporter who is the better barometer because there were cases where I'd ask the court reporter what he thought the result was going to be, or she. And they'd usually be within like 10 percent one way or the other. So, they might be the better barometer.
But I was very rarely surprised by the findings. I was frequently surprised by the sentence, just because the sentences varied so greatly and because members had so little guidance on how to come down within that spectrum.

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

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

And I would also mirror what Wes and Jeff said vis-a-vis sentence. The time where there's usually a point where you're like,
really?, is the sentence. And I would tell you, frequently, that's to the harshness of a sentence. I was known by the defense bar as a very harsh sentencer. And there were times where I would hear a sentence and think, wow! And on a very, very few occasions I actually wrote a memo to the convening authority, when they had that authority to change the sentence, saying that -- I would say very fair; I think it's twice -- where I would have sentenced much differently. But that's my observation.

CAPT PAYTON-O'BRIEN: I would agree with Colonel Glass on the sentence, but my wow was more the leniency in sexual assault cases of sentences. Members don't have any parameters other than what's being asked for by either side, and they come back completely away from anything that any side asked for, and less. And that sometimes was a surprise. But, then, again, they don't know what cases are, in our view or the prosecutor's or the defense counsel, worth. They just sentence, and I know they take their job
seriously because I've interviewed or discussed with members afterwards just their job and what they do. And they take their oath very seriously.

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

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

MS. BASHFORD: That I think, though,
brings us right back to the acquittal rate.

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

COLONEL GLASS: Before, ma'am, so the
question I would ask back, at least the
rhetorical question is, how long have your
prosecutors been doing that job? And the reason
I go back to that is because I think it just
matters. So, when you look at the most
experienced prosecutor in the Army, I don't know
what the number is, but it's five-seven years
prosecuting cases. That's just not the way it is
in district attorneys' offices, and that makes a
difference, especially with these cases that are
almost always -- well, that's an overstatement --
very frequently, almost like dormitory room, the
analogy is dormitory room Saturday night, a lot
of alcohol, little supervision, if any, and it's
a he said, she said, and she may not or he,
whoever the victim is, may not remember.

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

But the reason why I keep banging this
drum is because, ultimately, to me, this part is
not rocket science. This part really comes down
to, when you're asking somebody to try some of
the very, very hardest cases, often without
quote-unquote objective evidence that's forensic,
sometimes with, you're asking, that's a tough
carry for Major Jones who is the experienced
prosecutor, even if they have highly-qualified experts to talk to.

And you all know this if you've tried cases. Some of that is just the field. Okay?

What I've heard -- and pardon my horrible German -- referred to as fingerspitzengefühl, which is just the feel, the knowledge. I've been on my feet so many times arguing this issue where I've felt this is what's going on I need to change.

Then, some of it is the develop people skills to be able to pull those difficult facts out of the victims.

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

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

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

Okay. So, we all know that there's some exceptions for -- it could have been a day, a month, a week. Really good cross examination. I don't remember. We know there's exceptions for child victims extending out that time, but I have
no timeframe. So, how's it an excited utterance? How's it admissible? So I don't admit it.

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

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

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

COLONEL MOORE: I think perhaps the
difficult decision is, what is a healthy acquittal rate? I would submit zero is unhealthy because it means we're not taking the difficult cases. Eighty percent is probably unhealthy as well. What is the middle ground in there that is an indication we're still taking the tough cases, but we're not unnecessarily incurring all of these costs?

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

And so, if we're going to incur all of this cost, what is going to be enough to say it's worth those costs? I think we have to start with investigations. The investigations have to be more thorough. Investigators have to feel at
ease to ask the tough questions of alleged victims. I don't think that they always do.

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

The ability to read my own handwriting would be helpful.

(Laughter.)

But the other would be trust in the people who have the discretion, the prosecutorial discretion to go forward. I think that's been kind of a theme that has permeated everybody's testimony here today. It is that, whether it's the Staff Judge Advocate or whether it's the convening authority, we have to trust them. We have to accept that they are on occasion going to make bad decisions, and those decisions sometimes
are going to get public scrutiny. But that's the
cost of any system. There are going to be bad
decisions in any system. And overcorrecting for
every bad decision on an anecdotal basis I don't
think is the way to go forward.

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

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

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

But we have to do better at that
stage, whether it's the training of the military
members. Intervention, when I see some of these
records and I see some of these cases, I wonder,
how did we get here and nobody intervened? Why
did nobody intervene with this girl who was
sloppy drunk and two males are taking her up to a
room? Where were the supervisors? Where was the
barracks petty officer who saw that? Why did
nobody intervene?
We talk about bystander intervention,
but is it really working? I would beg to say
that it might not be, this training that we're
giving them, and certainly the training, then,
not only when we talk about bystander
intervention, but when we tell them that you
can't have one drink and consent.

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

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

MS. BASHFORD: We can take on last
question from General Schwenk, and then I'm going
to ask us to take just a 10-minute break, and
maybe start our lunch at 12:15, so we'll have
more time.

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

Okay. The first one has to do with
victim impact statements. And I will read from
the Joint Explanatory Statement of the conferees
from conference. The conferees recognize the
importance of providing survivors of sexual
assault an opportunity to provide a full and
complete description of the impact of the assault
on the survivor during court-martial sentencing
hearings related to the offense. The conferees
are concerned by reports that some military
judges -- obviously not retired judges, it must
be somebody else -- some military judges have
interpreted R.C.M. 1001(c) too narrowly, limiting
what survivors are permitted to say during
sentencing hearings in ways that do not fully
inform the court of the impact of the crime on
the survivor.

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

So, victim impact comments, please.

Thank you.

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

BGEN SCHWENK: No, that was one.

COLONEL GLASS: Okay. So, from my
perspective, I have limited victim impact
statements in the past according to what the rule requires. I've just read the rule and applied the rule.

BGEN SCHWENK: Could you give an example?

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

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

COLONEL GLASS: I know I've done it. I also know that I've seen victim impact statements that were very, very effective and persuasive, and I've seen victim impact statements that were rambling and not very effective -- maybe all because of victimization.

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

I've seen them be entirely in writing. For me, that's okay, but that writing doesn't usually emote very much. There's not much
emotion to it.

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

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

I would say in terms of the effectiveness of them, my experience goes back a little bit to before we had that rule where victims would come in and talk about impact. And
I think that the effective impact statements before me have been very, very similar to the victim impact I heard before, sometimes crushing impacts on their lives and their ability to trust, et cetera. All of that is relevant and admissible under the current rule, but it was relevant and admissible under the former rule.

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

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

Otherwise, there is an instruction that we would give. I don't know if it's still
in the benchbook because I haven't looked at the
benchbook for a long time, but, thank goodness
for that. But there is an instruction we give to
the panel members about how they should consider
this victim impact statement, and I think that's
a good instruction. It was a product of a lot of
thoughtful reflection by a lot of judges.

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

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

COLONEL NANCE: I don't know.

BGEN SCHWENK: It must have been his
reason.

COLONEL NANCE: It had to be a reason.

BGEN SCHWENK: Okay.

COLONEL MOORE: It just has not been
my experience. I can't recall having limited a
victim impact statement. I've found the victim's
legal counsel has done a very good job generally of preparing those and of modifying them, if there are rulings throughout the course of the proceedings. So, I can't recall a time when I've been in a situation where there was even an objection to a victim impact statement.

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

But I agree with Colonel Moore, I think the victims' legal counsel are doing a pretty good job at helping them prepare. I think the only concern towards the end of my time on the bench before I retired was the timing of it and when it was provided to the Government to have an opportunity to review. And sometimes that caused delay, because the Government was not privy to it until the moment the person was coming in and wanted an opportunity to have a
chance to object. But I don’t recall any
significant items that I had the victim extract
out or would not consider. It seemed that they
had pretty full range of options to give their
statement.

BGEN SCHWENK: Thank you.

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

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

COLONEL GLASS: Yes, sir. So, I do
want to note that the issues, as I reflect on it,
involve notice, as required by the rule.

Usually, that was cured, if it needed a cure,
with some form of recess. Now in one instance I
can recall an overnight recess. It was near the
end of the day anyway.

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

And then, the third was, it involved
the members in a matter that had been previously
excluded that to reopen would constitute a
mini-trial.

BGEN SCHWENK: Thank you very much.

Okay. The other one, as advertised:

appointment of guardian ad litem for minor
victims. This is from the House side. The
Committee is concerned for the welfare of minor
military dependents who are victims of an alleged
sex-related offense. The Committee acknowledges
the Department of Defense's continued efforts to
implement services in support of Service members
who are victims; and further, to expand some of
these services to dependents who are victims.
However, the Committee remains concerned that
there is not an adequate mechanism within the
military court-martial process to represent the
best interests of minor victims following an
alleged sex-related offense.

So they ask us for a report that
evaluates the need for, and the feasibility of,
establishing a process under which a guardian ad
litem may be appointed to represent the interests
of a victim of an alleged sex-related offense for
people under 18.

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

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

I think the need is probably a
reasonable need. I think that, certainly, there
are times when the custodial parent's interest
might not dovetail with the child-victim's
interest. And I've seen that happen before and
had to, in my own mind, sort of worry about, you
know, was the child's real interest, both
personal interest and legal interest, being taken
care of?
I don't know how we would do that. I haven't had a lot of time to think about how we would do that in a military justice system.

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

COLONEL NANCE: Yes, sir.

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

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

What I've also observed in the
courtroom is that the victims' counsel are doing
their level best, and that they are doing the
things you want them to do in terms of getting to
know the child. To the degree those interests
compete, though, again, you don't know what's
happening behind the scenes.
COLONEL NANCE: I know that at a lot of places there are private, nonprofit organizations that provide guardian ad litem services for children. I wonder if there would be a way that the military could sort of come up with a cooperative agreement with some of those organizations in order to work hand-in-hand and maybe even provide them some funding to be able to help them help us provide that. I mean, that's just a thought that just occurred.

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

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

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

MS. BASHFORD: Okay. We have 20
entire minutes to discuss the testimony that we
heard today.

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

             SGT. MARKEY: Yes, I'll start it off.

Thank you, Chair Bashford.

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

             I think everybody is concerned about
improving the process. I think everybody is
genuinely interested in ensuring that the process
is fair and equitable, and that the individuals
involved in the process have the knowledge,
skills, and ability to do their jobs, that they
have the resources and tools to be able to
perform the functions that they need to.

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

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

And I was trying to resolve the conflict of there was complete confidence in the ability to do that, and yet, the SJAs and other staff that are providing the legal information, decisionmaking process, and information for them to make the decision are typically transferred a lot, don't have a lot of experience, not much
training. And so, you kind of question the basis for the command to be able to make -- I don't want to say a really good decision -- but a decision based on facts, circumstances, and information that is brought to them.

So, those are the comments I had.

Thank you.

MS. BASHFORD: Ms. Cannon?

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

There are a number of things, but the only other one I'll address right now is the point that was raised with regard to experts, and
defense experts being a really important area
where there has to be independence from the
prosecution and funding independent from the
prosecution. And I thought that was a valuable
collection. And also, they said experts for
the court, which I thought was also -- that's
kind of a good idea, it seems.

MS. GENTILE LONG: Thank you. So, in
addition to some of the things that have been
raised -- I might be reiterating a little bit of
Mr. Markey's comments about the need for a
process to support specialized, experienced trial
attorneys to stay within the system and to,
therefore, create a true Special Victims Unit
within the military justice system of trial
attorneys, of prosecutors who are truly able to
bring a breadth of experience, along with the
training and expertise that they may receive, and
to be rewarded, or at least not to be penalized
from a career perspective or to be moved around
for the needs of the military, to really support
people staying in the position. Because,
although there wasn't consensus, I heard enough
of it that was very credible to me.

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

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

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

I believe it was Colonel Nance who I
thought posited a good question back to us in the
midst of an answer, which was, during the 32
discussion, it was, ask what is the purpose,
which I know we're talking about, and determine, before changes are made, what is the purpose. Is it to get -- and this is paraphrased -- but to get more convictions or to pull back the curtain, or exactly what is the purpose?

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

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

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

DR. SPOHN: May I respond? So, one of the things that the four of them emphasized is that the Services take cases to trial that the civilian world wouldn't. And I think they said that a number of times. And the question that I have is -- and that they didn't really answer, I don't think, is why is that? Is it because
they're referring cases to court-martial using a probable cause standard, which many civilian prosecutors' offices would not do? Especially in the arena of sexual assault, they would use something approaching a proof-beyond-a-reasonable-doubt standard before they would take a case to trial.

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

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

And the other thing that struck me -- and we kind of ran out of time or I would have asked them -- is, the analysis of the yearly data shows that the acquittal rate is much higher for
cases that are tried by a panel of members than that it is by judges. And yet, the judges said that they felt that the panel members were making appropriate decisions, which there's a little bit of disconnect there. Although one question that we might ask is, are different kinds of cases going before a panel of members as opposed to going before a judge only? And that might be something that we can tease out as we start looking at some of the data.

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

MR. KRAMER: Go ahead.

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

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

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

And so, I think that's something to consider very seriously, is sentencing guidelines
or something maybe softer than the original
version of the sentencing guidelines, but
something that provides more guidance to a panel
than here's the max and here is the minimum.
Pick something in the middle of it. Pick
something in that range.

MS. BASHFORD: Mr. Kramer?

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

But, in any event, a couple of things.
We still can't seem to get an answer of why the
acquittal rate is so high compared to the
acquittal rate in civilian courts on not only
sexual assault cases, but any type of cases. And
I can't understand why we can't get a better
answer on just we take cases that civilians
wouldn't take. I don't know how we would compare
that to begin with, but it's troubling that we
can't seem to get an answer to that.
The alcohol thing is also very troubling, although I have to say they give them training, and they talked about that. The same thing goes on at college campuses. They give them training about that, and routinely, alcohol is involved in many sexual assault cases on college campuses. So, that one is very troubling, but I'm not sure there is any answer to that at all. It's just a fact of life.

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

MS. GARVIN: Just a quick comment
back. That was in my notes also, about that
every single judge, I believe all four commented
that they didn't want to put the reasons on the
record. And the reason they gave was about
appellate review, and maybe not saying something
they shouldn't say, which flagged to my brain
training moments to understand permissibility,
but also the sentencing guidelines to understand
range.

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

MS. CANNON: I would be curious to
follow up on the pilot program that was pointed
out by Colonel Glass when we were discussing
staying in your position as a prosecutor or a
defense attorney, and somehow there is a program
going on, a pilot program, in the Army. I'm not familiar with that. Maybe somebody here is. But I would like to know more about that program.

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

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

MS. CANNON: You do have that one?

Okay.

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

MS. CANNON: I could find it. Fine.

MS. GARVIN: If I may, on the 32 also -- and I guess this might be a transcript question for later -- but while there seemed to be consistency of, depending on the purpose, a more robust 32 that involves some, I believe, evidentiary ideas, I didn't hear any of them
articulating a return to the previous 32. In fact, I believe they all said the opposite of that, and included that they weren't asking for the cross examination of the victim. I at least heard one of the judges say that. So, it's about what I heard -- and I'd like to look back through the transcript a bit -- but it's about ensuring the defense can get witnesses in the room, other witnesses potentially, and have testimony, but perhaps not a return to the victim being in the space.

MS. TOKASH: I have a comment.

MS. BASHFORD: Ms. Tokash?

MS. TOKASH: Yes.

HON. GRIMM: And I have one after her.

I have one after her.

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

HON. GRIMM: No, please, please, please.

MS. TOKASH: Okay. I agree with Mr. Kramer that we need to get behind this alleged
notion that the military is taking cases that the
civilians aren't. I heard from the judges today
characterize what are considered hard cases or
the military is taking hard cases. But I think
we need to determine, is the military
characterizing these cases as hard because of the
facts, or because they don't have a prosecution
standard that civilian prosecutors have?

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

And I was primarily struck by Colonel
Glass' comment that the prosecution standards in
the military and civilian systems are, I believe
he said dramatically different, and that
sometimes he found himself saying, how are we
here? Why are we here? If we are here, then something went really wrong with the case, or you didn't really consider that this case should see the inside of a courtroom.

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

MS. BASHFORD: Judge Grimm?

HON. GRIMM: Thank you.

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

A couple of observations. Number 1, a standard for bringing a case to trial, I agree with Ms. Tokash and the others who have commented
about that. This is critical. A standard that
requires admissible evidence sufficient to move
forward seems to me to be an essential
clarification that we should consider and
explore, number 1.

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

I share Mr. Kramer's concern about the
guidelines approach, but there should be a
standard, and every sentence, whether recommended
by a panel or a judge, should meet that standard.
And I think it is essential, as one of our
colleagues said, for transparency to explain what
the reason is. To simply go from nothing, a
reprimand up to 30 years with no explanation
seems to me to be disruptive for the system and
invite criticism about the transparency, the
consistency of the system, and to the ultimate
detriment of the phenomenal efforts that the
military has made to try to get its arms around
this issue.

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

Experts, something needs to be done to
give equal access to experts to Government and to
the defense and to the court, where needed,
without going to some cadre of bean-counters who
view this as being nothing more than a long and
demanding process to justify it.

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

And I think the guardian ad litem is an interesting idea, but I will tell you in the federal system we have a statute allowing for a guardian ad litem, but there is no funding. And
if you're going to require it, you have to have funding. Otherwise, all you're doing is creating an expectation that cannot be fulfilled.

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

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

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

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

MS. BASHFORD: Thank you.

DR. SPOHN: Just one thing.

MS. BASHFORD: Very, very briefly.

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

In Los Angeles -- I just pulled up our
data -- there were five acquittals out of 5,000 cases, 5,000 reports.

MS. GENTILE LONG: Five acquittals?

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

MS. GENTILE LONG: How many were tried?

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

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

DR. SPOHN: Three hundred and ninety were convicted.

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

DR. SPOHN: Three hundred and ninety.

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

DR. SPOHN: It depends on what your denominator is.
MS. GENTILE LONG: Right, but you have to care about that denominator of what is happening. What was that big number again?

DR. SPOHN: Five thousand thirty-one.

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

Sorry. Sorry, Chair.

MS. BASHFORD: Back at one o'clock.

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

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

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

HON. GRIMM: We're here.
MS. TOKASH: Yes, Meghan Tokash --

MS. BASHFORD: Okay, great.

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

MS. BASHFORD: Great.

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

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

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

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

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

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

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

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

So, we'll start with the table of
contents and Page 1, and the edits that were made, were approved by General Schwenk.

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

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

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

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

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

So we go to Chapter 1, which is on Page 11. And Chapter 1 is Findings and Observations Based on the Review of MCIO, those are Military Criminal Investigation Organizations, Penetrative Sexual Offense
Investigation of Investigative Case Files Closed in Fiscal Year 2017.

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

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

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

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

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

And I'll turn it over to the Chair to
discuss the language that should be in the sentence that's in the first full paragraph.
While some victim's counsel agreed to do the follow-up interview, other counsel requested that the MCIO send written questions for the victim to answer, which is less than an ideal method for developing information.

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

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

And so my question was for whom, to what end. Those kind of things. And not necessarily factoring that in a case-by-case moment there are different ways of eliciting effective information for investigative purposes.
Depending on the person being interviewed and followed up with.

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

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

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

MR. KRAMER: No, obviously -- I mean, obviously you're correct that I would never think
of communicating with a client in writing.

MS. BASHFORD: What --

MR. KRAMER: As the primary.

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

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

MS. BASHFORD: Yes.

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

So, I get a first round of questions
with you and then, let's say the SVC says, and
I'm assuming that's where this came from, right,
based on the paragraph it is, said, you know
what, I'm not going to have them sit down for an
in person again because when they sit down with you, law enforcement, they actually start to have panic, their memory becomes confused and, in fact, they are going to give you a statement that is less accurate because of the way X, Y or Z has impacted them.

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

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

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

MS. BASHFORD: With that friendly
amendment, which is often a less than ideal method for developing information for law enforcement, from a law, or for a law enforcement perspective, does anybody have any problem with
that?

(Show of hands.)

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

HON. GRIMM: Yes.

MS. BASHFORD: Ms. Tokash?

MS. TOKASH: Yes.

MS. BASHFORD: Okay, that's unanimous.

Next?

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

Page 18, the Number 2 there under discussion. The last sentence in that paragraph says, the word swiftly is used and that seemed to cause some issues.
So, investigators need the ability to tailor the scope of an investigation to the facts of that case, including the ability to swiftly close investigations when appropriate.

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

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

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

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

MS. CANNON: I think part of the thing
that we wanted to address was the speed. And so, I would just add a little twist to what you suggest to close the investigations quickly as practicable and appropriate.

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

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

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

BGEN SCHWENK: You going to keep one appropriate?

MS. BASHFORD: In a timely fashion?

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

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

HON. GRIMM: Could you say timely and
appropriate fashion?

MS. BASHFORD: Say again?

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

PARTICIPANT: Timely and appropriate.

HON. GRIMM: -- suggestions.

PARTICIPANT: An appropriate fashion.

MR. KRAMER: Sure.

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

BGEN SCHWENK: Appropriate fashion.

MS. BASHFORD: Appropriate fashion.

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

(Show of hands.)

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

MS. TOKASH: Yes.

HON. GRIMM: Yes.

MS. BASHFORD: Okay, that's unanimous.

BGEN SCHWENK: Are Judge Grimm and Ms.
Tokash raising their hands when they say yes or are they --

(Laughter.)

HON. GRIMM: And we're standing.

(Laughter.)

BGEN SCHWENK: Thank you.

MS. TOKASH: Saluting.

COLONEL WEIR: Okay, turning to Page 19.

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

PARTICIPANT: Yes, I believe we did.

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

COLONEL WEIR: And then also, at the last paragraph on Page 18, we decided to delete
the agency that was mentioned.

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

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

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

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

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

MS. BASHFORD: So, the sentence Ms. Garvin is concerned about is, the committee is most concerned -- the questioned sentence is, the committee is most concerned about those cases reviewed in which the victim's preference to go forward with the trial prevailed even though
there was insufficient inadmissible evidence to
obtain and sustain that conviction. Can you tell
us your concern?

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

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

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

     MS. BASHFORD: Thoughts from members
of the committee.

     MS. GENTILE LONG: I think that that's
valid to raise since we have some thoughts about
whether or not we were able to review the
complete record, even as given. So to flag it as something, we need to go use a term that indicates we want to go back and look.

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

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

MS. BASHFORD: Any other comments, suggestions?

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

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

BGEN SCHWENK: Change concern to interest.
MS. GARVIN: In further, yes, in analyzing or further analyzing. Because I am interested in digging in. There is clearly something we need to look at that I don't feel like we've finished.

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

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

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

(Show of hands.)

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

MS. TOKASH: Yes, no problem.

HON. GRIMM: Yes.

MS. BASHFORD: Unanimously passes.

COLONEL WEIR: Okay, that was all that was on Page 31. If we turn to Page 32, there was
just technical changes that we handled yesterday.

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

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

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

MS. BASHFORD: I think ensure was, it's really not the job to ensure that the advice is, our job to ensure that the advice is being conveyed. I think it's more to see, to observe if the advice is being --
BGEN SCHWENK: Assess.

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

BGEN SCHWENK: To assess whether.

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

PARTICIPANT: Yes.

MS. TOKASH: Yes.

HON. GRIMM: Yes.

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

BGEN SCHWENK: Assess whether, yes.

MR. KRAMER: Whether.

BGEN SCHWENK: Assess whether --

MR. KRAMER: Whether.

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

MR. KRAMER: Right.

PARTICIPANT: Yes.

MS. BASHFORD: Okay. Okay, in favor?
(Show of hands.)

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

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

BGEN SCHWENK: Right.

COLONEL WEIR: Okay.


(Laughter.)

COLONEL WEIR: Thank you, sir.

BGEN SCHWENK: You're welcome.

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

Turning to Page 35, there were no additional comments, those were technical edits,
which I mentioned earlier about conformity throughout the report.

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

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

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

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

MS. GARVIN: Further analyze. I mean, if we could go back to that language is, I'm okay, potentially, even with the has concerns here, as long it's, would like to further analyze. Particularly in light of everything
we've heard about how these hearings are going and what's happening in them. I feel like it's just the next investigative moment for us.

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

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

BGEN SCHWENK: What's a verb?

(Laughter.)

MS. GARVIN: Conjunction junction.

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

MS. GARVIN: When.

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

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

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

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

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

MS. GARVIN: Yes.

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

MS. GARVIN: I would be fine with that.

BGEN SCHWENK: So can somebody read the whole thing as we've revised it?
MS. BASHFORD: The DAC-IPAD has concerns regarding cases in which charges and specifications for penetrative sexual offense were preferred, that the preliminary hearing officer determined were not supported by evidence establishing probable cause to believe that the accused committed the offense. The DAC-IPAD will continue to investigate this.

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

(Simultaneous speaking.)

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

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

MS. GALLAGHER: Yes.

MS. BASHFORD: Sounds --
MS. GARVIN: That works.

MS. BASHFORD: Yes.

MS. GARVIN: Yes, thank you.

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

(Show of hands.)

MS. BASHFORD: Judge Grimm, Ms. Tokash?

HON. GRIMM: Yes.

MS. TOKASH: Yes, no problems.

MS. BASHFORD: Okay. So that passes unanimously.

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

The CRWG reviewers express concern. That paragraph. It was determined yesterday that that was one long, almost non-understandable sentence. So what the Staff did was draft a potential, broke it down into more manageable pieces.
So that sentence would read, CRWG reviewers express concern about cases referred to trial by general court-martial that the preliminary hearing officer had determined lacked probable cause to believe the accused committed a penetrative sexual offense.

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

MS. BASHFORD: Is that a Staff edit?

COLONEL WEIR: Yes.

MS. BASHFORD: Okay. All in favor?

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

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

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

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

MS. BASHFORD: Okay.

MS. GARVIN: Thank you.

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

(Show of hands.)

MS. BASHFORD: Judge Grimm, Ms.
Tokash?

HON. GRIMM: Yes.

MS. TOKASH: Yes.

MS. BASHFORD: Okay, that's unanimous.

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


There was some discussion about the observation
itself which states, many sexual assault cases
are being referred to courts-martial when there
is insufficient evidence to support and sustain a
conviction.

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

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

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

COLONEL WEIR: So I believe that, let
me see if I have this sentence right. Based on
information reviewed, and that's before many. So
it would be, based on information reviewed, many
sexual assault cases are being referred.

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

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

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

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

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

COLONEL WEIR: What we stated --

MS. BASHFORD: -- provide a defense or the --
COLONEL WEIR: What we've stated earlier is that our review by the case review working group was we reviewed those investigations that were provided to use and based our analysis on the case file that was presented. That was reviewed.

MS. GENTILE LONG: But that's really not the full picture, because if we didn't watch the tapes, which we didn't, then we didn't review what was given to us.

BGEN SCHWENK: What if put a footnote on that and down in the bottom refer back to the pages where we actually addressed that point, and also the other point about the limitations based only on the investigative case files being gauged, whatever.

And then the one where I added that sentence about, we didn't know, we relied, I think we said we relied on the investigators putting the key information into the summary. And we were up front about that. That's what we did.
MS. GENTILE LONG: Yes.

BGEN SCHWENK: So if we rely, if we footnote to those two pages, prior in the report, then anybody that looks at that and raises their eyebrows will look at the footnote, then they'll read the other stuff.

MS. GENTILE LONG: That's fine with me.

BGEN SCHWENK: Okay.

MS. BASHFORD: So the Staff will have to find that to footnote it. Is that fine with the Committee as a whole? Represented that way.

HON. GRIMM: Yes.

MS. BASHFORD: Ms. Garvin?

MS. TOKASH: Yes. Yes.

MS. BASHFORD: Okay, that passes.

MS. GARVIN: Ms. Tokash.

MS. BASHFORD: Oh, I'm sorry.

(Laughter.)

BGEN SCHWENK: It's almost like you're not here.

MS. GARVIN: Oh, my comments are
COLONEL WEIR: That was all the edits or deliberation on Page 39.

There was no -- on Page 40 it was just technical edits. Moving to Page 41, there was some comments about Observation 9. And Ms. Garvin had a comment, so I'll turn it over to the Chair for discussion.

MS. BASHFORD: Yes, Ms. Garvin, can you tell us what your concern was?

MS. GARVIN: Yes. The observation talks about that pretrial advice would be more helpful to, and this is quoting, to convening authorities if it included explanations of the staff judge advocates conclusions.

And that is, we had not yet, I didn't believe we have heard from convening authorities telling us that fact. This is us assuming that it would be more useful to them.

And I thought that clarification point might be useful so that it's not misconstrued as a testimonial statement based on facts. But
that's my recollection.

MS. BASHFORD: What I remember we saw a lot was a check box, the forms, that we have jurisdiction over the accused, the forms and specifications are correct and there was one more. There was like three checks.

Jurisdiction, forms with specifications, oh, and probable cause. But it was like a check box.

So, again, we're basing it on what we saw in the file. Like, we have heard in testimony that there's a lot of oral advice that's not documented that's given.

But since it's not documented we don't know what it is. Thoughts?

MS. CANNON: Would the word could, as opposed to would, solve the problem?

MS. GARVIN: Absolutely.

MS. BASHFORD: So, instead of, instead of the very last sentence of Observation 9, we could say the Article 34 pretrial advice could be more helpful?

MS. GARVIN: Yes.
MS. BASHFORD: As amended, in favor?

(Show of hands.)

MS. BASHFORD: Ms. Tokash --

MS. TOKASH: Yes.

MS. BASHFORD: -- Judge Grimm?

HON. GRIMM: Yes.

MS. TOKASH: Yes.

MS. BASHFORD: Okay, that's unanimous.

And it's amended.

COLONEL WEIR: There was nothing else on Page 41 that needed to have any discussion.

Turning to Page 42, Ms. Garvin had a comment that needs to be discussed.

MS. GARVIN: Chair, do you want me to --

MS. BASHFORD: Yes, can you explain that please?

MS. GARVIN: So, my reading of the final two sentences, and it mostly hangs on the clause at the last sentence. So the last two sentences read, better practices to provide, sorry, three sentences, to provide written
explanations with further explanation as needed.

A written legal analysis and rationale could enhance further, could enhance fairness, due process and transparency in the military justice system. And then an em dash that says, benefits that do not seem to be outweighed by a need for confidentiality.

And it's that last, following the em dash, that benefits that do not need, that do not seem to be outweighed by a need for confidentiality, that I wasn't sure we had enough evidence to make that statement. But again, maybe the working group got more information that they could share to explain that piece.

MS. BASHFORD: Thoughts?

MS. CANNON: We could just omit it. I don't recall that specific point of confidentiality being discussed.

MS. BASHFORD: I believe it was discussed when, it was in a discussion about somebody tipping their hands.

BGEN SCHWENK: Right.
MS. BASHFORD: The prosecution said, well then the defense will know what we know and the defense is like, we already know where you're going and the prosecution already knows where the defense is going, something like that.

But if we could just put a period right after system and leave out anything after the dash, if that works?

MS. GARVIN: Yes.

MS. BASHFORD: All in favor of that?

(Show of hands.)

MS. BASHFORD: Judge Grimm --

MS. TOKASH: Yes.

MS. BASHFORD: -- Ms. Tokash?

MS. TOKASH: Yes.

HON. GRIMM: Yes.

MS. BASHFORD: Okay, that's unanimously adopted.

COLONEL WEIR: Let's make sure. So a written legal analysis and rationale could enhance fairness due to process and transparency in the military justice system, period.
Now we're moving on to Chapter 2, which is titled, Article 32 UCMJ Preliminary Hearings and the Court-martial Referral Process. There's nothing further on Page 42 or 43, 44, 45, 46, 47, 48, 49, 50, 51, 52.

There were changes on 53 that we discussed yesterday, and those were technical edits. Same with Page 54, 55 and 56.

Now, if you will please turn to Tab 5 in your materials. These are the charts that would go with the Chapter. So what we needed you all to do yesterday when we came to these charts I said, it's a lot to digest in five seconds that you're looking at them so take a look at them tonight and determine whether or not you think there are, if there are any changes that need to be made to them.

And we discussed some quick changes to the charts, which was Figure 1. Where the 19, I think that was General Schwenk, the 19 was outside the box.

And so the concurrence was that we
would just move the numbers inside the boxes to make it more understandable to the reader. And that was the only change on that chart. And we had agreed to that yesterday, I believe.

BGEN SCHWENK: Grade and rank.

COLONEL WEIR: Oh, right. Looking at --

MS. CANNON: Excuse me. There was also a question with regard to the numbers on the left, zero up to 30. Given the nature of the numbers in the graphs.

BGEN SCHWENK: We were going to put a --

MS. CANNON: That there is some --

BGEN SCHWENK: We were going to put something on the left-hand side that explained what that column meant. Like total cases or something.

MS. CANNON: It doesn't match up with the number, well, scale. Scale is off.

COLONEL WEIR: I think when you add nine and 19 it's two shy of 30, which is the
graph. The confusion, I think is when 19 was above it. Because we all looked at 19 and saw it in the middle of the 30.

I mean, if this chart is unclear, or doesn't add anything, we can certainly delete it.

MS. BASHFORD: I think if you put those top numbers into the column, it will take care of that. Because the lower numbers are in the column itself. So the nine below the 19 is in there. It's making it look as though the total is 19.

COLONEL WEIR: We will redraft or rework this slide and get it back out to you. But --

BGEN SCHWENK: I've seen cases just like this where they put the nine in the box, the 19 in the box and they put 28 on top. So that everybody sees that it's there the total, 28.

COLONEL WEIR: Is that a change that everyone can agree to?

MS. BASHFORD: Yes.

COLONEL WEIR: Excellent.
MR. KRAMER: I think it was good to think outside the box though.

(Laughter.)

COLONEL WEIR: So we'll make those changes to that chart.

Looking at the chart on the next page, we looked at the dark gray and the light gray and the decision was made to merge those. It made it easier to read and more understandable since we were talking about dismissed by a convening authority. Is that everyone else's recollection to those charts?

BGEN SCHWENK: Will we then use a medium gray for that?

MS. GARVIN: Yes.

BGEN SCHWENK: All right, never mind. I withdraw.

COLONEL WEIR: So we'll make that change.

And then the same with the following chart. It's just a reproduction of the chart that's Fiscal Year '17. And the next one is
Fiscal Year '18. So we'll make the same changes on those charts.

Any questions about the charts?

Great.

BGEN SCHWENK: Can we go back to the round circle chart? Down in the bottom right-hand.

It says dismissed by the GCMCA and dismissed by the SPCMCA. Did we yesterday say we were going to merge those two?

COLONEL WEIR: Yes, sir.

BGEN SCHWENK: Okay. So it's just going to say dismissed?

COLONEL WEIR: (No audible response.)

BGEN SCHWENK: Okay.

COLONEL WEIR: Okay. Turning back to Page 58. There were no changes.

Looking at Page 59, the first paragraph, there was some discussion about whether it should be DoD or SAPRO. Changing the wording there. So I'll turn that over to the Chair for discussion.
MS. BASHFORD: Yes. General Schwenk, what did you mean here?

BGEN SCHWENK: The sentence says, the DoD does not collect information on the legal outcome of cases in which the victim is the spouse of an intimate partner. Then it goes on from there.

And I just point out, DoD does collect information on the legal outcome of all cases and so it doesn't really matter who the victim is. DoD meaning the services as part of DoD.

And I believe the people from the, or Chuck was there from the data working group and he said that the DAC-IPAD gets their information that this refers to from the sexual assault prevention and response office, SAPRO, in the Department of Defense. And that SAPRO does not, the sentence is true for SAPRO, which is where we get our information from.

So it was my understanding that the proposal was, change DoD to SAPRO, and if there was a feeling on behalf of the Staff to explain
that, and that's where we get our information
from, you would do so. So that's --

MS. BASHFORD: Thoughts? I'm not sure
SAPRO is where we get all of our information from
though.

DR. MARKOWITZ: Wasn't there an issue
about FAP also not collecting that data?

BGEN SCHWENK: Right. Because --

DR. MARKOWITZ: So do we need to
clarify that it's DoD, SAPRO and also the family
advocacy programs?

BGEN SCHWENK: Yes, we can say SAPRO
and FAP don't collect it. I mean, they'd have to
go to their services and have them pull through
all their records to get them.

DR. MARKOWITZ: Yes. I just want to
make sure we're clarifying that.

BGEN SCHWENK: Okay.

MS. BASHFORD: I think the point is
that for those years, 2012 to 2014, we don't have
that information. We do have it for the
following years.
COLONEL WEIR: That's correct, Chair.

The reason, this is in the methodology of the working, the data working. How the data came out.

And so that's just explaining why the 2012 to '14 data is not as accurate as the rest of the data that we've collected for the case adjudication report.

MS. BASHFORD: Why don't we just say then, the statistical data for Fiscal Years 2012 through 2014, collected by the JPP, do not include the legal outcomes of cases in which the victim is the spouse or an intimate partner.

BGEN SCHWENK: Good.

MS. BASHFORD: And will not be included in the historical discussion to follow.

COLONEL WEIR: So the sentence that reads, the Department of Defense does not collect information would be deleted?

MS. BASHFORD: Yes. We would start, we would start out with, the statistical data for Fiscal Years 2012 through 2014, collected by the
judicial proceedings panel, do not include legal
outcomes of cases in which the victim is the
spouse or an intimate partner.

Then you continue on to, and will not
be included in the historical discussion to
follow. As amended, all in favor?

(Show of hands.)

HON. GRIMM: Yes.

MS. TOKASH: Yes.

MS. BASHFORD: That is passed

unanimously.

COLONEL WEIR: If I could, if you
could turn your attention to Tab 6. These are
the charts that will go in the report.

And once again, the same discussion
was had about giving you time yesterday evening
to digest these charts. There's a lot of
information there.

DR. SPOHN: That's the total number of
cases?

For the first bar chart on Page 1, is
that the total number of cases each year?
PARTICIPANT: Yes, ma'am. It's the total number of cases that we have in the database at this point.

DR. SPOHN: So do you need a title for that figure?

PARTICIPANT: There should be a title that would be actually in the text for the heading part.

DR. SPOHN: Oh, it will be in the text.

PARTICIPANT: Yes, ma'am.

DR. SPOHN: Okay. No, that's --

PARTICIPANT: There will be a table --

DR. SPOHN: That's not the right heading.

BGEN SCHWENK: On Page 59, down at the very bottom, it says, Figure 3.1, which I guess is that next figure.

Cases documented by the DAC-IPAD. So that's the lead in.

COLONEL WEIR: And the chart at the bottom of that page just breaks out, once again,
the percentages of service members in each
service. And as a percentage of sexual assaults
per service for the population.

And if you look at Page 60 it says,
Figure 3.2, military service of the accused.
Then, the following tables provide an overview of
the cases involving penetrative sexual assault,
sexual offense and contact offenses completed by
the military services in Fiscal Year 2018.

Anybody have any questions or concerns
about either of those charts on Page 1 of Tab 6?

Moving to the next page. Table 1,
dispositions.

MS. BASHFORD: Colonel, I would just
note that it seems on Page 62 we say Table 3.1.
And, oh, I'm sorry, the difference between
figures and tables.

COLONEL WEIR: Yes.

MS. BASHFORD: That was duplicative.

Anybody have any comments, suggestions? Good.

COLONEL WEIR: Now on Page 66, there
were no edits on Page 66. No edits on 66, 67, 68
Looking at Page 70 we had some discussion. I want to make sure that we're, everyone is clear. It was on Paragraph 2 that starts, false allegations of sexual assault.

And we discussed that in the body of, there is, and I think Ms. Garvin highlighted the fact there should be, it should be consistent with what's in the body of the, when it refers to sexual assault. False allegations of sexual assault.

And I think, but I want to be sure, I think that we said it could be with the apostrophe on each side of that sentence or not. Quotes I mean.

MS. GENTILE LONG: And weren't you going to rename it consistent with Paragraph 1, inconsistencies --

DR. SPOHN: Yes.

MS. GENTILE LONG: Okay.

DR. SPOHN: Inconsistencies in defining, quote, allegations of sexual assault,
unquote.

COLONEL WEIR: Is everyone comfortable with that technical change?

MS. BASHFORD: Yes. All in favor?

(Show of hands.)

MS. TOKASH: Yes.

HON. GRIMM: Yes.

MS. TOKASH: Yes.

MS. BASHFORD: Judge Grimm?

HON. GRIMM: Yes.

MS. BASHFORD: Okay, that's unanimous.

MS. TOKASH: Yes.

COLONEL WEIR: All right. There was no changes on 71. If we look to Page 72, if you could go to Tab 7. And these are charts that deal with the incidents of collateral misconduct. So what you see in Table 1 is broken down by service. And then what type of action was taken.

And then further in Table 2, it's also broken down by service and then the type of alleged misconduct. And also broken further down
into the number for each type of collateral
misconduct and then as a percentage of the total
of collateral misconduct.

BGEN SCHWENK: Is there somewhere
where we explain the difference between, quote,
accused, unquote, and accused, underlined? As we
use in Table 4.1.

COLONEL WEIR: Could you say that
again, sir?

BGEN SCHWENK: Okay. In Table 4.1 in
the left-hand column, the second one down says,
number of service members quote, accused,
unquote, of collateral misconduct. Same in the
third one down.

But the fourth one down says, accused,
underlined. And the next one on the next page,
which I guess is the fifth one down, says
accused, underlined.

So we have a tie score. Two with
quotes and two with accused. And I'm wondering,
do we mean something different, is that why we
did that? Do we need to explain it or -- there
must be a reason.

MS. BASHFORD: It doesn't seem that it matters much which way it is, it should just be consistent across the table.

MS. CARSON: I think I can explain it. The reason it's accused in quotes in the first two is because that's the way the term was used initially in the report.

And then it wasn't carried through and it was underlined in the next two because the next two are just getting the percentages of, first, just the accused, and the second, the accused to receive an adverse action is sort of our emphasis.

So I would suggest here, we could take it out. There's nothing wrong with just taking it all out, having it all one way or the other.

MS. HAM: And it's both the first time the body of the report explains that accused, of course, is a technical term in the military. So the services define that differently for purposes of providing numbers so it was less than thought.
MS. CARSON: So it's not important of them, however, for consistency you want it --

MS. BASHFORD: Any thoughts on it, Meg?

MS. GARVIN: I think the quotations are relatively important in light of the disparate definitions. And so, for consistency if they could all be quotes, I think that triggers recognition of disparate definitions as opposed to underlining, which is pure emphasis.

MS. BASHFORD: That's administrative, we don't need to vote on that. That's fine.

MS. GENTILE LONG: I have a substantive question. On Table 4.2, false report, I think we also need to indicate, because as it reads it would read like what one would think is a false report, but based on the inconsistent definitions, I don't know if we just footnote that table back to the page where we talk about it or if you need to put it in quotations.

It says, as defined by each military
service, but even a footnote maybe would just --

MS. CARSON: You want it in quotations?

MS. GENTILE LONG: Or just the footnote back to where you talk about it in the report.

SGT. MARKEY: Jen, just out of curiosity, it calls it false allegations, and then this says false report.

MS. GENTILE LONG: I know, but I think this is the same data. Unless this is, this table is different data, but I don't recall hearing any testimony about a true false report. A clean false report.

COLONEL WEIR: When we were going through the collateral misconduct report, the drafts that we received from the services, and then we brought that to the attention of the Committee, you all discussed that their definitions of what a false allegation, a false complaint wasn't clear.

And I recall if a victim made an
allegation, and then there was a cross complaint, remember that discussion. There was some --

MS. GENTILE LONG: Where some of the third party made it --

COLONEL WEIR: Right.

MS. GENTILE LONG: -- and then the victim said it wasn't, that was a false report?

COLONEL WEIR: Right. And so, based upon what you all discussed, we decided to not include that as collateral misconduct. Because it wasn't clearly defined.

MS. GENTILE LONG: So then this thing in there is a true/false report in that table?

MS. BASHFORD: No. I think it's as each service defines it.

MS. GENTILE LONG: Defines it.

MS. BASHFORD: Which is very different. I think we also thought that if it's a true/false report it's not collateral misconduct, it is misconduct.

MS. GENTILE LONG: Right.

MS. BASHFORD: So that's why I think
we're not including them, counting them.

MS. GENTILE LONG: But am I missing something because it's in the table? I mean, it's in that table.

COLONEL WEIR: It depends on how you want to capture that information. What you decided that, it wasn't, as the Chair said, it really wasn't collateral misconduct. And then there really wasn't a clear definition what that meant across the services.

And so, the decision was made that you all would not put it in the collateral report as, I mean, collateral misconduct report as collateral misconduct. But you would note, which we did in the false allegation paragraph we talked about.

So we can either leave it in if you think it's helpful or just delete that section right there in the graph.

MS. BASHFORD: It seems to me, since we're not counting it, we could probably just delete that last block. Thoughts?
Delete the last block? Favor?

(Show of hands.)

MS. TOKASH: I say delete it.

MS. BASHFORD: I'm sorry?

MS. TOKASH: Delete it. Ms. Tokash.

MS. BASHFORD: Judge Grimm?

HON. GRIMM: I agree.

MS. BASHFORD: So that passes, with

Ms. Tokash dissenting.

BGEN SCHWENK: No, she said agrees.

MS. BASHFORD: Oh, I'm sorry, I

thought she said she dissents. Okay.

COLONEL WEIR: She said delete it.

MS. BASHFORD: Oh, okay.

MS. TOKASH: I said delete it. I

agree.

(Laughter.)

COLONEL WEIR: And I --

MS. BASHFORD: So it passes

unanimously.

COLONEL WEIR: And I believe the

Paragraph 2 on Page 70 fully discusses your
concerns that you had so I don't think it's, based upon that I don't think it's relevant.

Any discussion on Table 3? And that's just a breakout of what was the result of the collateral misconduct versus what they received as a result of committing collateral misconduct.

MS. BASHFORD: Any opposition, thoughts, comments? Moving on.

COLONEL WEIR: And then the next chart is a pie chart. I don't know whether this is helpful to you all or to the reader but that's something you can --

MS. CARSON: This is the exact same information as Table 1. So the question for you is, do you prefer Table 1, do you prefer this Table 1 or the first Table 1 or do you --

There are just two ways, and then the graphic design are presenting the same information.

MS. BASHFORD: Personally, I find the pie chart with the wedge coming out very confusing, but that may just be me. So I defer
to the Committee as a whole.

    COLONEL WEIR: My recommendation is you go with Table 1, not the pie charts, because it's consistent the way the other charts are laid out by service.

    MS. BASHFORD: In favor of the table, not the pie?

    (Show of hands.)

    (Laughter.)

    MS. BASHFORD: Judge Grimm, Ms. Tokash?

    HON. GRIMM: Yes, I mean, you can have your pie but you can't eat it too.

    MS. TOKASH: I agree.

    MS. BASHFORD: Okay, unanimously passes.

    COLONEL WEIR: If you go to Page 75, there were no edits there. Page 76, 77, 78, 79, 80, 81, 82, 83. And that ends the collateral misconduct.

    Chapter 5, Military Installation Site Visits and Member Observations of Sexual Assault
Courts-Martial in 2020. Chapter 5 is just a chapter we added in here to discuss the site visits and the court-martial observation.

So we're on Page 84. And there was a Staff edit on Page 85 where we took out the dates when we would be going to those places. And we discussed that yesterday.

And that seemed to be what everyone wanted to do was just take the dates out. And the staff edit was approved.

And then we looked -- Page 86, no changes. And that brings us to the end of the review of the draft report.

And at this time I believe the Chair can take over and we'll have a vote on the acceptance of the report that as amended, with your amendments and changes.

MS. BASHFORD: I so move that we accept the report.

DR. MARKOWITZ: Second.

MS. BASHFORD: All in favor?

(Show of hands.)
HON. GRIMM: Aye. Yes.

MS. TOKASH: Aye. Yes.

MS. BASHFORD: Okay, it unanimously passes.

COLONEL WEIR: Okay, ma'am, what we'll do next as a staff --

BGEN SCHWENK: Wait, time out. I just want to say, on behalf of all the members, thanks to the Staff for putting this together.

PARTICIPANT: Absolutely.

BGEN SCHWENK: I don't believe we wrote one percent of this or less. Point something percent. Even with all of our edits.

And so, I thought it was another great job for another year. And I recommend that your contracts be extended for another year.

(Laughter.)

COLONEL WEIR: Thank you.

HON. GRIMM: Agree.

COLONEL WEIR: Well, you don't realize how much you did help because what we do to write the report is we go back and look at the
transcripts and the conversations that you all have had when you're discussing these issues. And so you'll look at the footnotes and you'll see where you're footnoted.

And a lot of the information contained is stuff that you said and did. So, I think that, so the way forward, the Staff will make those changes, we will get that all out to you.

Just so you have a comfort level that we did make the changes. And then we will send that to the printer and out to the various organizations that get the draft report.

Secretary of Defense and the members of the Senate Armed Services Committee and House Armed Services Committee are the folks that get this.

So, while I'm up here and I don't have to move, I just want to let you know what's going to happen on the 18th. The Chair is having an office call with the Secretary of Defense. So she will have the opportunity to discuss the fine work that you all are doing as a Committee.
He's received some of the read ahead materials to brief him on what you all are doing, and some talking points. So that's going to happen on the 18th.

And part of the 2020 NDAA, which Colonel Pflaum may talk about, is that you all, the DAC-IPAD has been extended for five years. So, that requires decisions on your part.

And we'll get back to you individually as to whether you want to continue in this excellent mission to make the military justice system better. So that will be forthcoming.

But if you want to, are willing to, and what's good about this is you all know what the time involvement is. And now I know some of you are retiring, you'll even have more time to involve yourself with this worthwhile goal.

So, the Staff would like to thank you for your input and the ease of this. Really, the ease working with you all is amazing.

I came in at the tail end of some other committees where they didn't have the
cohesiveness and the discussions that you all are having. And that's vital for the Staff to be able to work and put together a product that you all are vitally important to help us do that.

So thank you once again. And we're not done for today, but -- oh yes, you voted on the report.

MS. BASHFORD: Yes, we did. The only, depending on the date of the transmittal letter to the Secretary of Defense, there would be one other edit in the introduction where you have to insert the word former, if it's after March 20th.

COLONEL WEIR: Yes.

MS. BASHFORD: If it's before, you're aces.

COLONEL WEIR: I don't know if you are all aware, but I don't think she'll mind me telling you that the Chair is retiring after 40 years in the Manhattan DA's Office.

And so once again, she'll have a lot of time to cruise, fly around the United States and observe courts-martial and site visits. So
we'll make that edit when we go --

MS. BASHFORD: As needed.

(Laughter.)

MS. BASHFORD: We're scheduled for a break but we've really only been back for an hour, so if people don't mind, why don't we forge through with Mr. Hines and the site visit.

MR. HINES: This will be a brief update. I'm not going to rehash what we covered at the last meeting.

Just to let you know that the site visit planning is proceeding. The staff is putting together question packets on the various topic areas that you will be questioning the practitioners and the various stakeholders that you're going to meet with on the trips.

We have at least four Committee Members now going on each trip, which is very good, a very good participation rate. So we're very appreciative of your willingness to take time out of your busy schedules to go on these trips.
And we've been working closely with our Service Representatives to line up our local points of contact on the ground, onsite, so that we can facilitate our movement, do all those little logistical things that people don't think about.

And the Service Representatives have been very responsive and very good at giving us the names of those people on the ground. And that's a continuous process and will proceed as we go through.

So unless there are any questions, that's really the extent of my update. Everything's proceeding fine. We haven't -- actually, there is, there was one development that I should probably let you know about.

The Navy did notify us that that portion of the Europe trip that includes meeting with the Navy, as we had the trip set, the Navy folks were going to have to drive seven hours to meet us.

And so what we decided, we weren't
going to ask them to do that. So that group is

going to go ahead and go on down from the first

installation down to the Navy, because at Naples,
they have a very robust, not only operational

presence there, but legal presence there as well.

There's a RLSO there. That's where

the Navy Judge In-Theater sits and has their
courthouse.

And that's about it. Are there any

questions about any of the site visits? I know

that --

MS. CANNON: I don't understand --

MR. HINES: -- I've talked to some of

the members --

MS. CANNON: -- what you just said.

MR. HINES: -- including Ms. Cannon,

about your personal travel and that's something

we can talk about and handle, she's not the only

one, but we can handle offline with our staff.

And that's how we're going to --

BGEN SCHWENK: What is the -- Glen,

what's the process for determining what questions
we're going to ask each particular group at each, if we're going to do this, I thought originally we were talking about the idea of coming up with, like, five questions --

MR. HINES: Sure.

BGEN SCHWENK: -- for the trial counsel, five questions for the defense counsel, five questions for each group, that everybody would ask, so that when we got back and you guys compiled it, you'd have answers from across the board.

And so the question then is, out of the 50 million questions we could ask trial counsel, for example, what are the five that are the most important to us, to make sure we all ask?

So I just wondered if we have a process to figure that out.

MR. HINES: Yes, sir. Yes, sir. We, as a staff, are working on that issue right now, and have been working on it.

And it's just a process of soliciting
everyone's ideas, so that we can come to what we call question packets, which was very similar to what we used for the Judicial Proceeding Panel.

And those tend to get refined after you do a couple of site visits. You find that there are some questions that are maybe better than others and some topics that are more robust for discussion than others.

And so the staff is working on that. And it's our intent to route that around to get your input, so that we have a final product when we get out there.

I've also had discussions with Dr. Wells about -- because there has been, there's a concern presented that you need to make this as objective a feedback as we possibly can. So we've been talking with Dr. Wells on how to refine the questions and even use instructions that are part of every site visit, so that when you get that information back, you can put it in a form or a format that's more objective and less susceptible to being called anecdotal, if you
understand. Does that answer your question, sir?

BGEN SCHWENK: Yes, thank you.

MR. HINES: Yes, ma'am?

MS. CANNON: I didn't understand what you meant about Europe, since there are two locations in Europe. One is Germany, one is Italy.

MR. HINES: Yes, ma'am, good question.

We had such positive response on that particular trip that we determined, with the Staff Director and the Deputy, that we were not going to have everyone go to both sites. And so we've got basically half of the members going to Germany and half going to Italy.

BGEN SCHWENK: So when they come back from Naples talking about the admiral's villa that they had their meeting in, overlooking the bay in Capri and everything, you're not going to be on that one.

(Laughter.)

COLONEL WEIR: Just for --

BGEN SCHWENK: You're going to Germany.
COLONEL WEIR: -- for that site visit, for Italy, if you signed up for that, if you signed up for the site visit to go to Italy, that seven-hour trip that Glen was talking about, we'll probably fly, but that's going to take an extra day of travel, which we didn't anticipate doing.

So I would look at your calendars and make sure you have the additional day or two to make that trip. Because one of the things we're trying to do on these site visits is make it a little as possible impact on the units we want to talk to. And clearly having folks drive seven hours is not, so we're going to just travel all day and then get those folks the next day, so that we're not impacting them.

MR. HINES: And I don't think -- it's not going to cause, shouldn't cause too much of a problem, because that trip is the week of July 26, and it was already scheduled to end on Thursday. And so if we had to add one more day, it would still be -- it wouldn't be going over
into the following weekend or the following work
week. Any other questions on the site visits --

SGT. MARKEY: Glen, I just had one.

HON. GRIMM: This is --

MR. HINES: -- before I turn it over?

SGT. MARKEY: In addition to developing
the questions that we want to present --

MR. HINES: Yes.

SGT. MARKEY: -- are -- have we
identified specifically which components of the
system that we're -- who are we going to talk to
in particular, what disciplines they are? And
that we're going to have a representative sample
of those at the sites?

MR. HINES: Yes, Mr. Markey. So each
day, we'll have, much like our public meetings or
our prep meetings, there will be an agenda that
we prepare.

And then in addition to the agenda,
each of those sessions will be with a different,
the term I use is stakeholder. So trial counsel
will be in one session, defense counsel in
another, VLC, if we meet with the VLCs, investigators, commanders, convening authorities.

In the two training bases, there will also be a period where we're going to meet with recruits or trainees in entry-level training.

So we're working with the Service Reps to make sure that we get the right people for each panel, but we also get a sufficient number of them, and hopefully a sufficient number of them with the requisite level of experience that will be of the most value for you when you're speaking with them.

MS. BASHFORD: Thank you very much.

HON. GRIMM: Could I ask a question?

Well I just did.

MS. BASHFORD: Judge Grimm?

HON. GRIMM: Could I ask another question, just one followup on the trip? Would it be possible to have you circulate a little chart perhaps that has the dates of the trips, the people that you have as indicating a desire to attend, and maybe a point of contact, if the
individual members have some questions about travel arrangements, to get some background information?

Some of us, myself included, our schedules may have shifted, as a result of work exigencies that created situations that didn't exist before. And I just want to have the most recent information about these site trips to confirm availability, if that's possible.

MR. HINES: Yes, Your Honor. If I heard you correctly, were you just asking about the current schedule of when the trips are and which members and which staff are going to be attending each trip?

HON. GRIMM: Correct. And then maybe a point of contact, so that if we have questions about travel arrangements, for example, we could contact and get some information on that.

MR. HINES: Yes, sir. Our staff will be putting together your travel. So I'll absolutely get you that information as soon as possible.
HON. GRIMM: Thank you so much.

MR. HINES: You're welcome.

MS. BASHFORD: Thank you. Unless anybody minds, why don't we forge ahead? Which would be Colonel Pflaum with the 2020 NDAA.

MS. GALLAGHER: If you wanted to hear just a very, very brief update on your court-martial observations, I can provide that.

MS. BASHFORD: Great.

MS. GALLAGHER: Yes. The court-martial observations are still ongoing. Holidays slowed us down a little bit, but we had two more members attend courts-martial since the last meeting.

We are now into some of the members attending second courts-martial, of a different Service. And everyone is finding the experience very valuable.

I just sent out a list of over 80 courts-martial that are sexual assault courts-martial scheduled to take place between now and really June. And some people have already responded with the dates they may have available.
If everybody else can take a look at that and just get with me on that. If there's no questions, that's it.

MS. BASHFORD: Okay, thank you.

Colonel Pflaum, welcome.

COLONEL PFLAUM: Thank you very much, it's great to be back. If you recall, I testified before this group back in August, as part of the initial hearings that we conducted back in August.

But by way of introduction, I'm Colonel Pat Pflaum, I'm the Chief of the Criminal Law Division for the Office of the Judge Advocate General for the United States Army.

And I've been asked to provide an update or sort of an overview of the key provisions of the 2020 National Defense Authorization Act.

And I'll hit several items that of course impact this body directly, and some of which have already been mentioned in the earlier hearings, but also some other provisions that are
in the Act that may be of interest to this group as it looks at the investigation, prosecution, and defense of sexual assault in the Armed Forces.

For, I guess, the larger audience, I won't, of course, hit every item that's in the 2020 NDAA. It's a comprehensive document that is of course the, it's the 1,000-page statutory provisions that provide the authorization for the Department of Defense writ large. These are only the provisions that basically address military justice, and specifically sexual assault, in the Armed Forces. So with that, next slide.

The first section that is worth noting is of course Section 535, that extends the DAC-IPAD from its initial five-year charter to 10 years. So congratulations, you've been extended until 8 February 2026, where previously the expiry was 18 February 2021.

The next item of interest is Section 550, that actually appoints a new Defense Advisory Committee. This one is the Defense
Advisory Committee on the Prevention of Sexual Assault. So this charter of this committee is that it shall advise the Secretary on the following.

The prevention of sexual assault, including rape, forcible sodomy, other sexual assault, and other sexual misconduct involving members of the Armed Forces, as well as the policies, programs, and practices of the Department as it relates to the prevention of sexual misconduct.

And so the key note here is that there are of course going to be matters of joint interest with both of these bodies. And the statute actually requires coordination between these two separate Defense Advisory Committees. Next slide.

The next section that is important and specifically addresses the DAC-IPAD is a requirement to conduct an assessment of racial, ethnic, and gender disparities in the military justice system.
So this statutory provision actually has two portions of it. The first is a task to the Department of Defense, and it requires the Armed Forces to record the race, ethnicity, and gender of the victim and the accused.

It also requires the Department to gather any other demographic information about the victim and the accused as the Secretary determines to be appropriate.

And then it also requires the Services to include this data in a report that the Armed Services each produce each year under Article 146a that basically records the data of courts-martial each year. It's been called, colloquially, it's called the CAF report, but now, it is called the Article 146a report.

But then that will then drive a task to the DAC-IPAD, which requires an assessment of three things, two of them are listed here on the slide.

But a review and assessment by fiscal year of the race and ethnicity of members of the
Armed Forces accused of penetrative sexual assault or contact sexual assault offenses in an unrestricted report. Then the next is the same assessment, review and assessment by fiscal year of the race and ethnicity of members of the Armed Forces against whom charges were preferred.

And then the final task that's not listed on the slide, but is in the statute, is an assessment of the race and ethnicity of those members of the Armed Forces who were convicted of a penetrative sexual assault or other contact sexual assault offenses.

And then it requires a report from the DAC-IPAD informing the Secretary of Defense and the House Armed Services Committee and the Senate Armed Services Committee setting forth the results of those reviews and assessments.

And again, the portion of this provision is to record this data and then determine if there are any disparities that require action by the Department of Defense or by Congress. Next slide.
Outside of this statute, there are two tasks -- there are actually three, I'll address the third a little bit later, but General Schwenk brought it up earlier today.

But there are two assessments in the conference report to the National Defense Authorization Act. So this is outside the statutory language, but it's included in the report of the conferees from the HASC and SASC on the National Defense Authorization Act.

And the first is a task to the DAC-IPAD to conduct an assessment of other justice programs -- for example, mediation or restorative justice programs -- that might be appropriate to assist the victim of alleged sexual assault, particularly where that sexual assault may not have proceeded to a criminal prosecution.

So in essence, an assessment of other programs that might assist victims in the process.

The next is an assessment under RCM 1001(c) of victim impact. So as you may already
know, and of course, General Schwenk brought this up earlier, RCM 1001(c) affords victims a special right to provide input to the court-martial with respect to two items: victim impact and also mitigation. They can do this in one of two ways. They can do it through a sworn statement or an unsworn statement.

And the conferees are concerned that some of the military judges have interpreted this rule too narrowly, and as a result it's limiting what survivors are permitted to say during sentencing hearings in a way that doesn't fully inform the court of the impact of the crimes on the survivors.

So what the conferees have asked the DAC-IPAD to do is to conduct their own assessment as part of their review of courts-martial cases to determine whether this may be the case.

There's also a third task in the conference report that's related to guardians ad litem, and I'll talk about that a little bit later, with respect to a separate study the
Department of Defense has to conduct with respect to guardians ad litem.

Next is a series of provisions that do not have any specific task to the DAC-IPAD, but may be of interest. And these result to victim notification. And so the first is Section 536, that is a special statutory provision that requires the DoD to establish procedures to enable the return of personal property that's been collected from a victim as part of a sexual assault forensic examination.

And so currently, those procedures may not be as clear or as formalized as the statute would or as Congress would like, and so, they've directed the Department of Defense to establish procedures by which a victim can seek return of personal property and also, too, making sure that they're informed perhaps of the consequences that the collection of that personal property may have on their case.

Next is Section 538, which requires the notification of the victim of each
significant offense in the prosecution of the --
in the military justice system or the military
justice process and the processing of their case
specifically.

It requires two things, additionally.
It requires documentation in the case file of the
victim notifications. And also, too, it
specifically also requires documentation of a
victim's preference, whether they prefer their
case to be handled through the military justice
system or the civilian system.

Next is it requires status updates,
specifically as a case makes its way through the
system. And so the commander, as the commander
who is making determinations, they must
periodically notify the victim of the status of a
final determination on further action and on
their case.

So basically, again, it requires
status updates to the victim on the case, as it
proceeds to final determination, whether that
final determination be court-martial or non-
judicial punishment under Article 15 in the Uniform Code of Military Justice, another administrative action, or no action at all. So again, statutorily requiring victim notification. Next slide.

The next two sections that I'll address, I've consolidated them into sort of one bullet, but two sections that basically by statute increase the manpower allocated to the investigation and victim assistance in sexual assault cases.

And so the first is a requirement that Military Criminal Investigative Organizations increase their number of defense forensic examiners by at least 10 over about the next -- by at least 10, since the number that was in existence on 30 September 2019. So a statutory increase of ten defense forensic examiners.

Next is an increase in number of sexual assault investigators. And so that doesn't, the statute doesn't prescribe a specific number, but what it does prescribe is a standard.
And so the standard is that Military Criminal Investigative Organizations are to have enough investigators such that they can process their cases to the extent practicable within six months from the report. Or I should say, the initiation of the investigation.

DR. MARKOWITZ: Colonel Pflaum, excuse me?

COLONEL PFLAUM: Yes, ma'am?

DR. MARKOWITZ: Can you just clarify the MCIOs will increase the number of defense forensic examiners or digital forensic examiners?

COLONEL PFLAUM: I'm sorry, you're exactly right, it's digital forensic examiners.

DR. MARKOWITZ: Okay.

COLONEL PFLAUM: Yes, DF --

DR. MARKOWITZ: Two different things.

COLONEL PFLAUM: -- or DFEs, right.

DR. MARKOWITZ: Okay.

COLONEL PFLAUM: Yes, I misspoke there, thank you, ma'am.

Finally, it requires an increase of
VWLs, Victim/Witness Liaisons, across all the Services. In essence, the Services are directed to fill all of their shortages. So there may be allocations out there that aren't filled for one reason or the other, and that the Services are required to fill their shortages by 19 December 2020.

Next is Section 540C, that requires the Secretary of Defense to establish a policy to ensure timely disposition of sexual assault prosecution decisions, most importantly a decision not to prosecute a particular case.

And so that policy is required by June of 2020. And again, the policy is designed to ensure timely disposition of those non-prosecutable sexual related offenses.

The next three sections that I'd like to address address training. And so these three provisions are statutory provisions that direct the Department of Defense to conduct specific training.

The first is to initial disposition
authorities, IDAs. So the statute requires specific training for initial disposition authorities. And those are the authorities that were established in an April 2012 Withholding Policy from the Secretary of Defense.

So you may be familiar that the Secretary of Defense withheld disposition of certain types of sexual offenses to O-6s with the special court-martial convening authority power. And so this requires specific training for these initial disposition authorities that basically is designed to train them on the exercise of their disposition authority.

Next is Section 540B, which directs specific training on the role of commanders in the military justice system. And so commanders across all of the Services are instructed to, are required to receive uniform training on the role of commanders in all stages of the military justice process.

That training is to include investigation, prosecution, victim and assistance
rights, retaliation prevention, healthy command climate to facilitate reporting, and any other matters that the Secretary of Defense may deem as appropriate.

That training is also required to include best practices, and the Department is also required to conduct periodic surveys to identify those best practices, and then, again, incorporate them into the training.

And again, all the Services are different in terms of how they train their officers and their commanders, but the statute requires the Secretary to ensure, to the extent practicable, uniformity across all of the Services.

Finally, a section on this, with respect to training, is Section 540D. The Secretary of Defense is to establish and develop, or to develop and issue a comprehensive policy to reinvigorate the prevention of sexual assault. And so this is complementary to the Defense Advisory Committee that the statute creates.
This also directs the Secretary to establish policy to reinvigorate prevention.

And so that's -- the policy is designed to include education and training and programs designed to encourage and promote healthy relationships, empowerment of noncommissioned officers, fostering of social courage to promote intervention, processes and mechanisms to address behavior on the continuum of harm, prevention of alcohol abuse, and any other matters that the Secretary deems appropriate.

And so within 180 days after the issuance of that policy -- so that policy is required by 17 June 2020. Within 180 days after that, the Secretaries of each of the Services have to have their own policy. Next slide.

These next three provisions are those that I best categorize as affecting the prosecution of sexual assault. And so the first is Section 540J, that requires a pilot program for defense investigators. You heard that
mentioned by one of the panel members earlier, that the statute requires each of the Services to conduct their own pilot program.

There are two specific aspects of those that are worth mentioning. And the first is that the programs are supposed to be as uniform as possible across all of the Services. But also, too, by statute, it requires that a defense investigator may not speak to a victim of an offense, except through a request made through the Special Victims Counsel or another counsel, if the victim does not have their own Special Victim Counsel.

So that is one sort of aspect of the program that, as the Services are conducting their pilot programs, that will be required as a part of this new statute. And then after the pilot program, the statute requires a report after three years on those.

And I will note that the Army has already begun a program to institute defense investigators, and it will hire 12 over -- and
it's in the process of hiring 12 right now.

Next is Section 543. And so Section 543 amends 10 USC 1567a. So just -- I apologize, and I'll send a corrected copy back, but it's 1567a, Subparagraph A. And so what Section 1567a does is require notification to law enforcement, to local law enforcement, when a commander issues a military protective order, when either the victim or -- when either party, I will say, to the military protective order lives off of the military installation.

So it requires notice. This provision requires that notice to take place within seven days of the issuance. It also establishes a reporting requirement that the Services will track the number of military protective orders issued and the number that are reported to civilian authorities.

Section 550 is an additional provision to protect disclosures that are made as part of the Catch a Serial Predator or Catch a Serial Offender Program. So this is a program under the
Department of Defense whereby victims who have
made a restricted report can still provide
details with respect to their offender or the
offense to law enforcement to enable the
investigation of serial offenders.

So this provisions provides two
protections back to victims who choose to
participate in this program. And the first is
that anything that a victim says or discloses as
part of this program is protected from disclosure
under the Freedom of Information Act.

BGEN SCHWENK: Is there such a program
now?

COLONEL PFLAUM: There is such a
program now, yes. It has been started. I don't
recall the exact specific date, but it is in
effect right now. Next is -- Section 550 also
makes clear that anything that a victim says as
part of this disclosure with respect to this
program does not affect the status of their
restricted report. Again, it protects their
restricted report even though they choose to
participate in this program. Next slide.

So this is Section 541. So these provisions address basically the victim, I want to say, legal counsel that's provided to victims. And so first, Section 541 makes clear that Special Victims Counsel or Victims Legal Counsel must assist, consult and assist victims within incidents of retaliation.

So they are to assist victims in understanding their rights, assist victims in filing any complaints, and also assist victims through any other resulting military justice proceedings.

This provision, Section 541, also directs, by 20 December 2024, that staffing levels for Special Victims Counsel or Victims Legal Counsel are such that, to the extent practicable, the average client load is 25 cases for these counsel.

Section 542 mandates that a Special Victims Counsel or Victims Legal Counsel will be made available to a victim within 72 hours of
notification, or I'm sorry, 72 hours of the
request absent exigent circumstances.

So the statute gives authority to the
Secretaries to articulate what those exigent
circumstances are, but basically, again, mandates
that the Special Victims Counsel be made
available within 72 hours.

And if the Secretary determines that
a Victims Legal Counsel cannot be available
within that 72 hours, that the Secretary ensure
that the counsel be provided to the victim as
soon as possible.

Section 548 is a new statute, and I'll
address this also later in the reporting
provision. But what this does is expand the
availability of counsel to domestic violence
victims.

And so as long as the domestic
violence victim is otherwise entitled to legal
assistance under 10 USC 1044, that's the statute
that authorizes legal assistance, they would also
be entitled to counsel. That leaves to the
Services the ability to determine whether that
will be provided out of the Service's legal
assistance function or the Special Victim Counsel
function.

However, what it does also require is
a report back to Congress, actually coming up
very quickly, within 120 days of the passage of
the statute, which would be in April, on how the
Services are going to implement this, what
resources they may need, what training or other
statutory provisions may be necessary to expand
and to make this program happen.

But it also specifies that these
counsel are to receive special legal training in
the legal issues commonly associated with
domestic violence offenses. And also, too, it
directs, to the extent practicable, that they
serve as counsel in this role for not less than
two years. It also makes clear that this
relationship is to be an attorney-client
relationship, versus some other type of
relationship.
Finally, Section 550C makes clear that when a counsel is assigned as a Special Victim Counsel, that they're to receive special training on the local laws that are applicable in the jurisdiction in which they practice.

What this is designed to facilitate is the educated and informed advice that they may give to a victim on whether to elect the handling of their case through the military justice process or through the civilian jurisdiction.

And so that training must include victim rights, prosecution of criminal offenses, sentencing for conviction of criminal offenses, and protective orders. Again, the local laws that address those four items.

MS. BASHFORD: Can I just make one comment --

COLONEL PFLAUM: Yes, ma'am.

MS. BASHFORD: -- about that? It takes a fair amount of time to learn all of those things about a local jurisdiction. People get transferred from installation to installation. I
just also note, you could have soldiers in Fort Dix come to Manhattan for the weekend. So knowing New Jersey law, to the extent you can learn it that quickly, is really not going to help you very much. I think it's well-intentioned, but it's not an easy task, is what I'm trying to point out there.

COLONEL PFLAUM: Yes, ma'am, thank you very much. No, and I think it will be incumbent on the Services to look at those nuances of this election and make sure that we tailor our programs appropriately.

MS. GARVIN: Sir, if I may, just a quick question also? That training on the law and policies, with regard to the state systems, that doesn't expand the SVC/VLC's role to representing in those systems, does it? It's just if the survivor, the victim goes that route and prosecutions that route, then the SVC and VLC is not representing in that system still, correct?

COLONEL PFLAUM: That's right. I --
MS. GARVIN: Okay.

COLONEL PFLAUM: -- do not -- yes. I do not read it that way. Again, it's solely to assist the Special Victim Counsel in advising their client in making an informed decision as to which process to choose. Next slide.

The next eight provisions over the next two slides are reports that the Department of Defense is required to provide back to Congress on various aspects of the military justice system. So the first one is a recommendation as to the establishment of a separate sexual harassment punitive article. So currently under the military justice system, sexual harassment is generally punished in one of two ways -- I'll say addressed in one of two ways.

The first is through Article 93 of the UCMJ, which is a provision that prevents cruelty and maltreatment to subordinates. The second way is through violations of any applicable Service regulations or policies that address sexual
harassment.

What this provision is asking the Department of Defense to do is to provide an assessment on whether, for lack of a better word, the pros and cons, the issues involved in an actual separate UCMJ article that would address sexual harassment.

Next is Section 540F, and if I may editorialize, I think this is the most significant study that the Department of Defense has to conduct, both in scale and in consequence. But what this is is an assessment of the feasibility and advisability of an alternative military justice system for felony level offenses, where an O-6 judge advocate with significant criminal litigation experience outside the chain of command of the accused makes preferral or referral decisions.

So that is a very comprehensive study that also, by the statutory terms, requires an assessment of other military justice systems throughout the world. And that is -- the
Department of Defense has been given 300 days to conduct that study.

Next is Section 540H. And this is the study to assess the feasibility and advisability of establishing or expanding a policy that's currently applicable only within the Air Force, with respect to what's called Safe to Report.

And so what this would do is provide immunity to victims who may have engaged in collateral misconduct during or predating their sexual assault, or also if there was collateral misconduct discovered within the investigation of the sexual assault. What this provision would do would be to provide immunity to victims who report with such collateral misconduct.

Of note, though, a bill has been introduced in both the House and the Senate within the past two weeks that would create this provision by statute. Next is Section 540 -- and so --- and that would be considered as part of the 2021 National Defense Authorization Act.

Next is Section 540K. And the purpose
of this study is to conduct an assessment as to the feasibility and advisability of expanding the protections available to victims who make restricted reports. In other words, when a victim makes a restricted report, that restricted -- they can only make that restricted report and have it remain restricted to certain individuals.

What this is -- requires the Department of Defense to assess the feasibility and advisability of expanding that. In other words, victims could make restricted reports to other particular members.

For example, one of the questions by statute that we're asked is whether they might be able to make a restricted report to law enforcement. So they make a report to law enforcement, but say that they want the report to be restricted.

And also, too, to members of their chain of command or a military sponsor. And so again, they could make those reports, and they would still be considered restricted for purposes
of that policy.

BGEN SCHWENK: Or a third party.

COLONEL PFLAUM: I'm sorry?

BGEN SCHWENK: Or a third party.

COLONEL PFLAUM: Yes, and the third party, as I understand the statute, is that if a third party were to report a sexual assault, that the victim themselves isn't reporting the third party is making that, then the victim could still ask that that be a restricted report.

Next -- and what's important also on this one is that, as DoD is conducting this study, that DoD is required to consult with the DAC-IPAD on this. That report is due in June of 2020.

The next is Section 540L. And what this provisions asks or what this provision asks DoD to study -- actually it asks both DoD to study, as well as the DAC-IPAD to study the feasibility and advisability of establishing a guardian ad litem program. And General Schwenk, you mentioned this earlier in the discussion with
the judges.

The military, the DoD study is basically limited to determining whether a guardian ad litem program would be appropriate for military dependents who are victims or witnesses in a crime under the UCMJ.

So that requires a couple things by the statutory terms that we're asked to look at is what -- if the victim is under 12 or if the victim has a mental impairment or incapacity in some way, shape, or form.

The next -- what the DAC-IPAD though is required to study -- and by the way, I will say that DoD has a year to provide our study, the DAC-IPAD only has six months to conduct its study. But what the DAC-IPAD is directed to study is the advisability of providing a guardian ad litem upon the report of any sexual related offense for any victim who has not attained the age of 18.

So it would be a much broader, sort of broader group of folks that would be entitled to
a guardian ad litem under the DAC-IPAD study.

MS. GARVIN: May I ask a clarifying question? The DAC-IPAD though is just victims not witnesses, and DoD is victims and witnesses?

COLONEL PFLAUM: That's the way I understand it.

MS. GARVIN: Okay.

COLONEL PFLAUM: Yes, ma'am. Next is 540M. This is not a Department of Defense study, it's actually a GAO study. But it is noteworthy that the Congress has tasked the Comptroller General of the United States -- again, likely it would be the GAO that conducts this study -- but it's a report on the implementation of the statutory requirements on sexual assault prevention and response in the military over the period of 2004 to 2019.

So this is, again, a very comprehensive study governing 15 years' worth of statutory and policy changes that have occurred in the sexual assault arena during that time.

Section 542 directs a study on the feasibility
and advisability of establishing and maintaining
civilian positions to support Special Victim
Counsel or Victims Legal Counsel.

And so in those Services that don't
have, by policy, civilians assigned to, in
essence, as paralegals or other legal assistants
to help their Victim Legal Counsel or Special
Victim Counsel, this asks a study as to whether
that might be appropriate to maintain continuity
of representation, in the representation of
victims, and also the preservation of
institutional knowledge when it comes to
assisting victims in this capacity.

Next is Section 548, which I mentioned
earlier, but again, to the extent that -- well
the statute does require the Services to provide
counsel to domestic violence victims.

This requires the Services to report,
well actually DoD to report how the Services are
going about the implementation, any additional
resources that might be necessary, and any
additional law or policy changes that are
required to implement that.

And then finally, I'll end with the mention of the change to Article 37. And that, previously, that section was previously called unlawfully influencing the action of the court. Under the new statutory title, it's called command influence.

This is the most significant to the unlawful command influence statute since 1968. There's been quite a bit of case law that's evolved since then, but it's the most significant statutory change.

A couple key points from this that are worth mentioning, for your awareness, is that it now protects preliminary hearing officers, and Special Victims Counsel has been previously, I won't say excluded, but not specifically mentioned in the statutory protections against unlawful command influence. And it provides two significant expansions that had previously not been included in this statute.

And the first is, it allows for -- it
expressly authorizes statements regarding
criminal activity and offenses that do not
advocate for a particular disposition or a
particular court-martial finding or sentence, or
do not relate to a particular accused.

So in essence, a commander could talk
about -- it authorizes commanders to talk more
freely about criminal offenses in their
formation, with the intent to dissuade or deter
those types of offenses. It makes it clear that
that, in and of itself, is not unlawful command
influence.

BGEN SCHWENK: So this puts into
statute the old crimes not criminals, or yes,
crimes not criminals, process not results?

COLONEL PFLAUM: Yes. You may --

BGEN SCHWENK: It's now in statute?

COLONEL PFLAUM: -- have heard it as
lawful command emphasis, as the counterbalance to
unlawful command influence, but yes, sir, I think
that's accurate.

Next, it also allows more, it also
specifically allows more communication between
superior and subordinate authorities, in
discussing military justice matters, as long as
the superior does not direct a specific
disposition or substitute the subordinate's
discretion. So again, it allows a subordinate to
see counsel and mentorship, but still protects a
case from a superior commander directing a
particular disposition.

The next major expansion of this
article is that it requires an accused to show
prejudice to receive relief. In essence, the
violation must materially prejudice a material
right of the accused in order to obtain relief
under Article 37, which is, again, a change to
the current state of the law.

And so with that, I appreciate your
patience. I ran through a number of provisions
of the 2020 NDAA, I hope it wasn't too dry or too
much of a recitation of the statutory language.
But again, I tried to identify those that
specific address the DAC-IPAD, as well as other
provisions that, again, may be relevant to you as it address the investigation, prosecution, and defense, and I would also say, victim support through the military justice process.

So with that, I'm able to answer any questions, if you have any, or I'll yield the floor.

DR. MARKOWITZ: Yes, I have --

HON. GRIMM: So it seems like --

DR. MARKOWITZ: -- a quick question.

Related to Section 538, notification of significant events, does that include submission of kits, analysis of the kit, things like that, or is this just strictly related to investigatory, like the actual investigation and moving it through the actual process?

COLONEL PFLAUM: I read this to solely address process, and as it moves through sort of each step of the process. I don't know if the drafters were thinking of sort of what I would call investigative steps that are outside of the normal flow of a case, but it is certainly a
point worth noting.

DR. MARKOWITZ: So USACIL is not considered part of the calculus right now, where 538 is concerned?

COLONEL PFLAUM: That is my understanding, --

DR. MARKOWITZ: Okay.

COLONEL PFLAUM: -- but I'm willing to stand corrected if I'm wrong.

DR. MARKOWITZ: Okay, thank you.

MS. BASHFORD: Judge Grimm, did I hear that you had a comment or question?

HON. GRIMM: No, I was just going to say, it doesn't sound like Congress is very concerned about this area that we're dealing with. That was sarcastic.

MS. BASHFORD: Oh, okay. I'm sorry, Judge Grimm, did you have a comment or no?

HON. GRIMM: No, no, no, no, I was just observing that there's obviously a great deal of Congressional interest in this area that we are looking at.
MS. BASHFORD: Okay. Well --

MS. TOKASH: I heard you, Judge Grimm.

MS. BASHFORD: Meghan, do you have a comment?

MS. TOKASH: I don't --

HON. GRIMM: No, that's all right.

That's --

MS. BASHFORD: Okay.

HON. GRIMM: -- all right. It's too hard to hear, it was just an observation that there's obviously a lot of Congressional interest in this area that we are focusing on.

MS. BASHFORD: Okay.

BGEN SCHWENK: We got it, Judge Grimm, thank you.

MS. BASHFORD: Colonel Pflaum, thank you so much. I hope you have an enormous wall calendar for all of these due dates, and I hope you don't plan to sleep.

(Laughter.)

COLONEL PFLAUM: Thank you, ma'am.

Thank you very much.
MS. BASHFORD: We're just going to take a brief like stretch in place break while the staff arranges for our public comment.

(Whereupon, the above-entitled matter went off the record at 3:05 p.m. and resumed at 3:09 p.m.)

MS. BASHFORD: Welcome, Jennifer Elmore, is that correct?

MS. ELMORE: Yes.

MS. BASHFORD: Thank you very much for coming to speak with us. I know you've made a request for public comment, and we look forward to hear what you have to say.

MS. ELMORE: Thank you so much. I realize I am what stands between you and being adjourned, so I will be brief as I can be.

MS. BASHFORD: Take all the time you want.

MS. ELMORE: Thank you. I would like to thank the esteemed members of this Committee for the opportunity to be here today before you.

My name, as you shared, is Jennifer
Elmore, and I am a survivor of sexual assault, military sexual assault committed by my father, a now retired United States Army Major General.

For the past five years, I've lived and am still living as a victim through the investigation, the prosecution, and the defense of my sexual assault, first through the military justice system, and now through the civilian justice system.

Today though I'm not here as an individual, but as a representative for a broader group of military sexual assault survivors known as Survivors United. We are a group that has come together to provide a room for voices of victims and their experiences navigating the military justice system.

It is because of those firsthand experiences that we are well-equipped and eager to be active participants in creating fair and comprehensive change.

We are more than our stories. We want more than just to be told, we are sorry for what
you've experienced. We want to be as actively sought after and respected for the contribution we can make to improvement as are so many others -- legislators, experts, judges, prosecutors, defenders -- who are committed to the building of a system which is fair and functional.

One way in which we've sought to participate is through ongoing conversations with legislators on specific concerns, observations, and ideas that are based on our experiences.

Last year, we spoke with legislators on specific topic of sentencing and the restrictions placed on victims in that process. The restrictions severely limit what a victim may include in their victim impact statements, as well as how those statements are delivered.

Specific experiences we've had include: redlining of statements before being given, not being allowed to complete the statement in delivery, being cut off by judges, the inability to say anything about our preference or desire for sentencing.
While I have not yet had a chance to give an impact statement, I was close enough in the Article 32 process to have been asked to begin preparing my thoughts. Preparing myself for that moment to sit in a room with my father, look him in the eye, and tell him the impact of his actions was of extraordinary importance. To have been restricted as to what I could or could not have said was a re-enactment of the very message of insisted silence of my perpetrator.

What we know anecdotally we strongly believe represents a common experience of survivors of military sexual assault that get to this stage in the process. We do not, however, have the data to support that belief. We hope as this Committee continues to gather informing data in many areas, that this specific topic would be included in those efforts.

Victims are watching this process. They are making the determination of whether or not it is safe to come forward. Is the process fair? A victim having the freedom to speak
freely at sentencing is the one way that they can
know -- or one way they can know the answer is
yes.

In closing, I'd like to share with you
the appreciation for various members of Survivors
United who have had the opportunity to come
before you in the past. Personally, I have
experienced the results of the hard work by you
and others in -- hard work for the Armed Services
in making improvements. I did want to share a
story of a life experience with the prosecutor in
my case.

In the first meeting with the
prosecutorial team, without my having said
anything, I walked into a room and they knew the
impact of being in a room filled with members of
the Armed Services in uniform, and they showed up
in civilian clothes. It was profound --
profoundly kind.

By the time we got to the preliminary
hearing, and I was to go before the judge and be
cross examined and give a testimony, uniforms are
required. And the fancy ones, not the comfortable ones. And I was standing nervously in the hallway and the Army Captain, main prosecutor, came up to me and silently whispered to me, with her hand over her Army badge and said: this is your Army, we choose you.

Thank you for the work you are doing to put the broader facts together that allow for real change to happen. We look forward to working with you on an ongoing basis. Thank you. And I'm happy to take questions.

HON. GRIMM: Thank you.

MS. BASHFORD: Thank you, Ms. Elmore. Does anybody have questions for her?

BGEN SCHWENK: So one of the areas that you're concerned about having victims restricted is a specific sentence recommendation, or however specific they want to be. Is another -- we heard, remember, I asked -- I don't know if you were here, but I asked the judges earlier for their thoughts and read them the statute.

And one of the other areas they said
they had limited victims testimony was when there
is a piece of evidence that the judge, during the
trial, ruled was inadmissible, and the victim --
to the victim, it was a significant matter that
they wanted --

MS. ELMORE: Yes.

BGEN SCHWENK: -- because it helped
explain the impact of --

MS. ELMORE: Yes.

BGEN SCHWENK: -- the offense on them.

MS. ELMORE: Yes.

BGEN SCHWENK: Is that something else
that you think we should look at?

MS. ELMORE: Absolutely.

BGEN SCHWENK: Okay.

MS. ELMORE: I have a very passionate
answer to that, just because the completion of my
experience with sexual assault spans over a
period of 15 years. And so the totality of those
experiences sets the context for any one
experience. And so the importance of evidence
being admitted more broadly than just what
otherwise might make sense is incredibly important, in my opinion, in these cases.

BGEN SCHWENK: Okay. Do you have any other -- if you do now know of other categories, that's great. Please let us know what they are.

MS. ELMORE: You shouldn't have asked me that, I have a list of 20 back here.

(Laughter.)

BGEN SCHWENK: Well then could you give us or give the staff a list, and --

MS. ELMORE: Yes.

BGEN SCHWENK: -- that way, there are specific things that we can then talk to people about --

MS. ELMORE: Yes.

BGEN SCHWENK: -- because we're about to go on site visits and --

MS. ELMORE: Yes.

BGEN SCHWENK: -- and ask people in the field and talk to Special Victims Counsel and Victims Legal Counsel and --

MS. ELMORE: I'd be happy to.
BGEN SCHWENK: -- that would help us as we step forward. And so --

MS. ELMORE: I'd be very happy to.

BGEN SCHWENK: -- thank you very much for being here, I --

MS. ELMORE: Thank you.

BGEN SCHWENK: -- appreciate it.

MS. BASHFORD: Mr. Kramer?

MR. KRAMER: Thank you for being here, I had a question. You were here all day, I --

MS. ELMORE: About halfway through the day --

MR. KRAMER: Okay.

MS. ELMORE: -- so I missed the judges' testimony.

MR. KRAMER: So I have -- okay. The judges told us that they don't give reasons at sentencing for why they have imposed the sentence, they just say evidently a term of years.

And I thought, both for the defendant who's been convicted and the sentence is imposed,
as well as the victim, --

MS. ELMORE: Yes.

MR. KRAMER: -- that they would want to

know the reasons the judge imposes the sentence.

I'm just curious if -- obviously from the

victim's viewpoint -- if you would want to hear
the reasons why the judge imposed the sentence,
or if just --

MS. ELMORE: Or acquitting.

MR. KRAMER: -- the ultimate sentence?

Yes.

MS. ELMORE: It is something we've had

a lot of sentiment about and have experienced

firsthand, and it is very frustrating for there
to be silence on either side, whether it's a
conviction, acquittal, or for that matter, any
judgment that is made.

One of our group members, in fact, had

a full acquittal in her case and has nothing to
point to as to why that was the case and really
is shut down even in asking the question. Right?

There's no dialogue. So extraordinarily painful.
And again, back to my comment about victims watching, I know one of the things that Department of Defense and the Armed Services are focusing on are getting accurate numbers of how many -- what exactly is the extent of this epidemic? And I believe it is.

I believe people are watching. And I -- the facts come together and for victims that see these things, where I'm going to really put myself out there and incur a huge cost to tell a story, and I know my chances are one direction or the other of there ever becoming a conviction, and then not to have an explanation is very heavy on the side of not saying anything.

MS. BASHFORD: Ms. Tokash, did you have a question?

MS. TOKASH: I didn't have a question, I just wanted to say thank you very much for coming in to speak to us today. We really appreciate it.

HON. GRIMM: And this is Paul Grimm, Chair, if I could have one comment to add to echo
entirely what Ms. Tokash said.

In the federal courts, I know that there are statutory victims' rights that have been enacted by Congress in the last few years. And it is very frequent to have both written submissions in federal court that are provided in sentencing.

And that it is not at all infrequent for me to read from, if not the entirety, sometimes unfortunately I get dozens of them, and reading from all of them is not possible, but to help the defendant understand the impact of the conduct.

And also an opportunity to speak in person. And whether or not the victim chooses to do it or not, it has been my personal observation that the ability of the victim to have their experience shared with the defendant is something that is instructive not only to the defendant, but also -- even if the outcome is a lesser sentence than what the victim might have hoped for -- helps them understand.
And I have been enormously impressed by the grace and dignity of the victims under these circumstances, and sometimes, quite candidly, their forgiveness.

MS. BASHFORD: Thank you.

MS. CANNON: Thank you for being here.

I believe you mentioned that you testified, if I'm not correct, correct me, but you testified at a 32 hearing?

MS. ELMORE: The preliminary hearing --

MS. CANNON: Right.

MS. ELMORE: -- before the 32.

MS. CANNON: Yes. And how did you feel about that? Because we're looking into questions about that, and we want to know your feelings about that.

MS. ELMORE: My -- the advice and counsel that I was given prior to the preliminary hearing was that much work had been done to protect victims from having to testify at the preliminary hearing.

In this particular case, the advisors,
the prosecutorial team felt it was very important
for the judge to hear from me in the preliminary
hearing. And so it was my choice to either take
the protection that I'm afforded or to testify,
and I chose to testify.

And it was -- there's a lot to say.

It was extraordinarily difficult, and I've had a
vision in years gone by that that moment of
sitting in a courtroom and being allowed to
answer questions truthfully would make a
difference and fix something.

And it was important, but then to be
subject to cross examination and having judgments
made on different aspects and different
activities, that for me were devastating, some
thrown out, some kept in, and know that my
testimony was having a lot to do with what was
given validity and what wasn't, was a learning
experience.

MS. CANNON: One of our concerns is if
you don't testify at the preliminary hearing, and
it does go to court-martial, you have no idea and
it's kind of like --

MS. ELMORE: Yes.

MS. CANNON: -- a blind side, in --

MS. ELMORE: Yes.

MS. CANNON: -- some respects. So
given that --

MS. ELMORE: I would have been better
prepared for the 32, had we made it there.

MS. CANNON: Okay, thank you.

MS. ELMORE: Yes.

MS. GARVIN: Thank you for being here;
it's good to see you. I want to make sure I
understood part of your statement. You mentioned
that one of the things that some of your members
have experienced is, I think you talked about
redlining or --

MS. ELMORE: Yes.

MS. GARVIN: -- cutting out, which
certainly used to happen in the civilian system a
couple of decades ago. But you're saying some of
your members actually --

MS. ELMORE: Yes.
MS. GARVIN: -- have had people redline?

MS. ELMORE: That's correct.

MS. GARVIN: Okay, thank you.

MS. BASHFORD: Thank you very much for --

MS. ELMORE: Thank you so much.

MS. BASHFORD: -- coming and sharing your experience, it will be very helpful to us as we continue our work in this area.

MS. ELMORE: Thank you --

MS. BASHFORD: Thank you.

MS. ELMORE: -- so much, I appreciate it. Thank you.

MS. BASHFORD: Colonel Weir, do you have any last matters?

COLONEL WEIR: I just want to draw your attention to the next public meeting is May 15th, but I know the working groups have had some conversations about meeting before or in-between that public meeting.

BGEN SCHWENK: No.
COLONEL WEIR: There's some more work to be done. So the staff will be contacting you to take care of that.

Next week, I'll shoot out an email that gives you almost the next year and a half's dates that have been selected for the public meetings, but they're going to fall roughly in the same months.

I just want to emphasize the importance of these courtroom or court-martial observations, because what we envision as a staff, you've heard a lot of information about what transpires in a courtroom. So when you all go out and observe courts-martial, observe courts-martial from different Services.

And then what we would like to have, if not everybody, a large number of the Committee, that has gone and witnessed two, three, four, however many you can fit into your schedule, and then come back and have a discussion about what you saw, the good, the bad, not specifically pointing out Prosecutor Weir was
horrible, but generally what you saw in those courts-martial.

I think the members who have seen trials already have a frame of reference when they're listening to what the military judges are talking about. And so I think that's vitally important.

Remember, for the site visits, you all can submit questions about what you think is important. So if you are a former high speed investigator, that would be the person who would submit questions for investigators.

(Laughter.)

COLONEL WEIR: So what we will do is gather all those questions up in a format, and there will be prosecutor questions by the various types of folks we want to talk to. And then we'll try to come up with a, I won't say a one to whatever it is, number one's the most important, but we'll try to get those questions in some type of order that makes sense, as far as trying to make sense out of the site visits.
And I think it's important that, as was pointed out by Glen, that Dr. Well says these site visits can have research, analysis can be done on those questions. And so it would make sense to have all the same questions asked, or refined as we go to various installations.

Ma'am, that's all I have.

DR. SPOHN: Just for planning purposes, the site visits, you have them listed for three days. Is that two days of travel and one day of site visit, or is that a three-day site visit?

COLONEL WEIR: That's including travel.

DR. SPOHN: Including travel. Thank you.

MS. BASHFORD: Mr. Sullivan?

MR. SULLIVAN: This meeting is closed.

(Whereupon, the above-entitled matter went off the record at 3:26 p.m.)
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