

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

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PUBLIC MEETING

+ + + + +

TUESDAY  
DECEMBER 6, 2022

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The Advisory Committee met in the Grand Ballroom at the Ritz-Carlton Pentagon City, 1250 South Hayes Street, Arlington, Virginia, at 9:00 a.m., the Honorable Karla N. Smith, Chair, presiding.

PRESENT

Hon. Karla N. Smith, Chair  
MG(R) Marcia Anderson\*  
Ms. Martha Bashford  
Mr. William E. Cassara\*  
Ms. Meg Garvin  
Hon. Suzanne Goldberg  
Hon. Paul W. Grimm\*  
Mr. A.J. Kramer  
Ms. Jennifer Gentile Long  
Ms. Jenifer Markowitz\*  
Hon. Jennifer O'Connor\*  
BGen(R) James Schwenk\*  
Dr. Cassia Spohn  
Ms. Meghan Tokash  
Hon. Reggie Walton

**ALSO PRESENT**

Mr. Dwight Sullivan, Designated Federal Officer

**DAC-IPAD STAFF**

Colonel Jeff A. Bovarnick, JAGC, U.S. Army,  
Director

Ms. Julie K. Carson, Deputy Director

Mr. Dale L. Trexler, Chief of Staff

Ms. Stacy Boggess, Senior Paralegal\*

Ms. Audrey Critchley, Staff Attorney

Ms. Alice Falk, Technical Writer-Editor

Ms. Theresa Gallagher, Staff Attorney

Ms. Nalini Gupta, Staff Attorney\*

Ms. Amanda Hagy, Senior Paralegal

Mr. R. Chuck Mason, Staff Attorney

Ms. Marguerite McKinney, Management & Program  
Analyst

Ms. Meghan Peters, Staff Attorney

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri Saunders, Staff Attorney

Ms. Kate Tagert, Staff Attorney

Ms. Eleanor Magers Vuono, Staff Attorney

Dr. William Wells, Criminologist\*

\*Via video-teleconference

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Public Meeting Adjourned

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

2 9:01 a.m.

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

9 This meeting of the DAC-IPAD is now  
10 officially open. Judge Smith, you have the con.

11 CHAIR SMITH: Thank you, Mr. Sullivan,  
12 and good morning, everyone. I want to welcome the  
13 members and all attendees to the 25th public  
14 meeting of the Defense Advisory Committee on  
15 Investigation, Prosecution, and Defense of Sexual  
16 Assault in the Armed Forces or DAC-IPAD.

17 Today's meeting will be in person and  
18 by videoconference via Zoom for members and  
19 presenters. For those joining by video, please  
20 mute when not speaking. If we have technical  
21 difficulties, we will break for ten minutes, move  
22 to a teleconference line, and send the

1 instructions by email.

2 The Secretary of Defense created the  
3 DAC-IPAD in accordance for the Fiscal Year 2015  
4 National Defense Authorization Act. The DAC-  
5 IPAD's statutory purpose is to advise the  
6 Secretary of Defense on the investigation,  
7 prosecution, and defense of allegations of sexual  
8 assault, and other sexual misconduct involving  
9 members of the Armed Forces.

10 Representatives from the Military  
11 Services Criminal Law divisions, who serve as  
12 specific experts and liaisons to their services,  
13 have joined us today. Welcome.

14 We will begin today with a panel of  
15 service representatives to discuss the court-  
16 martial panel selection process. This continues  
17 the committee's discussion and education on a  
18 topic of importance to the committee and that is  
19 the difference in the military's process for  
20 selecting panel members under the UCMJ versus the  
21 civilian practice of random jury selection under  
22 the Sixth Amendment.

1                   The remainder of the morning is  
2 dedicated to victim issues with a focus on victim  
3 impact statements. We will hear from Survivors  
4 United, the victims' advocate group dedicated to  
5 helping victims of sexual assault committed by  
6 members of the Armed Forces. We will then hear  
7 from a panel of representatives from the Services'  
8 Special Victims Counsel, Victims Legal Counsel  
9 Programs.

10                   After lunch, we will welcome back the  
11 General Counsel of the Military Departments and  
12 the Service Judge Advocate's General and Staff  
13 Judge Advocate to the Commandant of the Marine  
14 Corps. This panel will provide an update on the  
15 status of the four offices of Special Trial  
16 Counsel and answer questions from the committee.

17                   After a break, we have a staff briefing  
18 on racial disparity reports and will close out the  
19 day with a public comment session.

20                   The public meeting will continue  
21 tomorrow morning beginning at 8:55 a.m. and the  
22 full committee will receive updates from our three

1 subcommittees that were formally established with  
2 subcommittee members appointed after our September  
3 meeting. We will hear from the Case Review  
4 Subcommittee, chaired by Ms. Bashford; the Special  
5 Projects Subcommittee, chaired by Ms. Tokash; and  
6 the Policy Subcommittee, chaired by General  
7 Schwenk.

8 I want to thank all of the members for  
9 their work on subcommittees between full committee  
10 meetings.

11 The public meeting will close out  
12 tomorrow morning with a deliberation session  
13 focused on our fifth annual report due in March  
14 2023, and the meeting wrap up as we plan our next  
15 meeting in March and look toward our work in 2023.

16 This meeting is being recorded and  
17 transcribed and a complete written transcript will  
18 be posted on the DAC-IPAD website at [www.dac-](http://www.dac-ipad.whs.mil)  
19 [ipad.whs.mil](http://www.dac-ipad.whs.mil).

20 If a meeting attendee wants to make a  
21 public comment, please submit your name no later  
22 than 2:00 p.m. to [whs.pentagon.em.mbx.dac-](mailto:whs.pentagon.em.mbx.dac-)

1        iPad@mail.mil. Comments will be heard at my  
2        discretion at the end of today's session.

3                    To assist the court reporter and to  
4        avoid multiple people speaking at the same time,  
5        committee members should signal if they have a  
6        question or wish to speak by stating your name and  
7        waiting to be acknowledged before proceeding.

8                    Thank you to everyone for attending  
9        today.

10                   Over to you, Colonel Bovarnick, to  
11        start the meeting. Thank you.

12                   COL BOVARNICK: Thank you, Chair Smith.  
13        I just have a quick update on committee action  
14        since our 24th Public Meeting on September 21st,  
15        2022 and Chair Smith mentioned briefly. On  
16        September 24th, the DoD General Counsel formally  
17        established the DAC-IPAD's three permanent  
18        subcommittees, the Case Review Subcommittee, the  
19        Policy Subcommittee, and the Special Projects  
20        Subcommittee, and approved separate terms of  
21        reference for each subcommittee.

22                   On October 18th, the Secretary of



1 Defense appointed the following members to each  
2 subcommittee: Case Review Subcommittee, Ms.  
3 Bashford as the chair, Ms. Garvin, Ms. Long, and  
4 General Schwenk. Policy Subcommittee, General  
5 Schwenk as the chair, General Anderson, Honorable  
6 Goldberg, Honorable O'Connor, and Judge Smith.  
7 Finally, the Special Projects Subcommittee, Ms.  
8 Tokash is the chair, Judge Grimm, Mr. Kramer, Dr.  
9 Markowitz, Dr. Spohn, and Judge Walton. The  
10 subcommittees, as noted, will provide updates on  
11 their activities tomorrow.

12 With that, I'm going to hand it off to  
13 Ms. Teri Gallagher, who is going to introduce the  
14 topic and presenters for our first session.

15 MS. GALLAGHER: Good morning, Chair  
16 Smith and committee members. It's my pleasure to  
17 welcome representatives from each service to  
18 provide the committee information on panel  
19 selection processes and training. Each has  
20 experience as a Staff Judge Advocate advising  
21 convening authorities on panel selections. Their  
22 biographies can be found at Tab 2(a) in your

1 public meeting read ahead materials. Each  
2 representative will provide a five-minute  
3 introduction to their service's processes and then  
4 be available to address questions from the  
5 committee.

6 Tab 2(c) of your materials contains the  
7 text of UCMJ Article 25(e)(2) which provides the  
8 criteria for selection of panel members by the  
9 convening authority.

10 Tab 2(d) contains sample documents used  
11 by each service in their panel selection process.

12 This presentation is a continuation of  
13 the discussion from the last meeting where in  
14 response to your questions, Major Dray from the  
15 Army JAG School and Colonel Bovarnick provided  
16 general information on panel selection and  
17 information specific to the Army panel selection  
18 process.

19 Tab 2(d)(5) contains sample of the Army  
20 selection documents referenced at the prior  
21 meeting, including potential panel member  
22 nomination documents, convening authority

1 selection documents, convening orders, and excusal  
2 requests.

3 Colonel Kennebeck, Chief of the Army  
4 Criminal Law Department, is here to provide  
5 additional information on the Army processes.

6 Our first presenter will be Colonel  
7 Shannon Sherwin, the Staff Judge Advocate for the  
8 Air Force Air, Education, and Training Command  
9 joining us virtually from Texas. She will be  
10 followed by Captain Andrew House, the Staff Judge  
11 Advocate of the U.S. Naval Academy; Colonel  
12 Christopher Tolar, Deputy Staff Judge Advocate to  
13 the Commandant of the Marine Corps; Commander  
14 Kismet Wunder, Executive Officer for the Coast  
15 Guard Legal Services Command in Norfolk, Virginia;  
16 and finally, Colonel Kennebeck.

17 Chair Smith, at this time I would like  
18 to turn the floor over to Colonel Sherwin for her  
19 introductory remarks.

20 COL SHERWIN: Thank you very much.  
21 Good morning, Chair Smith, committee members,  
22 everyone. It's a pleasure to be here today and

1 thank you for the opportunity to speak here today  
2 on behalf of the Air Force to introduce panel  
3 selection process.

4 I am currently the Air Education  
5 Training Command Staff Judge Advocate sitting down  
6 here in San Antonio, Texas, so thank you for  
7 letting me appear virtually.

8 The member selection process in the Air  
9 Force starts at the installation level and in  
10 accordance with Department of the Air Force's  
11 Instruction 51-201 which is our administration of  
12 military justice. Our squadron commanders  
13 nominate a portion of their eligible officers and  
14 enlisted members up through their chain of command  
15 to their group commanders who then pass that  
16 information over to the Installation Legal Office.  
17 The Installation Legal Office places them in a  
18 pool of members for a certain period of time and  
19 that period of time can be anywhere from three to  
20 six months. Those nominating commanders, whether  
21 they're the squadron commander or the group  
22 commander, do have access to the personal records

1 of all of the individuals that they are going to  
2 nominate for panel selection and to be put in that  
3 pool. They look at those eligible officers as  
4 those that meet the criteria of Article 25 and the  
5 Rule for Court-martial 502.

6 The Legal Office will keep that pool  
7 and when they need to do a referral for a court-  
8 martial, whether that is at the special court-  
9 martial convening authority level or the GCM  
10 level, they will look at that pool and then they  
11 will take that pool and work that authority, the  
12 convening authority package for referral.

13 They will compile a list of officers  
14 and enlisted members depending on the type of  
15 court. The number will change depending on the  
16 type of court, and the selection panel, whether  
17 they're officers, enlisted or a combination of the  
18 two. It will depend on the accused.

19 They will review that group of panel  
20 members for disqualification such as the accuser,  
21 a witness, members of the same unit. Maybe they're  
22 unavailable for the time period that they're

1 looking at for trial because of a temporary duty  
2 or leave or some other reason that they cannot sit  
3 during that time frame.

4 They will compile that list and that  
5 list will then be provided to the special court-  
6 martial convening authority, along with what we  
7 call a data sheet, a member data sheet. And that  
8 data sheet will give all of the Article 25  
9 criteria plus any court-martial experience that  
10 they may have, discharge, administrative discharge  
11 panel membership that they may have, or anything  
12 that may keep them from being able to sit as a  
13 member.

14 That whole package will go up to the  
15 special court-martial convening authority. It will  
16 remain there for obviously, the special court-  
17 martial, and then if not, then that nominating  
18 package, so the SCMCA will also nominate members  
19 that he or she believes fit the criteria of  
20 Article 25 to provide to the GCMCA for his or her  
21 consideration as well.

22 All of those documents are forwarded to

1 the GCMCA SJA Office who then will draft and sign  
2 the pretrial advice and provide that potential  
3 list of members to the GCMCA for consideration.

4 During that discussion, the convening authorities  
5 are advised that they can choose any member under  
6 their chain of command or those that are provided  
7 by another chain of command, for instance, our  
8 tenant unit sitting on the installation.

9 They can also ask for additional panel  
10 members. If they do not believe that that is  
11 representative of their installation, the court  
12 member of the Air Force or the accused, they are  
13 able to do write-ins if they need to or simply ask  
14 for more panel members.

15 Once the GCMCA picks those members and  
16 considers everything in that package to include  
17 those data sheets that the members provide during  
18 their nomination process, then that list comes  
19 back to the GCMCA SJA and then the special order  
20 is produced.

21 In the event replacement members are  
22 necessary, but most GCMCA and special court-

1 martial convening authorities will allow the SJAs  
2 and delegate that down to the SJA to be able to  
3 excuse up to one third of the panel members prior  
4 to needing to do a full replacement package. But  
5 in the event that we do need to a full replacement  
6 package, those processes -- the members actually  
7 will do the excusal and that will route to their  
8 chain of command after the special court-martial  
9 convening authority to then be forwarded to the  
10 GCMCA as well.

11 Those nominating commanders who  
12 recommend that their member be excused will  
13 provide two additional names of somebody who is  
14 available and meet the Article 25 criteria so that  
15 the GCMCA and the special court-martial convening  
16 authority do have the ability to have decision  
17 space and pick from those individuals.

18 In the event that that is not enough,  
19 obviously, our convening authorities can ask for  
20 additional members and that data pool that was  
21 originally utilized can be utilized again.

22 Convening authorities are detailing the



1 best qualified person for courts-martial in  
2 accordance with the criteria of Article 25, UCMJ  
3 and the rules for Court-martial 502. Where the  
4 accused is enlisted, the convening authorities  
5 will detail or may detail a court-martial panel of  
6 all officers, all enlisted or a combination of the  
7 two.

8           The SJAs at all levels will ensure that  
9 no involvement by trial counsel or the assistant  
10 trial counsel is used in the identification of the  
11 prospective court members. SJAs will reiterate to  
12 the convening authority and duty iterate  
13 throughout the entire process the Article 25  
14 criteria and we will maintain it at the SJA levels  
15 all of the documents submitted to the convening  
16 authority in the course of detailing members,  
17 those are those data sheets.

18           The convening authorities do detail a  
19 sufficient number of members so that after the  
20 exercise of challenges, the required amount of  
21 members remain depending on the type of court. So  
22 you can see packages that go up to the GCMCA with

1 over 30 names on that panel so that they have the  
2 right amount to pick from and they'll pick  
3 anywhere from 17 to 18 to 19 to 20.

4 So that is just a quick overview of the  
5 Air Force's process and thank you for your time  
6 and I stand by for any questions.

7 CHAIR SMITH: Thank you, Colonel  
8 Sherwin. Up next, we have Captain House from the  
9 Naval Academy. Good morning.

10 CAPT HOUSE: Good morning, madam chair,  
11 distinguished members of the panel. Thank you for  
12 this opportunity to address the panel today.

13 The member selection process lies at  
14 the heart of an effective, fair, and responsive  
15 military justice system that seeks to secure good  
16 order and discipline in a manner consistent with  
17 our ideals, due process, and the rule of law.

18 By way of background, I had the great  
19 honor to serve as a Navy Judge Advocate for 25  
20 years, the majority of which either as a defense,  
21 Navy Defense Counsel, at both the trial and  
22 appellate level, or as a Staff Judge Advocate,

1 managing and executing the court-martial process  
2 from the perspective of the convening authority.

3 I've also enjoyed the opportunities to  
4 work with the Navy Victims Legal Counsel Program  
5 and to engage both U.S. Marine Corps and U.S.  
6 Coast authority in litigating cases at trial.

7 With regard to member selection, I  
8 would suggest at the outset that our ability in  
9 the military to rely on established articles per  
10 the UCMJ, the rules for courts-martial, and an  
11 often standardized members collection and  
12 selection process increases our ability to meet  
13 our obligation to not only convene courts, but in  
14 my opinion to do so with court members who take  
15 their responsibilities seriously and who stand out  
16 for their professional record in meeting such  
17 duties.

18 The process starts with Article 25 of  
19 the UCMJ whose sum effect is to require convening  
20 authorities to appoint members who have  
21 distinguished themselves in judgment, maturity,  
22 and deportment. Professional expertise, life

1 experience and appropriate temperament all bear  
2 towards selection and service on a military  
3 members panel.

4 In my own practice, Article 25 serves  
5 as the basis for engaging, informing, and  
6 assisting convening authorities in the member  
7 selection process. These are the factors directly  
8 discussed and used and set with that convening  
9 authority to seat a panel.

10 In my experience, these factors lead to  
11 panels which include educated, engaged, and  
12 inquisitive members who faithfully review the  
13 evidence, hold the Government to its burden, and  
14 follow guidance from the military judge as to the  
15 conduct and content of a trial. They follow those  
16 orders because they are used to following orders  
17 and they do their duty because it has become their  
18 nature to do so.

19 This nature, when coupled with the  
20 typical administrative and almost antiseptic  
21 members collection process in my experience  
22 provides the Government a forum where they will

1 have to meet their burden of proof and defendants  
2 an environment where their service is respected  
3 and their rights, including their right to be  
4 presumed innocent, are honored.

5 While the precise members collection  
6 and selection practice may differ slightly among  
7 various services or commands, the process is  
8 governed by the same rules and typically requires  
9 the convening authority to draw upon a large and  
10 diverse pool of potential members varying in rank,  
11 age, career designator, duty assignments,  
12 professional history, and personal background.

13 In larger fleet concentration areas  
14 like during a prior assignment of mine to Navy  
15 Region Mid-Atlantic in Norfolk, this required  
16 collection and consideration of a pool of  
17 literally hundreds of officers and enlisted  
18 personnel drawn from multiple subordinate commands  
19 who are personally unknown to the convening  
20 authority, but who are nominated by their  
21 respected commanders as individuals who meet the  
22 standards for selection set by the UCMJ.

1           Even where those pools are smaller, as  
2           in my current assignment to the U.S. Naval  
3           Academy, those same responsibilities apply to the  
4           convening authority who may know potential members  
5           more closely, but in my experience is firmly and  
6           fully committed to providing a fair trial. Our  
7           rules then offer both the Government and the  
8           defense the chance to robustly challenge that  
9           expectation at trial.

10           Navy Judge Advocates are repeatedly and  
11           continuously trained in member selection matters,  
12           while executing military justice duties, to  
13           include real time updates when appellate court  
14           decisions impact or alter the existing practice.  
15           These counsel are then responsible for training  
16           and advising their superiors when they meet with  
17           or advise them in member selection decisions.

18           In the end, Article 25 and the  
19           selection process I have described yield, in my  
20           view, a potential panel that is both committed to  
21           serving the ends of justice while remaining  
22           respectful of the rights of the accused.

1                   Thank you again for this opportunity  
2                   and I look forward to answering your questions.

3                   CHAIR SMITH: Thank you, Captain. Up  
4                   next, we have Colonel Tolar.

5                   COL TOLAR: Good morning, Chair Smith  
6                   and committee members. Thank you for inviting the  
7                   Marine Corps to be here. I'm happy to present our  
8                   take on today's panel.

9                   Like the other services, the Marine  
10                  Corps's panel selection process is based on and  
11                  complies with the criteria of Article 25 of the  
12                  UCMJ, particularly the requirement that the  
13                  convening authority personally select members to  
14                  serve on the panel who the convening authority  
15                  believes are best qualified by reason of age,  
16                  education, training, experience, length of  
17                  service, and judicial temperament.

18                  There is not a standard process across  
19                  the Marine Corps and each convening authority  
20                  exercises discretion in the manner of identifying  
21                  and selecting those who are best qualified.

22                  The SJA provides legal advice

1 consistent with Article 25 to both the convening  
2 authority and to any command members nominating  
3 potential members for the convening authority to  
4 ultimately select. Typically, a convening  
5 authority will assign a committee to work to  
6 establish a standing panel of officers and  
7 enlisted Marines to serve on any courts-martial  
8 ultimately referred to it. Convening authorities  
9 may also sign a convening order for a specific  
10 case.

11 Convening orders are often signed weeks  
12 or months before a case is referred to a standing  
13 panel and before the court-martial ultimately  
14 convenes. Consequently, it is common for members  
15 on the convening order to be unavailable for the  
16 court-martial due to any number of reasons  
17 including leave, temporary duty, deployment, or  
18 receipt of orders to a new duty station. In such  
19 cases, prior to assembly of the court-martial, the  
20 convening authority may excuse those members from  
21 the panel and select new members to replace them  
22 using Article 25 criteria.



1           Standing panels are usually kept in  
2 place for one year and sometimes through the  
3 duration of the convening authority's command,  
4 although there is no standard in the Marine Corps.

5           Let me run through a quick overview of  
6 the typical process in the Marine Corps. So  
7 typically, the convening authority through the SJA  
8 will direct subordinate commanders or perhaps  
9 primary staff members such as the G1, G2, G3, et  
10 cetera, to nominate a certain number of officers  
11 and sometimes enlisted Marines of varying grades  
12 to potentially serve on the court-martial panel.  
13 They are directed to use Article 25 criteria when  
14 nominating potential members and potential members  
15 usually complete a member questionnaire for  
16 submission to and consideration by the convening  
17 authority.

18           Once compiled, the SJA typically builds  
19 a package for the convening authority containing  
20 an alphabetical roster of all members of the  
21 command and then the completed questionnaires and  
22 printouts from the Marine Corps total core system

1 are also provided for the nominated members.

2 The SJA will advise the convening  
3 authority that he or she must personally select  
4 the members the convening authority believes are  
5 best qualified by Article 25 criteria, that any  
6 member of the command may be chosen and the  
7 convening authority is not limited only to those  
8 who have submitted questionnaires.

9 SJA will also recommend the convening  
10 authority to pick a certain number of members, for  
11 instance, 20 to 30 to 40 for his consideration and  
12 will request the convening authority initial the  
13 alphabetical roster next to the names of the  
14 members chosen to ultimately serve on the panel.

15 The SJA will take this information,  
16 draft a convening order and return it to the  
17 convening authority for signature. If a member is  
18 excused prior to assembly of the court-martial and  
19 new members are needed and if the convening  
20 authority did not appoint alternate members, the  
21 convening authority uses the same process to  
22 choose new members. A modified convening order is

1 drafted and signed by the convening authority,  
2 removing the excused member and adding the new  
3 members.

4 As previously stated, convening  
5 authorities use Article 25 criteria to select  
6 panel members. When it comes to consideration of  
7 race and gender in the selection process, the  
8 convening authority may take race and gender into  
9 account as seeking good faith to ensure the court-  
10 martial panel is representative of the military  
11 population. However, a convening authority is  
12 constitutionally prohibited from including or  
13 excluding a potential member based on gender  
14 and/or race with the intent of achieving a  
15 particular result as to findings or sentence.

16 Several means of training are available  
17 to members, service members who are involved in  
18 the court-martial process. Judge Advocates attend  
19 a basic lawyer course at Naval Justice School.  
20 They may attend basic or advanced Staff Judge  
21 Advocate courses at the Naval Justice School, at  
22 the Army JAG School, and they may even attend the

1 graduate course for one year of academic training  
2 at the Army JAG School.

3 Commanders may attend the Naval Justice  
4 School Senior Leader Course intended for 05 and 06  
5 commanders to teach them the nuts and bolts on how  
6 to administer their commands. And in the Marine  
7 Corps, new 05 and 06 commanders are required to  
8 attend Cornerstone, which is a two-week period of  
9 instruction, again, instructing commanders on how  
10 to administer their commands. That includes a full  
11 day of legal breakout sessions administered by two  
12 senior Judge Advocates in which they use vignettes  
13 to walk through various scenarios including panel  
14 selection and unlawful command influence.

15 And then finally, legal officers and  
16 other members of the command also have training  
17 available to them. They can attend the Naval  
18 Justice School legal officer course, and then  
19 oftentimes the local legal services support  
20 section will hold a day or two of training to  
21 instruct those members involved in facilitating  
22 the panel selection process.

1 Thank you.

2 CDR WUNDER: Good morning, Chair Smith  
3 and members of the DAC-IPAD. Thank you for the  
4 opportunity to participate in this important work.  
5 I'm lucky to be joined by all of my DoD colleagues  
6 and their wealth of experience on all things  
7 military justice, especially the court-martial  
8 convening process.

9 As I'm sure you are aware, but it is  
10 worth highlighting, although we all operate under  
11 the same rules, the Coast Guard is different. The  
12 Coast Guard is different because we are a smaller  
13 service. We deal with less courts-martial on an  
14 annual basis and because we have centralized our  
15 prosecution functions under one command. Right  
16 now, that command is the Legal Service Command  
17 which will be transitioning to the new Office of  
18 the Chief Prosecutor next year.

19 The Coast Guard's convening authorities  
20 are also different than their DoD counterparts.  
21 Our general court-martial convening authorities,  
22 in large part, are responsible for a smaller

1 number of members who are often spread over a  
2 multi-state AOR. In light of these facts, the  
3 Coast Guard has developed techniques to account  
4 for our differences. Specifically, our commands  
5 frequently make their members available to other  
6 commands when they are selecting members. We  
7 often use nominations from commands outside of or  
8 subordinate to the convening authority, and we  
9 most frequently use standing panels.

10 Our Staff Judge Advocates and convening  
11 authorities work closely together on a myriad of  
12 legal issues including military justice. And  
13 while this is not exclusive to the Coast Guard, we  
14 feel like there is a synergy between the SJA  
15 offices and our client commands.

16 And so when the panel selection process  
17 is required, the Coast Guard Staff Judge Advocates  
18 already have an established relationship with  
19 their principals. We found that this helps with  
20 the relatively smooth court-martial convening and  
21 panel member selection process.

22 Additionally, our legal program is

1 small enough that if there's a need to engage with  
2 other legal offices to facilitate a robust pool of  
3 potential panel members, the Coast Guard Staff  
4 Judge Advocate cadre all know each other and work  
5 well to accomplish this mission.

6 Addressing some of the proposed  
7 questions to the panel, the Coast Guard conducts  
8 training with our commanders on their roles and  
9 responsibilities dealing with military justice and  
10 do address panel selections and context to that  
11 training. But because we convene less courts-  
12 martial, Staff Judge Advocates generally provide  
13 desk-side training when there is a need to select  
14 a panel with our convening authorities.

15 With the exception of advising that  
16 race and gender and all other protected categories  
17 cannot be used to exclude any panel members, race  
18 and gender, although authorized to be considered,  
19 are generally not part of the SJA's advice on  
20 panel member selection. Stated otherwise, the  
21 Coast Guard does not have a practice of selecting  
22 panel members because of any particular race or

1 gender.

2           Additionally, even if that was a  
3 consideration used by a convening authority,  
4 because our standard practice is using standing  
5 panels, it would be ineffective because the  
6 convening authorities are not creating a panel  
7 with any particular accused in mind.

8           We have previously provided sample  
9 documents that we have used when we go through the  
10 panel member selection process and I'm happy to  
11 address any questions that came out of those  
12 documents.

13           Thank you again for this opportunity to  
14 participate in today's discussion.

15           CHAIR SMITH: Thank you very much.  
16 Last, but not least, we have Colonel Kennebeck.

17           COL KENNEBECK: Thank you, Madam Chair,  
18 members of the committee. It's my pleasure to  
19 speak to the DAC-IPAD today.

20           I'm Colonel Chris Kennebeck and the  
21 chair of the Criminal Law Division at Army OTJAG.

22           I read the transcript from your meeting



1 in September and I know that Colonel Bovarnick  
2 already talked about a lot of details related to  
3 Army panel selection. I think we do business  
4 similarly to my compatriots up here, except maybe  
5 volume. In my last jurisdiction, it was a Corps  
6 command. We have about 20,000 service members  
7 under that command and my boss, I was the Staff  
8 Judge Advocate, chose 150 panel members to serve  
9 on 3 separate standing panels to try the number of  
10 cases that we pushed through.

11 So just to make it practical, he'd have  
12 a large, 3-ring binder with an alpha roster of  
13 every name of every service member, 20,000. He'd  
14 have a smaller, 3-ring binder with the nominations  
15 from the subordinate commanders and that generally  
16 would include all your 06s, all your lieutenant  
17 colonels, mostly your majors, a lot of your  
18 captains, and all the way down, and then enlisted,  
19 E9s, E8s, all the way down to typically E5s.  
20 Occasionally, you could have an E4 serve on a  
21 panel. I've seen college educated, 29-year-old  
22 specialists who probably would satisfy the

1 requirements of Article 25.

2 So in that broad swath, then my boss  
3 would pick the panel members and again, not for  
4 any particular panel, but for a standing panel we  
5 typically last a year, so we typically move in the  
6 summer, pick a new panel in August, stands for a  
7 year, you pick a new one the following year.

8 I will also include that Article 25  
9 does have 6 criteria and so the statute is pretty  
10 clear, but precedence since 1964 has allowed us to  
11 be inclusive. Consideration of race and gender to  
12 ensure fair representation has been upheld. That  
13 is before the CAAF right now for decision and it  
14 will be interesting to see what that decision is,  
15 but I just think it's -- I want to say out loud  
16 Article 25 inclusion is permissible. Exclusion is  
17 not permissible. Panel stacking, picking a panel  
18 for a specific outcome is not permitted by Article  
19 25 and precedent.

20 And with that, I think I'll pass it  
21 back to the committee to answer some questions.  
22 Thank you, you.

1 CHAIR SMITH: Thank you.

2 MR. SULLIVAN: Madam Chair, may I make  
3 an addendum?

4 CHAIR SMITH: Yes.

5 MR. SULLIVAN: So, Colonel Kennebeck  
6 just mentioned the order from the Court of Appeals  
7 for the Armed Forces in the Jeeter case.

8 I think it may be helpful to the, to  
9 the committee members, to hear a little bit more  
10 about that.

11 So on October 24th of 2022, after  
12 hearing oral argument in the Jeeter case, the  
13 Court of Appeals for the Armed Forces specified  
14 two additional issues it wanted to consider.

15 And so it mentioned the Crawford case,  
16 which Colonel Kennebeck just mentioned, which was  
17 the 1964 case that said hey, when you're picking  
18 panels, it's permissible for a convening authority  
19 to consider race to include you know, the race of  
20 a, of a member who is the same race, race of the  
21 accused. That's what the Crawford case was about.

22 And since then, that jurisprudence has

1       been broadened somewhat to suggest that trying to  
2       pick members that represent a fair cross-section  
3       of the military community, that that may be a  
4       permissible criterion.

5               So the Court specified two issues in  
6       the Jeeter case. First, it said in United States  
7       v. Crawford, this Court held that in the course of  
8       panel selection, a race conscious process is  
9       permissible for the purpose of inclusion.

10              How does the Crawford decision affect  
11       the analysis of this case under Avery v. Georgia,  
12       a 1953 case in which Georgia used a race conscious  
13       jury venire process that excluded all African  
14       Americans from the panel.

15              And then the second issue in, that was  
16       specified by Jeeter was, in light of appellant's  
17       statement at oral argument that race is an  
18       improper consideration in detailing panel members,  
19       should this Court overrule United States v.  
20       Crawford.

21              So I thought it was important for the  
22       committee members to know that those two issues

1 are now under active consideration.

2 A decision is expected in the Jeeter  
3 case by the close of this Court's term, which will  
4 be at the end of September of 2023.

5 CHAIR SMITH: All right, so at this  
6 point, we would like to open this up for questions  
7 from committee members of the panel. So I'll  
8 start. I have a question.

9 When the subordinate commanders are  
10 recommending panel members, when I guess they  
11 provide a list to the convening authority.

12 Is the subordinate commander from, who  
13 oversees whoever the accused is, are they excluded  
14 from providing a list?

15 I'm wondering how, how you ensure that  
16 the accused doesn't end up having people who are  
17 familiar with the case, or familiar with the  
18 accused, how you make sure that those people are  
19 not included.

20 Is that segment, I'm trying to think of  
21 what you call it in the military, is that  
22 particular group excluded all together, or is that

1 something through a voir dire process you would  
2 learn?

3 CAPT HOUSE: Good morning, ma'am.

4 From the, excuse me, from the Navy's  
5 perspective they're not excluded. We would use a  
6 voir dire process to determine whether or not that  
7 the potential member has some type of potential  
8 bias, or unfair advantage, or awareness of the  
9 case, or awareness of a connection to the  
10 defendant.

11 In a small, the current command that  
12 I'm working at is pretty small. It's only about  
13 8,000 total Navy/Marine Corps personnel at the  
14 Naval Academy.

15 So they're going to, they may know this  
16 person. But then we would use the, and but that's  
17 not a necessarily an exclusion to keep them off a  
18 panel.

19 It's the Article 25 factors would still  
20 be the factors that would govern who the vice  
21 admiral would place on the, on the panel, on the  
22 potential panel.

1                   And then we would rely on defense and  
2                   the prosecution through a voir dire process, to  
3                   weed out anyone he might have an inappropriate  
4                   connection to the case.

5                   Over.

6                   COL KENNEBECK: I would just add that  
7                   in addition to that, even before that, Article 24  
8                   prohibits anyone who's an accuser from serving as  
9                   a panel member. Or anyone who under ranks the  
10                  accused to serve as a panel member.

11                  So by Rule, they would be excluded.  
12                  And typically, the nominees are just picked from  
13                  the pool. And, then we pare down what the panel  
14                  looks like based on who the accused is.

15                  Over.

16                  COL SHERWIN: This is Colonel Sherwin.  
17                  From the Air Force side is, is that pool what may,  
18                  may contain them but the panel member, but the  
19                  pool that's put towards the GCMCA will not contain  
20                  the, the commander of the unit or the members of  
21                  the unit for that individual accused.

22                  CHAIR SMITH: Ms. Goldberg, did you

1 have a question?

2 COL BOVARNICK: Yes, I also wanted to  
3 point out to the members, within your documents I  
4 know that they're voluminous for the court-martial  
5 selection tab.

6 I guess if you go to tab 3 and just go  
7 backwards a little bit, page 3 of an Army document  
8 lists automatic excusal criteria so that the  
9 convening authority.

10 Like so for example, this document  
11 says, members and witness in a case. Members  
12 acting as an accuser or forward investigator that  
13 made a recommendation are not recommended.

14 So there are, there are some methods  
15 for example, even though the people will be, the  
16 members, nominees will be in the pool, the staff  
17 judge advocate could use the commander's automatic  
18 excusal authority.

19 So for example, Private Jones is in  
20 Company A of 1st Battalion. If there's another  
21 member that's listed Company A of 1st Battalion,  
22 they can be automatically excused.



1           So they don't have to go through this  
2 process of showing up in court, and then the  
3 person's like hey, that's my squad leader up  
4 there.

5           So there are methods to get after what  
6 you're saying like someone actually knows the  
7 person, they're in the same like company size  
8 unit.

9           This is just an example in some of the  
10 documents where it's automatically excused. You  
11 don't even have to go through that voir dire  
12 process of even sending the person into court.

13           Just wanted to point that out. So  
14 there are, there are some methods to get after  
15 that so you don't waste everybody's time.

16           So back over to the folks for  
17 questions.

18           MEMBER GOLDBERG: Great, thank you so  
19 much, and thanks to our panelists for your  
20 comments.

21           I have two questions, I think one is  
22 empirical, the other is, may vary more. And that

1 is in the nomination process, which seems to be  
2 where the action is in terms of winnowing down the  
3 potential pool, I couldn't tell.

4 It sounds like there's quite a bit of  
5 variation in what percentage of the total number  
6 of available individuals is nominated.

7 And that that may vary across, pretty  
8 significantly across services and across  
9 installations. Is that right? Am I understanding  
10 that correctly?

11 Because something you said, Colonel  
12 Kennebeck, made me think that actually lots of  
13 people are moving into the nomination process.  
14 And the action happens at the, so at that panel  
15 selection for an individual court-martial.

16 So I just want to understand if that's  
17 similar across the services. In other words, are  
18 most people nominated, and nomination is a sort of  
19 weeding out the real, that people who may be more  
20 problematic?

21 Or are relatively few people nominated  
22 and then the, you know, you sort of go to

1 availability of the individuals when you're  
2 putting together the group for the, for the court-  
3 martial.

4 COL TOLAR: Good morning, thanks for  
5 the question.

6 In the Marine Corps, at least, when we  
7 ask subordinate commanders, or some of the G shops  
8 to nominate members, we'll typically ask for 10-15  
9 nominees. And they'll use the Article 25  
10 criteria.

11 So to your point of weeding out those  
12 who may, maybe not as qualified. That's in fact,  
13 that's what they do. They pick the best qualified  
14 in accordance with the Article 25 criteria.

15 We consolidate those questionnaires and  
16 those nominations from across all the commands,  
17 and present that to the commander.

18 That's the primary staff that he's  
19 looking at, but he also has the alphabetical  
20 roster of every single member of that command from  
21 which to choose from.

22 And he can go through that roster, and

1 I've seen it many times, where they won't, they'll  
2 pick folks who have not submitted questionnaires,  
3 have not been nominated by subordinate commanders.

4 So that, the convening authority will  
5 make an independent determination on who he  
6 believes, he or she believes is best qualified  
7 under Article 25.

8 MEMBER GOLDBERG: Then can I just ask  
9 you a quick follow up? If someone is going off  
10 roster to choose, is that they're choosing people  
11 who, who they have interacted with then?

12 Or how would they know if they don't  
13 have the forms on those people?

14 COL TOLAR: That --  
15 (Simultaneous speaking.)

16 MEMBER GOLDBERG: Would it be sort of  
17 random, or, or is it based on familiarity?

18 COL TOLAR: I think it would be based  
19 on familiarity. It would not be random in my  
20 experience.

21 The convening authority would have  
22 some, would need some reason to believe that

1 person that he's selecting is the best qualified  
2 under Article 25.

3 CDR WUNDER: The Coast Guard operates  
4 almost exactly the same as our Marine colleagues.  
5 That our subordinate commands or commands in the  
6 area where the court-martial is going to be  
7 convened, would use the Article 25 criteria to  
8 look at their members and select the best  
9 qualified.

10 And then submit those to the convening  
11 authority for their consideration, along with the  
12 alpha roster, the list of all of the members under  
13 that convening authority's command.

14 And sometimes they pick from the list  
15 of nominated members, or sometimes they pick from  
16 members of their own crews.

17 CAPT HOUSE: Frankly, ma'am, there are  
18 some Navy fleet concentration areas where there  
19 would be potentially thousands and thousands of  
20 members. San Diego, Norfolk, Jacksonville.

21 So, we use a similar process. The  
22 subordinate commanders will use the Article 25

1 factors to provide us a list of 50-100 members  
2 from their commands.

3 Those lists will be pulled together  
4 into a larger pool for the general court-martial  
5 convening authority, including all those  
6 questionnaires.

7 Then the legal staff does a, spends a  
8 lot of time checking in to make sure that these  
9 people are still where we think they are, that  
10 they haven't transferred. That they haven't been  
11 assigned to some TAD or deployed.

12 Then we come up with a list for the  
13 general, for the admiral to go through and  
14 appoint. We generally appoint double of what we  
15 would expect to be sitting and actually at a  
16 court-martial.

17 At least double of those people will  
18 go, and then go through the voir dire process to  
19 see who will be ultimately determined to sit on  
20 the panel. Over.

21 COL KENNEBECK: And I'll finish up. My  
22 description earlier was an anecdote from when I

1 was a Corps SJA. We have three corps in the Army  
2 and they're large.

3 But I had been a Division SJA before,  
4 and in that panel we wouldn't ask for all  
5 colonels, all lieutenant colonels.

6 So depending on the size of the unit,  
7 you might ask for fewer people. But I have two  
8 comments about that.

9 One, I think typically what that helps  
10 is it helps identify people who are about to  
11 retire, so maybe they don't get nominated.

12 People who are going to PCS in the  
13 middle of the year. You know, people who have  
14 other things that sometimes going on in their  
15 careers, they might get nominated for those  
16 reasons. And I think that helps efficiency.

17 And then number two, I definitely have  
18 had GCMCA select from the alpha roster book. And  
19 a lot of times another anecdote is you know, the  
20 CG will ask a brigade commander I want three  
21 lieutenant colonels out of your formation.

22 And the brigade commander gives three

1 lieutenant colonels, and the CG's like I want to  
2 see more lieutenant colonels out of that unit.

3 So he flips open the alpha roster, he's  
4 says no, I want this lieutenant colonel out of  
5 that brigade.

6 And he might not know him well but, or  
7 her well, but say I think that is the person that  
8 I want to choose.

9 So I think for all those reasons, that  
10 the nomination process really is meant to help  
11 efficiency, and not sort of guard off people that  
12 might, you might want to see on the panel.

13 MEMBER GOLDBERG: Thank you so much.  
14 And if I could just ask my follow up question.  
15 It's helpful to understand the, the process.

16 And what I'm thinking about sitting  
17 here is that you know, most of the factors in  
18 Article 25 are kind of empirical, right?

19 How long have you been with the  
20 service? What's your education level and all of  
21 this. And then there's the judicial temperament  
22 factor that, that lets a lot more in potentially.



1           And so both that factor and then this  
2 sort of going on and off list factors, are the  
3 places where either it seems the, the selecting,  
4 the person who's doing the selection can err on  
5 the side of inclusion, can err on the side of, or  
6 can prioritize other factors when they're putting  
7 together the panel.

8           And so that's the part that at least as  
9 I sit here, I would like to understand more kind  
10 of what constrains those choices for the, you  
11 know.

12           We all might have roughly the same idea  
13 of judicial temperament, but we might see it more  
14 in the people we know. Or we might see it more  
15 in, in group A or group B.

16           And one thinking about your perspective  
17 on what constrains that and what constrains the  
18 kind of I'm going with these people because  
19 they're kind of familiar to me and I, I know them  
20 and I like them, which might lead the pool to kind  
21 of stay in a particular vein, rather than be a  
22 more cross-sectional.

1                   CAPT HOUSE: Well in my experience, if  
2                   it's a smaller command where I'm working now, it's  
3                   the convening authority vice admiral generally has  
4                   a good sense of the character, of the nature, the  
5                   temperament, the judgment of most of the people  
6                   who would be potential panel members.

7                   In a larger command where there are  
8                   thousands and thousands, in my experience the  
9                   admiral relies on the judgment of his subordinate  
10                  commanders who know these people, who have spent  
11                  time with them, who are aware of their character,  
12                  and their performance.

13                  Who are aware of their nature, and  
14                  their openness to serving this important duty in  
15                  the way that it's supposed to be served.

16                  I think it, and our questionnaires  
17                  help. We have a standardized questionnaire we use  
18                  in the Navy, developed by our judiciary, and there  
19                  are a number of questions on there.

20                  All, of course, all the biological  
21                  information and you know, biographics, and where  
22                  you're from, and how many times you might have

1 served on, done this or done that.

2 But there's questions also in there  
3 about general opinions on certain things. And  
4 that does provide some insight to the convening  
5 authority as to the overall temperament of the  
6 person. Over.

7 CHAIR SMITH: One of the complaints  
8 that we've heard during the comment section, we've  
9 had a couple different officers come in who were  
10 convicted of different offenses.

11 And they've been mostly minority  
12 officers who have come in and spoken to the  
13 committee. And I believe every one of them has  
14 indicated that their panel was all White.

15 So what do you do specifically, when  
16 you are looking at the list, how do you counter  
17 that to make sure that, or, or do you counter that  
18 recognizing of course this Jeeter case is out  
19 there.

20 But with this idea of having a jury of  
21 your peers, what do you do to try and make it a  
22 diverse panel?

1 COL KENNEBECK: I'll jump on that one  
2 first. I have worked for different commanders a  
3 number of times, and I've had one commander who  
4 said, I don't want to see race or gender.

5 You know, just give me the names, the  
6 unit, their duties, and I want the nomination list  
7 and the alpha roster and then I'm going to pick.  
8 In an effort I guess, to be purposefully blind to  
9 race or gender.

10 And then I've had other commanders say  
11 no, I want to see that. Because I want to be able  
12 to purposefully pick a spectrum that represents,  
13 that's more representative.

14 I think I would probably personally,  
15 this is and I'm not speaking for Army or for  
16 policy, but personally prefer the latter.

17 I think it helps to be purposefully  
18 inclusive. And I think Article 25 allows you to  
19 do that. But I mean those -- diversity is not  
20 purposefully included in Article 25. So we must  
21 stick with the criteria that exist today. I'll  
22 leave it there.

1                   MEMBER GRIMM: This is Paul Grimm, if  
2 I can get a question to follow up on the Chair's  
3 question.

4                   CHAIR SMITH: Yes.

5                   MEMBER GRIMM: I have a question for  
6 any of the panelists that fall on the same line  
7 about the racial composition of panels. And the  
8 perception of fairness in the composition of a  
9 panel.

10                   It sounds like there are times when in  
11 a large command you're picking a large number of  
12 potential individuals, even when there may not be  
13 a specific court-martial that has been convened.

14                   So you're going to have 50, 100, 200,  
15 however many people you have available. And if a  
16 court-martial comes down the line, they're the  
17 ones you're going to draw from after you then go  
18 back and eliminate the people about to retire, or  
19 who have just been you know, sent out to a  
20 deployment or something of that nature.

21                   Now you've got a court-martial comes  
22 in. I want to get a better feeling if you would

1 be good enough to help me with that, as to the,  
2 that court-martial is going to start. The trial  
3 is going to begin.

4 Do you have a certain number of  
5 individuals who are brought in as a jury panel,  
6 from which the parties have the opportunity to do  
7 what we call voir dire in the, in the civilian  
8 system, question them, find out information about  
9 them, and exercise challenges either for cause, or  
10 for peremptory challenges.

11 These are hallmarks of the jury  
12 selection process in the civilian community, which  
13 give it its legitimacy, and the ability to raise  
14 questions about the composition of a panel,  
15 whether it's race-based, or any other issue that  
16 might create a legitimate concern about the  
17 fairness, and the impartiality of that panel.

18 So can you help me out with that?

19 COL TOLAR: Thank you for the question.  
20 So I think we'd all agree that we have very  
21 similar system in the military, a very similar  
22 process in the military justice system.

1           So once the convening authority selects  
2 his panel and signs the convening order, those  
3 members once the court-martial is assembled, they,  
4 they complete questionnaires, detailed  
5 questionnaires as has been previously mentioned.

6           Those are provided to defense counsel,  
7 to trial counsel, and there is a voir dire process  
8 exactly as you described where, where defense and  
9 prosecutors have the, the opportunity to challenge  
10 for cause, and also to, to use peremptory  
11 challenges.

12           So I believe that that is covered.

13           CDR WUNDER: If I could just add on to  
14 that as well, that normally our convening  
15 authorities select two or three times more members  
16 than are required for the courts-martial itself.

17           And so there is essentially a pool of  
18 panel members, potential panel members that do go  
19 through the voir dire process.

20           And the counsel have an opportunity to  
21 examine those witnesses. I'm sorry, panel  
22 members, for bias, or for fitness to serve on that

1 particular courts-martial. And, ultimately, the  
2 panel that is selected is from that pool. Over.

3 MEMBER GRIMM: Just to follow up.  
4 Could you give me some thought, some information  
5 about the number of peremptory challenges?

6 So for example, there's no limit in the  
7 federal system to the number of challenges for  
8 cause. But once you have the actual peremptories,  
9 the defendant in a felony case in federal court,  
10 has up to 10 peremptory challenges, the government  
11 up to six.

12 I'd just like to get a sense of how  
13 many of those challenges are available. Does it  
14 change by court-martial type?

15 And if you have any thoughts on that,  
16 I'd appreciate it. Thank you.

17 COL KENNEBECK: Correct me if I'm wrong  
18 team, but I think we each get one peremptory.  
19 Government and defense, and then there's no limit  
20 to challenge for cause.

21 And in the Army, we tend to start with  
22 16 to 20 for an ending panel of eight. And that



1 way you can get through the voir dire process.

2 And if you somehow get so low that you  
3 get below eight, then you, you reach down and you  
4 grab substitutes and you bring them in and voir  
5 dire them, until you have the sufficient panel.

6 But we generally tend to start with 16  
7 to 20.

8 MEMBER GRIMM: Thank you.

9 MR. SULLIVAN: And Colonel Kennebeck,  
10 you might want to mention how the, the peremptory  
11 renews with each draw.

12 COL KENNEBECK: Well I'd hate to get  
13 the Rule wrong. I didn't quite study up on this.  
14 But Mr. Sullivan, I think you might remember the  
15 Rule and I'll.

16 MR. SULLIVAN: Yes, so chime in behind  
17 you.

18 The Rule provides that every, every  
19 member of the panel will potentially be subject to  
20 a peremptory challenge.

21 So in this situation that Captain  
22 Kennebeck posits, which it isn't infrequent where

1 you have the panel drop below quorum, and it can  
2 drop below quorum one of two ways.

3 If that happens and you have substitute  
4 members come in, those members will also be  
5 subject to peremptory challenges.

6 So while each party is statutorily  
7 entitled to one peremptory challenge, in practice  
8 there may be multiple rounds of that one  
9 peremptory challenge.

10 And then one other factor, do you want  
11 to talk about the enlisted representation?

12 COL KENNEBECK: Yes, so for an enlisted  
13 panel, you must maintain one-third, a ratio of  
14 one-third to the member.

15 So if you somehow peremptorily  
16 challenge your last enlisted and now you only have  
17 two left out of eight, you have just busted your  
18 panel and you need to bring in some more enlisted  
19 members. And then the peremptory challenge comes  
20 back to life again in the next round.

21 COL BOVARNICK: If I could I want to --  
22 (Simultaneous speaking.)

1 COL KENNEBECK: For the new members.

2 COL BOVARNICK: -- for Judge Grimm and  
3 for the members. I know we flooded you with a lot  
4 of documents, I think like 1,000 pages.

5 But perhaps to show, to kind of get  
6 after Judge Grimm's question. At the beginning  
7 now, so tab 2d, I think it is.

8 And if you just flip to the first  
9 couple pages to the Air Force materials, I'll even  
10 use the Air Force as an example here.

11 So the process described by each of our  
12 experts on the panel, this nomination process, so  
13 thousands of folks that the subordinate commands  
14 actually nominate people and those names.

15 And as was mentioned, we have like  
16 these big huge binders over here on this table.  
17 There's a separate document we call the alpha  
18 roster. That's everybody in the command, even if  
19 they weren't nominated.

20 So then the convening authority picks  
21 this jury pool. I'll just use that word, and  
22 there are a whole bunch of people on it.

1                   Then for a particular case so to get up  
2                   to Judge Grimm's question, one of the documents I  
3                   mean I guess it's I don't know the pages aren't  
4                   numbered, is like literally the third page under  
5                   the Air Force stuff.

6                   It says, special order for a case. The  
7                   top department of the Air Force headquarters,  
8                   base, state, zip code.

9                   That's the actual jury pool to call it  
10                  that, for an actual case. The members that are  
11                  going to show up in the court for a case.

12                  Actually the next page shows you,  
13                  sorry, general court-martial of U.S. v. Member.  
14                  These individuals are going to show up in the  
15                  actual court-martial, be sitting there, voir dire,  
16                  back judge allows some questions we talked about  
17                  last time.

18                  Then each of the counsel will get to do  
19                  voir dire, and, and group voir dire and then  
20                  individual voir dire, to try to build if they want  
21                  to do a challenge for cause. And then as was  
22                  noted, the one peremptory.

1           But that's how you get after the actual  
2           in the courtroom specific case. I just hope that  
3           was clear because I feel like the question was,  
4           you know, we have all these documents here that  
5           the group's provided.

6           But that's what happens is there's  
7           actual jury for a specific case that comes in and  
8           sits down in the courtroom, that will go through  
9           that process.

10           And there can be if members, so many  
11           members are charged for cause. I'll give you an  
12           example we call busting quorum.

13           If you don't have alternate members  
14           standing by, like literally in the courtroom  
15           somewhere, the panel's there and you come up to  
16           you have to have eight for a, the GCM.

17           And now the defense counsel, do you  
18           have a peremptory. Let's say you have like nine  
19           members left and the defense counsel says yes,  
20           peremptory on this person.

21           Then you turn to the trial counsel.  
22           Trial counsel peremptory. If the trial counsel

1 says yes and it goes below eight, you've busted  
2 quorum. Then you've got to bring in another  
3 member, or more members.

4 Anyway, that gets at some specifics but  
5 these documents all lay that stuff out how it  
6 works.

7 Sorry, back over to the panel.

8 CHAIR SMITH: All right, Judge Walton  
9 has a question, and then Dr. Spohn has a question.

10 MEMBER ANDERSON: This is General  
11 Anderson, and I have one as well.

12 CHAIR SMITH: Let's start with Judge  
13 Walton.

14 MEMBER WALTON: Good morning, I'm not  
15 unsympathetic to the challenge that many times you  
16 may face on certain basis of providing ethnic and  
17 racial diversity, because I don't have that  
18 problem in Washington, D.C. where I preside.

19 But I also have been presiding for  
20 seven years over criminal cases in Pittsburgh  
21 where I grew up, and in seven years and all the  
22 trials I've had, I've had two Black jurors.

1                   And I know from that there's a  
2                   perception among the population that this, the  
3                   cards are stacked against someone who's going to  
4                   trial if you're African American in the Pittsburgh  
5                   area, as compared to if you're White.

6                   And I know from things I've had said  
7                   to me by members of the military, especially  
8                   officers who feel the same way, that on certain  
9                   bases, there aren't many African Americans there.

10                  And as a result of that, they don't  
11                  feel that they are getting a panel that's  
12                  representative of who they are.

13                  What if, I mean do you perceive that as  
14                  a problem that you face? And if you do, what can  
15                  be done to address it?

16                  I know that you indicated in the Coast  
17                  Guard you can go to other I guess, locations and  
18                  bring panel members from those locations. But I  
19                  assume that's not the case in the other services.

20                  If it is a problem, and I have to  
21                  believe it is, what can be done to try and address  
22                  that?

1                   Because sometimes perception is more  
2 significant than reality. And if people feel that  
3 they're not getting a fair shake because of who  
4 they are and what they look like, I think it  
5 undermines the respect that people are going to  
6 have for the process.

7                   COL SHERWIN: Judge Walton, this is  
8 Colonel Sherwin. In the Air Force, our GCMCAs  
9 more times than not, actually have a wide breadth  
10 of individuals they can pull from.

11                   They don't have to stay at the  
12 installation level that it's at. So for instance,  
13 in 20th Air Force where I was most recently, I had  
14 four different installations that I could actually  
15 pull for to get members for my GCMCA.

16                   So if he didn't like the  
17 representation, so if the case was at F.E. Warren  
18 Air Force Base in Wyoming, he could go outside to  
19 any of the four installations that he actually  
20 oversee and pull members from that and bring them  
21 in TDY to, for the panel.

22                   So like the Coast Guard, we have the



1 ability to go outside as long as they're in our  
2 command, or another commander has given us  
3 permission to use their member.

4 CDR WUNDER: I was just going to add,  
5 sir, that in my experience, our convening  
6 authorities are very conscientious and think a lot  
7 about this process when they go through it.

8 Because they realize the importance and  
9 the impact that selecting these members has on  
10 some future accused.

11 And while they may not be doing it for  
12 any particular race, gender, or any other  
13 protected category, they are doing it with thought  
14 and with conscious about what they are creating.

15 And so they may, the makeup of the  
16 panel may not be with any particular race, color,  
17 or anything else, but they are picking people who  
18 they believe will do the best job for this  
19 mission.

20 And they do take that very seriously.

21 Over.

22 COL KENNEBECK: I second that comment.

1 I've seen, I mean it takes hours to select panel  
2 when I do that with my boss.

3 Looking at ORBs, looking at who the  
4 selectees are. And to select in like my last job  
5 150, obviously that takes some time.

6 I think that if this panel is  
7 concerned, I think perception matters. I would  
8 never want a, an accused of color to look at a  
9 panel who, that's all White and, and have to  
10 accept that this is what happened to me.

11 I don't believe it's a problem, but I'm  
12 a White male. So perhaps my perception of it  
13 isn't accurate. But I think if there is a  
14 perception issue, then it should be expressly  
15 addressed in 25 to permissively allow for  
16 inclusion.

17 MEMBER SPOHN: Thank you very much for  
18 your presentations.

19 Regarding the use of peremptory  
20 challenges, in the civilian court system their use  
21 is guided by Batson v. Kentucky, which prohibits  
22 the use of peremptory challenges to exclude people

1 based on race or ethnicity.

2 So that if one side makes a prima facie  
3 case that there is in fact, racial discrimination,  
4 then it's up to the other side to come up with a  
5 racially neutral explanation for the use of the  
6 challenge.

7 I know Batson doesn't apply to the  
8 military court system.

9 It does? Oh, okay, someone told me  
10 that it doesn't, but.

11 COL KENNEBECK: Oh, it does and there's  
12 a decent amount of jurisprudence related to that.  
13 There's definitely precedent on point. Panels are  
14 challenged, they're challenged by the selection  
15 methodology so there's a decent amount of case law  
16 on that, as well.

17 MEMBER SPOHN: So the same principles  
18 apply in the, in the military.

19 CDR WUNDER: And I would just add to  
20 that, but there's also the unlawful, or if there's  
21 command influence that also may come up that would  
22 be a, I guess a parallel track to a Batson issue,

1 as well.

2 CHAIR SMITH: All right, Ms. Garvin has  
3 a question and then we'll hear from General  
4 Anderson, and I have another question, and so does  
5 Ms. Goldberg.

6 MEMBER CASSARA: Excuse me, this is Mr.  
7 Cassara --

8 (Simultaneous speaking.)

9 MEMBER GARVIN: -- thank you for all the  
10 information so far. This is Ms. Garvin.

11 This may be outside the scope of what  
12 you can share and that's fine, or what you know,  
13 but I am curious and it builds off a question from  
14 my colleague about different understandings of  
15 judicial temperament, that criteria in Article 25.

16 And I am curious because what seems to  
17 happen right, is you have a pool of folks and then  
18 nominations happen, although of course you can go  
19 to the alpha list. But as we're contemplating  
20 notions of what is and is not judicial  
21 temperament, our own cognitive biases are going to  
22 come into play there of what is and isn't.

1                   And I think there's plenty of research  
2 that shows that folks who have similarly situated  
3 backgrounds to myself, likely consider have  
4 judicial temperaments I agree with. Right,  
5 there's research around this.

6                   So I'm curious what is the training  
7 around cognitive biases, particularly racism,  
8 gender, class, all of that, around what is and  
9 isn't going to come into your assessment of  
10 judicial temperament.

11                   So what is the training all along, to  
12 try to understand one's cognitive biases, as you  
13 are assessing someone for their judicial  
14 temperament?

15                   CAPT HOUSE: Well I would say that  
16 training begins at boot camp, or at OCS, or at the  
17 Naval Academy.

18                   I mean we are picking officers and  
19 enlisted personnel who have spent often years in  
20 the military, learning about fair treatment. And  
21 learning about the equality that's important for  
22 all Americans.

1                   This is a consistent, and I think  
2 serious obligation that the Navy and the military  
3 services feel.

4                   I mean you would be hard pressed to  
5 find anyone who's going to sit on a panel, who has  
6 not spent a considerable amount of time talking  
7 about these issues, being trained about EO, being  
8 trained about the necessity to approach every  
9 defendant from the perspective of a presumption of  
10 innocence.

11                   And a military judge is certainly going  
12 to underscore that in his or her conversations  
13 with the panel members.

14                   But we are blessed in some way in that  
15 we have a certain cadre of people in the military  
16 who are, who are all being trained, and all being  
17 vectored towards a certain direction when it comes  
18 to diversity and equal treatment, and you know,  
19 taking care of our fellow sailors, Marines, Coast  
20 Guardsmen, airmen, and soldiers.

21                   I mean there is a commitment to each  
22 other because we are a closed, tight-knit

1 community. And, I think there is a commitment to  
2 look out for each other. Over.

3 COL KENNEBECK: On top of that, I'll  
4 say that in the Army, we have really started to  
5 focus on implicit bias as you know, an intentional  
6 portion of our training at the judge advocate  
7 school. And, you know, we have these  
8 conversations with our commanders, as well. It's  
9 good to be self-aware when you're making decisions  
10 such as selecting a panel.

11 But in practice, I have to say that I'm  
12 not sure that judicial temperament is the most  
13 dispositive factor used by convening authorities.

14 I mean, oftentimes it is the age,  
15 experience. And judicial temperament is sort of  
16 fed by the notion that that person that I'm  
17 picking was a sergeant major, or was a commander,  
18 or has had to act in that, you know, impartial  
19 role before. Or hasn't. And that it feeds the  
20 narrative. It feeds sort of the decision process  
21 in that way.

22 CHAIR SMITH: General Anderson?

1                   MEMBER CASSARA: This is Mr. Cassara.  
2                   Could I speak after General Anderson very briefly?

3                   CHAIR SMITH: Ms. Long is next, and  
4                   then.

5                   MEMBER CASSARA: Oh, well, I mean,  
6                   whenever, yes.

7                   CHAIR SMITH: Okay.

8                   MEMBER CASSARA: After the last person.

9                   CHAIR SMITH: Thank you.

10                  MEMBER CASSARA: Whoever that might be.  
11                  Thank you.

12                  CHAIR SMITH: Sorry about that.

13                  MEMBER ANDERSON: Good morning  
14                  everyone, and thank you to the panel members I  
15                  mean for your, your presentations.

16                         I just have a question about Article 25  
17                         as it applies to members of the guard or reserve  
18                         from any service, who are on active duty.

19                         I don't know how the policies may, may  
20                         affect this but I was wondering if there is on any  
21                         of the, anybody is nominated or is it on any of  
22                         the panels, from those parts of the services.



1           Because in many cases, the Army I know  
2 we have reserve units that are on many of the  
3 installations that do have active duty members as  
4 part of those, those organizations. And whether  
5 or not they're considered for service.

6           I have a personal experience where I  
7 was on active duty at the Pentagon. There was a  
8 general officer who was on trial for sexual  
9 assault of a family member.

10           And I just wondered, could I have been  
11 nominated, or is there a policy that would have  
12 prevented me from being nominated to serve?

13           Thanks.

14 COL SHERWIN: Ma'am, this is Colonel Sherwin. The  
15 Air Force in our AFI 51-201, it does allow us to  
16 detail reservists.

17           And it actually tells us that for those  
18 court-martials involving reservists, the convening  
19 authority should look and consider detailing  
20 reserve members who are on active duty.

21           So and if they meet the Article 25,  
22 then they should be considered.

1                   MEMBER ANDERSON: But I'm also talking  
2 about, I should have clarified that. That it for  
3 active or reserve trials, not just restricted to  
4 reserve members.

5                   Thanks.

6                   CHAIR SMITH: Ms. Long?

7                   MEMBER LONG: Sorry, I didn't know if  
8 they were going to respond more to that.

9                   CHAIR SMITH: Did you want to respond?

10                  CDR WUNDER: Yes, ma'am.

11                  I would just say anecdotally, recently  
12 I was a part of a court-martial convening process  
13 where reservists were put on the panel for an  
14 active duty member.

15                  And, so we use Article 25 criteria  
16 regardless of their status. Reserve, active duty,  
17 or other, or national guard. The Coast Guard  
18 doesn't have national guard, obviously.

19                  But we would use that same criteria in  
20 order to select the panel members.

21                  CHAIR SMITH: Thanks.

22                  MEMBER LONG: Thank you.

1 I have a question for Commander Wunder,  
2 and I'm sorry if I missed it on other  
3 questionnaires.

4 But on the Coast Guard questionnaire I  
5 was interested in your perspective of the  
6 responses you typically get to question 39, which  
7 is the, do you think a defendant would receive a  
8 fair trial basically, it's a little self-  
9 reflective, with someone in your, if you were in  
10 the defendant's seat and you're the panelist.  
11 Would the defendant have a fair trial.

12 And I was curious what kind of  
13 responses you get to that. Do you feel that it's  
14 a helpful question, or do people typically just  
15 answer as they think the convener would want to  
16 hear?

17 CDR WUNDER: Yes, ma'am, thank you for  
18 the question. I have seen court-martial panel  
19 member questionnaires come back and this question  
20 answered in a way that a member says, because and  
21 typically because of something in my past, whether  
22 that be dealing with another criminal matter

1 themselves or a close family member, they don't  
2 think that they could sit in judgment of somebody  
3 else.

4 Some people have identified religious  
5 reasons, or just who they are, their, their own  
6 personal temperaments to say that I cannot sit in  
7 judgment of another person. And I would say that  
8 that's where those types of responses would show  
9 up. Over.

10 CHAIR SMITH: Mr. Cassara?

11 MEMBER CASSARA: Hi, this isn't really  
12 a question, it is an observation from somebody  
13 with over 30 years of military justice experience,  
14 and trying cases for about 25 years.

15 The very first court-martial I ever  
16 tried in 1990, it was an African American accused,  
17 and there was not a single African American on the  
18 panel.

19 The last case I tried in 2018, '16, the  
20 first one was an Army case, this last one was an  
21 Air Force case. I had an African American  
22 accused, and there was not a single African

1 American on the panel.

2 I would venture to say without a  
3 scientific analysis or any data, that in my  
4 empirical experience the overwhelming majority of  
5 my cases fell into that category.

6 A lower enlisted, and in the lower  
7 enlisted ranks there are a much large amount of  
8 African Americans than there are in the officer  
9 ranks.

10 So I would have lower enlisted African  
11 American accused, and if they chose as is usually  
12 the case, more so in the Air Force than in the  
13 Army, if they chose an officer panel, an almost  
14 exclusively White panel.

15 And if it was in the Army, unless we  
16 chose an enlisted panel, it was an almost  
17 exclusively White panel.

18 So I just want to note for my other  
19 panel members, that I really disagree with those  
20 who are saying that this is not a problem.

21 Whether it is a systemic exclusion, or  
22 whether it's just the raw numbers, the final panel

1 selection in my experience, leads to panel, an  
2 accused looking out at a panel, and I remember one  
3 very clearly telling me, you know, 15-20 years ago  
4 wow, there's nobody here that looks like me.

5 And that is more the norm than the  
6 exception in my experience. I'm not, you know, so  
7 if anybody wants to comment on that, feel free.

8 But I just wanted to let my other panel  
9 members know that at least from one lawyer's  
10 empirical experience, that's what happens out in  
11 the field.

12 MEMBER MARKOWITZ: I will actually just  
13 second Mr. Cassara's observation that in, in  
14 officer panels, that is also my experience. That  
15 they are overwhelmingly White panels.

16 CHAIR SMITH: So I think the committee  
17 would be interested in getting some numbers on  
18 that, if I could just jump out and speak for  
19 everyone.

20 So perhaps we could get some follow up  
21 on stats with respect to, for each of the services  
22 with respect to panels for officers, and then for

1 enlisted.

2 And that kind of piggybacks on a  
3 question that I had, which is whether in 2022,  
4 almost 2023, it would make more sense to have a  
5 random selection process that's computer  
6 generated.

7 An algorithm or however you would do  
8 it, just like you know, when we do jury selection  
9 in my court, the computer generates the list and  
10 they come up to the courtroom, and we go from  
11 there with our voir dire process.

12 So how would you see that working in  
13 the military, having a system where if it's  
14 officers, you know, you're putting in what, they  
15 have an algorithm that's already a computer  
16 generated system with the factors required under  
17 Article 25.

18 COL KENNEBECK: I'll jump in first on  
19 that one and say first of all, let's just go back  
20 to my hypothetical.

21 I'm at a Corps, 20,000 people and in  
22 the formation, and if I were to randomly select

1 100 out of that 20,000, what do you think the  
2 majority would be?

3 E4 and below probably under 24, and  
4 within that majority, what do you think that much  
5 of the majority is a White male? I'm not sure  
6 that random, especially left of Article 25, would  
7 get you what you're looking for.

8 I think we'd be better off orienting in  
9 the direction of either looking at best practices  
10 in those states who have found ways to overcome  
11 diversity problems in panels, and then taking a  
12 look at Article 25 as a, to be more purposeful  
13 about inclusion.

14 Because I think even if enlisted, take  
15 it another step. You looked at a convening order  
16 with about 20 names on it. Twenty officers, maybe  
17 10 enlisted.

18 You could take great effort to build a  
19 diverse panel of 20 officers, and 10 enlisted.  
20 But invariably, come time of trial you're going to  
21 have two of them TDY, one's deployed, one suddenly  
22 decided to retire. And you're bringing



1 substitutes in.

2 And now you've changed the makeup of  
3 the, the panel that you've built. Unless you want  
4 the services to build a panel for every case, for  
5 every accused, which would at least in the Army,  
6 become pretty cumbersome for our 600 cases a year.

7 So happy to share numbers but I think  
8 that the randomization can get, if you really were  
9 random from the beginning, from the get go, I  
10 don't think it would go the direction that you're  
11 looking for.

12 Over.

13 MEMBER WALTON: Let's talk about  
14 sentencing. We in the federal system, did adopt  
15 sentencing guidelines which initially were  
16 mandatory.

17 And one of the principle reasons for  
18 the adoption of the guidelines and making them  
19 mandatory, was racial disparity. Because there  
20 was a big gap between what a African American  
21 would get, and what a White person would get  
22 committing the same crime, with the same

1 background.

2 Those guidelines were declared  
3 mandatorily unconstitutional, and now they are  
4 advisory. And unfortunately what we've seen is  
5 that disparity has crept back into the system.

6 Has there been any type of evaluation  
7 of the sentencing within the military, and whether  
8 that type of disparity exists?

9 And if so, what is being done to try  
10 and address it?

11 COL KENNEBECK: The military is going  
12 to judge alone sentencing soon, except in capital  
13 cases. And there will be, I think we have a study  
14 under way right now to establish proposed  
15 sentencing criteria.

16 So I think we're going that direction  
17 that's already underway. Unless I'm overstating,  
18 Mr. Sullivan, I'll let you correct me if I'm  
19 wrong. But I think that's right.

20 MR. SULLIVAN: I happen to be on the  
21 Military Sentencing Parameters and Criteria Board.  
22 So, Your Honor, the Congress in the last NDAA

1 adopted a new sentencing system that will apply in  
2 cases where all findings of guilty are for  
3 offenses that occur after December 27th, 2023.

4 And those cases will be governed,  
5 exactly as Colonel Kennebeck said, a judge alone  
6 will sentence. Right now, we have the equivalent  
7 of juror sentencing at the option of the accused  
8 in some cases, but we're going to move to all  
9 judge-alone sentencing.

10 And so, for most offenses, the offense  
11 will have a parameter range. Parameter just is  
12 the equivalent of guideline. When Congress passed  
13 the statute, there was a realization that  
14 guidelines had become somewhat of a freighted  
15 term, so they picked another word that means the  
16 same thing.

17 So there's going to be a parameter  
18 range, and then the judge can depart either above  
19 or below the parameter, but must provide a written  
20 explanation, and then that written explanation  
21 will be challenged by either party on appeal.

22 CHAIR SMITH: Ms. Tokash.

1                   MEMBER TOKASH: Thank you. Are the  
2 panel member questionnaires going to be joint at  
3 some point, or are there any efforts to work in  
4 that regard so that, across the services, the  
5 panel member questionnaire will look uniform?

6 Thank you.

7                   COL KENNEBECK: I'm going to jump out  
8 in front and say I don't think that's a purposeful  
9 step that's being taken. I think the panel  
10 questionnaires do allow different services to talk  
11 about questions that might tie to the mission.

12                   We work in different places. Life is  
13 very different when you're on a ship that -- when  
14 you're in Joint Base Lewis-McChord, and sometimes  
15 that can be relevant, and when you're asking  
16 potential panel members about their service on the  
17 panel. So I do think it's important that some of  
18 those differences are recognized.

19                   And I also will say, though, that I am  
20 fully aware that the OSTC leads are routinely  
21 getting together. They're talking about business  
22 rules, and I would imagine that this is going to

1 be a discussion. We already share best practices  
2 across the service. We educate one another. We  
3 go to each other's schools.

4 So this notion of panel questionnaires  
5 is not novel. We do share information. I just  
6 don't think that there's a purposeful effort to  
7 make a purple questionnaire. Over.

8 CHAIR SMITH: Ms. Goldberg.

9 MEMBER GOLDBERG: Thank you again for  
10 all of your comments. Can you speak? And I know  
11 we are short on time, so I'd be happy to have a  
12 follow-up on this in writing. But if you could  
13 speak to the number of women that are typically on  
14 panels, and one other issue that was raised to me  
15 from service members including some victim service  
16 counsel, which is that women are  
17 disproportionately likely to be excluded from  
18 panels for two reasons.

19 One, because they are more likely  
20 either in the military or outside of the military  
21 to be subjected to sexual assault, and two, they  
22 are more likely to have been trained as or

1 participated at some point in their careers as a  
2 victim advisor or supporter or in some capacity.  
3 And that has been the basis at least in some  
4 proceedings for an argument that somebody with  
5 that training should be excluded from a panel  
6 because of a perception that they could not be  
7 fair.

8 I don't know if I'd be interested in  
9 your views about whether that actually -- whether  
10 that resonates with you, whether you believe that  
11 that is true and a basis for exclusion, but also  
12 the empirical question.

13 CAPT HOUSE: Ma'am, I would say, in my  
14 experience, I would say almost every members panel  
15 for contested trials that I've been involved in,  
16 there have been women. It has been gender  
17 diverse.

18 I would agree with some of the  
19 comments. They have not always been as ethnically  
20 or culturally diverse as they might be, but gender  
21 diverse seems to be, in my experience, has been --  
22 we seem to be better about.

1           As far as our history or having been  
2           trained to support victims or victim advocacy or  
3           whatever, it would come down to the voir dire. It  
4           would really just come down -- I have not seen  
5           women systematically excluded because of having  
6           those prior duties or responsibilities, but  
7           certainly, if I'm the defense counsel in that  
8           case, there's going to be a lot of questions about  
9           the extent of those duties, the type of services  
10          that were performed, sort of the person's personal  
11          approach to that.

12                 Particularly, if I'm in a sex assault  
13          case, that would be of significant questioning by  
14          the defense counsel during voir to determine if  
15          there's some type of bias. It makes that person,  
16          from the defense's perspective, unsuitable to sit  
17          on the court-martial. Over.

18                 MEMBER GOLDBERG: Very quick follow-up.  
19          When you were saying that you've generally seen  
20          women on the panels, is that as true for officer  
21          panels, as it is, for enlisted in your experience?

22                 CAPT HOUSE: Yes, ma'am.

1 CHAIR SMITH: Mr. Kramer.

2 MEMBER KRAMER: Thank you. Thank you  
3 very much, and sorry to extend this, but I had a  
4 question. I think I heard Colonel Sherwin say  
5 that for an enlisted personnel that the panel  
6 could be either be all officers, all enlisted, or  
7 mixed.

8 And I was curious, but I think I heard,  
9 sorry, Colonel Kennebeck say that, in the army, it  
10 had to be at least one third enlisted personnel  
11 for an enlisted trial. I'm curious if that --  
12 first of all, who makes that decision? Is it the  
13 convening authority whether it's all officers, all  
14 enlisted or mixed, in the Air Force?

15 And, of course, that can make a big  
16 difference in diversity as well as the enlisted  
17 person's perception of whether they're receiving  
18 a trial of their peers. And, so, I'm curious if  
19 the other services allow or require a certain  
20 percentage or allow an entire -- allow it to be  
21 all enlisted or all officers and who makes that  
22 decision. Thanks.



1 COL SHERWIN: So, sir, this is Colonel  
2 Sherwin. So I'll talk on the part of the Air  
3 Force first. So our panel members, if the member  
4 is enlisted, they will have both on there, and  
5 then the member, the actual accused, gets to elect  
6 whether he wants enlisted on his panel or not, or  
7 her panel.

8 And so, if we just did a officer in the  
9 past -- we used to just do an officer panel and  
10 then. When they elected to have enlisted on, then  
11 we would go and replace members. And the panel  
12 had to -- the sitting panels. So the panel that  
13 sits at the actual court-martial has to be at  
14 least one third.

15 So it actually, if you're getting  
16 through the voir dire process, if every single one  
17 of the officers got kicked, as long as there's at  
18 least one third left that are military --  
19 enlisted, I apologize, then the panel gets to sit.

20 If as was explained, if we have --  
21 eight is what you needed for your GCM, and we went  
22 down to two enlisted, well, we've been just busted

1 quorum. So it is driven -- at least the election  
2 of whether or not an enlisted member wants an  
3 all-officer panel or having enlisted on there is  
4 driven by the actual accused.

5 In the event that it is -- I have never  
6 seen one start fully enlisted. It usually is the  
7 officers get kicked off during voir dire process.  
8 Does that help?

9 MEMBER KRAMER: Yes. Thank you.

10 COL KENNEBECK: Sir, there are only two  
11 types of panels, enlisted and officer, and that's  
12 controlled by the rules from court-martial. It's  
13 the same for all the services, not different  
14 between the services.

15 So the rules for court-martial lay that  
16 out, and the enlisted panel must be at least one  
17 third. She's right, but I don't think I've ever  
18 seen a full enlisted panel, just enlisted. It  
19 could happen, but I don't think that that  
20 typically does happen. So it's either officer  
21 panel, all officer, or at least one third  
22 enlisted.

1                   MEMBER KRAMER: And why is there -- why  
2 have we never seen an all enlisted panel?

3                   COL KENNEBECK: That's how the system  
4 was built. I think it probably ties to age,  
5 experience, training, length of service. I think  
6 those factors helped shape the way the rules were  
7 built.

8                   CHAIR SMITH: What would you do to  
9 change things so that juries ended up being  
10 represented? In other words, is there something  
11 you would change about Article 25?

12                   How could you ensure that a Hispanic  
13 officer who is charged with whatever is actually  
14 tried by a jury of his peers? If you were making  
15 a recommendation, what would it be? And that  
16 might have to be the last question, but I have to  
17 hear the answer.

18                   CAPT HOUSE: I think Article 25 is your  
19 answer then, ma'am. I think we take Article 25  
20 incredibly seriously. It's the rule. That's how  
21 we follow it. I think a, however you would word  
22 it, a discussion of the importance of inclusion

1 somewhere in Article 25, just to make that clear  
2 to a convening authority, would provide us greater  
3 latitude than currently exists in Article 25.

4 I think, on top of that, the voir dire  
5 process remains a very vigorous and important  
6 component to every military trial. And the better  
7 that both the government and the defense are at  
8 that, and the better that -- the more training  
9 that we have in that, the better panels we will  
10 get to do what's important for the government and  
11 for the defendant. Over.

12 COL KENNEBECK: I totally agree. I  
13 think we should -- I think a possibility is to  
14 adopt Crawford statutorily incorporated into  
15 Article 25 to account for race and gender.

16 CHAIR SMITH: I'm looking at the  
17 Colonel. Do we have time for another question?

18 MEMBER GOLDBERG: Thank you so much.  
19 Actually not another question. It's just a repeat  
20 of the question I asked before about gender on  
21 panels and women on panels, and I would be  
22 interested to hear from a couple of our other

1 panelists on that, unless you all endorse what was  
2 shared initially.

3 COL KENNEBECK: Sorry, I'm talking too  
4 much. I routinely see females, we have females on  
5 our panels as well, but I have seen what you're  
6 alluding to, which is through the voir dire  
7 process a lot of female panel members might be  
8 removed, and that does come from the  
9 questionnaire. I mean, that process is vigorous.  
10 I think it inures -- it's meant to inure to the  
11 benefit of the accused to let the accused pick a  
12 panel that appears representative to that accused.

13 A lot of times that will result in  
14 certain people being excused for a cause,  
15 especially when some of the questions are do you  
16 know someone who's been sexually assaulted? Do  
17 you have a family member? Do you have strong  
18 feelings about this type of crime?

19 That dialogue that happens afterwards  
20 can often result in someone being excused, and I  
21 have seen that impact just anecdotally female  
22 panel members more often. That's just one

1 observation. But I think that, representation  
2 wise, we probably could do better, but I think  
3 Article 25, if it were changed to allow for  
4 purposeful inclusion, would help remedy that.

5 CHAIR SMITH: Do we have time for any  
6 other questions?

7 Thank you very much for your time. We  
8 really appreciate it.

9 COL BOVARNICK: We'll take a break for  
10 10 minutes. Reconvene at, say, 10:40.

11 (Whereupon, the above-entitled matter  
12 went off the record at 10:27 a.m. and resumed at  
13 10:41 a.m.)

14 MS. SAUNDERS: Okay. Switching gears  
15 to the topic of victim impact statements at  
16 sentencing proceedings, we now welcome Ms. Adrian  
17 and Dr. Breck Perry, who are founding members of  
18 Survivors United as well as Mr. Ryan Guilds, who  
19 is an attorney who has represented survivors and  
20 civilians in military court proceedings.

21 Survivors United and Mr. Guilds  
22 initially raised the issue with Congress of

1 whether crime victims are being given the  
2 opportunity to fully inform the courts of the  
3 impact of the crimes perpetrated against them. A  
4 member of Survivors United also provided public  
5 comment to the DAC-IPAD in February of 2020. The  
6 Perrys and Mr. Guilds are here today to provide  
7 the Committee with an update on their concerns  
8 regarding victim impact statements. Their  
9 biographies can be found at Tab 3A of the meeting  
10 materials, and the Perrys and Mr. Guilds will take  
11 a few minutes to provide their perspectives and  
12 then be available to address questions from the  
13 Committee. So I'll turn it over to you, Mr.  
14 Guilds.

15 MR. GUILDS: Thank you. Madam Chair  
16 and Members of the Committee, it's my great  
17 privilege to appear before you today and provide  
18 my perspective and experience on the important  
19 issues this committee confronts. I first appeared  
20 before the predecessor to this committee several  
21 years ago to discuss the strengthening of the  
22 psychotherapy privilege and rape shield laws, and

1 I am pleased and proud today to appear both as a  
2 pro bono victim legal counsel who has represented  
3 dozens of sexual assault survivors and as counsel  
4 for Survivors United, a victim-created, victim-led  
5 organization providing a survivor perspective that  
6 informs the military justice process taking place  
7 each and every day across this nation.

8 I represented my first military-  
9 connected survivor in 2012, a brave midshipman  
10 whose life garnered national attention when four  
11 members of the Navy football team were charged  
12 with her gang rape. Since that time, and thanks  
13 in no small measure to the attention garnered by  
14 that case and her bravery in coming forward, the  
15 military justice system has undergone foundational  
16 and transformative changes in how it investigates  
17 and prosecutes sexual assault. Dozens of  
18 important and meaningful reforms have taken place,  
19 many informed by the work of this Committee and  
20 those that came before it.

21 And so I would be remiss in not  
22 thanking this Committee for your important work



1 but also in particular in highlighting the work of  
2 committee staff who I know work diligently, often  
3 behind the scenes to provide real world data and  
4 perspective on these important issues. You have  
5 the thanks and deep appreciation of survivors  
6 everywhere.

7 Survivors United is a nonprofit  
8 organization founded by victims of military-  
9 connected trauma and based on the principle that  
10 the survivor's voice matters, not just in the  
11 telling of the story but in the lessons we can  
12 learn from those stories. Survivors United works  
13 to ensure that the victim's perspective is  
14 received and heard at all levels of the the  
15 military justice system. Its members -- we call  
16 them Sheep Dogs -- come from varying experiences  
17 and backgrounds but of common hope and goal;  
18 continued improvement in the military justice  
19 system's investigation and prosecution of sexual  
20 assault and harassment. The organization includes  
21 current and former military personnel as well as  
22 civilian victims. Together this otherwise

1 unaffiliated group is neither sheep nor predator.  
2 They give voice to their stories with the  
3 knowledge that only through education and  
4 validation of the victim perspective can  
5 meaningful change occur.

6 It is through that experience that we  
7 come before you today to discuss the survivor  
8 experience and providing impact statements at  
9 sentencing. For many survivors who are able to  
10 report and ultimately see their assailant  
11 convicted, the victim impact statement is a  
12 seminal moment in the criminal justice process.  
13 Indeed for many of my clients and Survivors United  
14 members, it is the opportunity to give voice to  
15 the harm caused by the assault, and the only  
16 opportunity to confront the individual responsible  
17 for their pain and anger. Victim impact  
18 statements are an essential pathway to justice and  
19 healing. For many survivors, it is more important  
20 than the actual sentence itself.

21 Article 60 provides that survivors have  
22 a right to be reasonably heard at sentencing.

1 Rules for court-martial 1001 governs the way in  
2 which that right is effectuated. There are three  
3 ways, in my experience, in which victim impact  
4 statements are usually received at sentencing.  
5 First, survivors can testify live or via a sworn  
6 statement under oath. Both options afford the  
7 defense an opportunity to cross-examine the  
8 survivor.

9           Alternatively, survivors may provide an  
10 unsworn statement. This provides the survivor an  
11 opportunity to address the court and members  
12 without cross-examination by defense, although  
13 defense has the right to rebut any statements made  
14 in the unsworn statement and the statement itself  
15 is not evidence. In my experience doing this work  
16 for over a decade and the experience of Survivors  
17 United's membership, the unsworn statement, which  
18 is often read live by the survivor, is the most  
19 common victim impact statement approach taken at  
20 sentencing, and it is the one I frequently advise  
21 my clients to employ.

22           Unsworn statements must be submitted to

1 trial and defense counsel in advance of  
2 presentation to the court and members to allow for  
3 an opportunity to object. It is in this process  
4 that Survivors United has seen anecdotal evidence  
5 of significant limitations on what victims are  
6 allowed to say at sentencing, and it is why  
7 Survivors United appreciates the work this  
8 Committee is undertaking in gathering data and  
9 information on the limitations placed on victims  
10 at sentencing.

11 In particular, in our experience,  
12 survivors have been limited in their ability to  
13 speak directly to the accused at sentencing, to  
14 advance their beliefs of a particular type of  
15 sentencing result, to describe in detail what has  
16 happened to them or the ways in which that does  
17 not fit into the defense narrative, and to express  
18 too much emotion. Often these limits are self-  
19 imposed, placed on survivors by well-meaning  
20 victim legal counsel, special victims counsel, or  
21 prosecutors who are concerned that the victim  
22 statements will run afoul of the law. Others are

1 whittled down in court with the judge serving as  
2 the final arbiter and editor. Whatever the  
3 source, these limits seriously undermine the value  
4 and power of the victim impact statement and serve  
5 to reinforce the survivor sense of powerlessness,  
6 and they are not necessary to protect the accused  
7 rights.

8           Recent case law has expanded and  
9 clarified what victims may say at sentencing, but  
10 more work can and should be done. That is why we  
11 appreciate the opportunity to speak here today,  
12 and why it is my great pleasure to hear, along  
13 with you, from Survivors United founding member,  
14 Adrian Perry, and her husband, Lieutenant Colonel  
15 Breck Perry, Marine Corps Retired, on their  
16 experience.

17           I thank you again for your time today  
18 and look forward to answering any questions you  
19 may have including questions regarding the jury  
20 selection panel process, an issue of deep concern  
21 to Survivors United and its members. Thank you.

22           MS. PERRY: Madam Chair and Members of

1 the Committee, my name is Adrian Perry, and I am  
2 the co-founder of Survivors United. Before I  
3 introduce Survivors United, I want to take the  
4 time to thank the DAC-IPAD panel for inviting  
5 Survivors United, specifically my husband and I,  
6 to be here today to share our experience  
7 surrounding victim impact statements and the  
8 military justice system, so thank you.

9           Throughout my statement, I will be  
10 using the term "survivor" and "victim"  
11 interchangeably. I wanted to address that  
12 terminology as I do not want to offend anyone who  
13 may be a victim or survivor of sexual abuse or  
14 sexual assault. As I have worked with various  
15 clients through Survivors United as well as Victim  
16 Witness, I have found that some of my clients  
17 prefer survivor while others prefer victim.

18           Survivors United is a nonprofit  
19 organization that supports survivors of sexual  
20 assault within the military while ensuring the  
21 voice of the survivor is heard at all levels of  
22 the military criminal justice process. We also

1 have an advocacy group known as the Sheep Dogs who  
2 are the voice of the survivors that we support.  
3 The Sheep Dogs mission is to educate legislators,  
4 military leaders, and policy makers regarding  
5 survivor experiences within the military justice  
6 process surrounding sexual assault cases.

7 Survivors United would be honored to  
8 continue to provide the DAC-IPAD with valuable  
9 experiences we receive from survivors on various  
10 issues and challenges that current or future  
11 survivors bring to our attention. I attended the  
12 last DAC-IPAD meeting virtually where the issue of  
13 jury diversity was discussed as it was previously  
14 discussed with the prior panel. Our family  
15 personally encountered that very same challenge  
16 with a jury that was stacked with all males in our  
17 case for our two daughters who were victims of  
18 sexual abuse. They were six years old at the  
19 time. Our organization has also encountered  
20 challenges with survivors having sufficient access  
21 to information regarding their case. So these two  
22 current items of interest to DAC-IPAD are also

1 issues we would be privileged to provide feedback  
2 on going forward should the DAC-IPAD desire us to  
3 do so.

4 As far as victim impact statements are  
5 concerned, my husband and I faced a myriad of  
6 challenges as well as restrictions when it came to  
7 us both being able to provide a victim impact  
8 statement to the court on behalf of, at the time,  
9 one of our six-year-old daughters who was the  
10 victim of sexual abuse by one of my husband's  
11 previous bosses, who was a Colonel in the United  
12 States Marine Corps. I was originally told I  
13 would be able to provide a victim impact statement  
14 on behalf of my child only later to be told that  
15 only one of us could provide one. My husband and  
16 I talked over great length about this decision.  
17 As you can imagine, that was very difficult to  
18 choose one of us to speak on behalf of our child  
19 whose innocence was stolen. And ultimately, we  
20 decided that it would be most appropriate if he  
21 gave the victim impact statement since he was the  
22 active duty service member and it was his boss who



1 harmed our daughters.

2 I am now elated to know this issue has  
3 been addressed making it now permissible for both  
4 parents of a child victim to provide a victim  
5 impact statement on behalf of a child victim.

6 I have been blessed with many  
7 opportunities in the civilian justice system to  
8 see what right looks like regarding victim impact  
9 statements while serving as a Victim Witness  
10 assistant director for a local county in Virginia.  
11 I have sat in on many cases of child sexual abuse  
12 and adult sexual assault cases where the judge  
13 allowed immediate family members to provide victim  
14 impact statements on behalf of or in support of  
15 their loved on. I have also been able to hear  
16 what these individuals were able to say in their  
17 statements. I have never experienced a situation  
18 where the civilian court restricted what could be  
19 said as long as it directly pertained to the abuse  
20 the accused was convicted of and as long as the  
21 content was focused on how the crime impacted the  
22 victim emotionally, physically, mentally,

1     spiritually, and financially. I've seen  
2     statements delivered where the victim spoke  
3     directly to their abuser in their victim impact  
4     statement. In our case, you will hear from my  
5     husband about how we could not speak directly to  
6     our daughter's abuser, and my husband had to  
7     actually stand facing the jury with his back to  
8     our daughter's abuser as he delivered his  
9     statement.

10                   From a personal and professional  
11     standpoint, delivering a victim impact statement  
12     is a moment that many victims and their loved ones  
13     wait for a very, very long time. They finally get  
14     to speak directly to the court and to their abuser  
15     about the level of pain and anguish that the  
16     defendant's actions inflicted upon them. It takes  
17     a great deal of courage and emotional energy to  
18     sit down and relive the abuse in order to  
19     powerfully and impactfully tell the court and the  
20     abuser about the trauma they have suffered. For  
21     a judge to unnecessarily or incorrectly restrict  
22     a victim from having their voice fully heard is

1 simply minimizing the level of pain and trauma  
2 that the crime has caused them. To put it plain  
3 and simple, it is insulting for a victim to have  
4 that moment tarnished after everything that they  
5 have endured and the silence that they've had to  
6 face for so long throughout the duration of the  
7 investigation and the criminal proceedings leading  
8 up to sentencing. It's a long time to be silent.

9           The purpose of a victim impact  
10 statement is to do just that, provide an impact to  
11 the court at sentencing. How can this purpose be  
12 fully realized across all cases if some of these  
13 statements are being unnecessarily restricted  
14 resulting in the victim being incapable of  
15 disclosing the overall traumatic effects the crime  
16 has caused them. I always reference the USA  
17 Olympic Gymnastics sexual abuse case involving  
18 Larry Nassar when referencing an example of what  
19 right looks like when discussing victim impact  
20 statements. The judge in that case allowed every  
21 single woman that he harmed and that he victimized  
22 to speak freely and powerfully to the court and to

1 the defendant about the impact of the abuse they  
2 endured.

3 In our daughter's case, I made it very  
4 clear that as a mother, I was so upset that I  
5 could not speak up for my child. I was eventually  
6 told that I could speak at sentencing but that I  
7 could only do so through sworn testimony from  
8 direct questioning. I was warned that I would  
9 have to take the stand and be subject to cross-  
10 examination by defense once again. I welcomed  
11 this challenge if it meant I could advocate for  
12 our daughter. Once I took the stand, I was only  
13 allowed to answer direct questions from the  
14 prosecution, and I could not deviate whatsoever  
15 from that questioning. So everything that I had  
16 written down in hopes of being able to say to the  
17 court, that was taken from me.

18 Knowing what I know now as a  
19 professional working with victims of crime, I'm in  
20 absolute shock that as a mother of a child victim,  
21 that right was stolen from me. Being able to  
22 provide a statement to the court at sentencing can

1 be extremely empowering and freeing for a victim,  
2 and it's a moment that can open the very first  
3 door to hopeful healing for survivors. I am  
4 hopeful that through advocacy and research, future  
5 victims going through the military court system  
6 will be afforded the dignity and respect to fully  
7 utilize this right without illegitimate  
8 restrictions so their voice can be heard and  
9 healing can begin.

10 In closing, I would like to mention my  
11 concern after reviewing the data from the previous  
12 DAC-IPAD meeting surrounding victim impact  
13 statements in military courts. In my professional  
14 opinion, it seemed that the numbers of cases where  
15 an actual victim impact statement was given was  
16 somewhat low in comparison to the amount of guilty  
17 verdicts. I understand that not every victim  
18 wants to provide a victim impact statement, but in  
19 my professional experience, when offered the  
20 opportunity to do so, all of the victims I worked  
21 with in Victim Witness as a victim advocate  
22 capacity chose to provide a statement in some

1 format once they received a thorough explanation  
2 of what a victim impact statement is.

3 I am curious if all victims going  
4 through the military court process are being  
5 notified of their right to provide a victim impact  
6 statement and if so, are they being fully educated  
7 on what a victim impact statement entails and all  
8 options available to them on how to deliver one to  
9 the court. Education is knowledge and knowledge  
10 is power. If we are not fully educating victims  
11 of their rights in the military justice process  
12 and what those rights mean to them, we are failing  
13 victims of sexual assault in the military.

14 That's all that I have for you all, and  
15 I would like to turn it over to my husband, Breck  
16 Perry. And thank you all again for your time and  
17 inviting us to be here today. We truly appreciate  
18 it.

19 DR. PERRY: Good morning, Madam Chair  
20 and Members of the Committee. My name is Breck  
21 Perry and I'm a retired Marine Lieutenant Colonel.  
22 I'm a former uniformed victim advocate, and I'm a

1 member of the advisory board for Survivors United.  
2 I'd like to thank you for taking time to listen to  
3 our testimony today regarding victim impact  
4 statements, and it's my hope that our story will  
5 compel you to recommend legislative changes that  
6 eliminate restrictions on impact statement  
7 protocol during military trials.

8           As my wife mentioned, we were faced  
9 with significant challenges during both the  
10 presentencing preparation and the sentencing  
11 hearing phases. During the trial, Adrian and I  
12 were advised to prepare victim impact statements  
13 that we would be allowed to read, at sentencing,  
14 if the jury decided to convict. This process in  
15 and of itself was simultaneously heart-wrenching  
16 but liberating. For the first time, we would be  
17 able to publicly express how our daughters' trauma  
18 had impacted them.

19           At first, we were told that Adrian and  
20 I could both speak but later we were told that  
21 only one of us were permitted to speak during the  
22 sentencing hearing. After the guilty verdict was

1 delivered, I prepared to give my victim impact  
2 statement before the court. I had to face the  
3 jury and not the defendant, making it a strange  
4 arrangement where my back was turned towards my  
5 daughter's convicted abuser. I remember the judge  
6 stopping me in the middle of my statement and  
7 telling me that I could not say certain things.  
8 He then asked for my written statement to be  
9 brought to him. He red-penned it and crossed out  
10 important thoughts that I wanted to convey to the  
11 court.

12           The judge returned my statement to me  
13 and told me that I had 15 minutes to revise it.  
14 In a flood of emotions, I did what I was told and  
15 I ran to an adjacent building. I scrounged some  
16 writing material. I revised the letter and  
17 reoccupied the court stand within the imposed 15-  
18 minute deadline. When I started reading my  
19 statement again, the judge stopped me again and  
20 said, "That will be enough, Major Perry,"  
21 dismissing me back to my gallery -- or back to the  
22 gallery before I was able to finish my statement.



1           I returned to my seat feeling angry,  
2           confused, and defeated wondering why a judge would  
3           restrict and suppress me in that way when as a  
4           father, I was there to be a voice for my daughter  
5           who was voiceless and who had her innocence stolen  
6           from her at the age of six.

7           The defense was then allowed to proceed  
8           with their impact presentation while the judge  
9           allowed the defense to call character witnesses,  
10          present multiple three-inch binders full of the  
11          convicted abuser's personal decorations and  
12          military awards, pictures, and even allowed him to  
13          talk to the jury where he droned on and on about  
14          saving his retirement, nothing about the impact  
15          that he caused to my family and to my daughter.

16          To add insult to injury, the judge  
17          reminded the jury that the convicted abuser was a  
18          decorated colonel reading out his military awards  
19          and accomplishments during his time in service.  
20          I could not believe what I was hearing and seeing.  
21          Why did the judge allow this to happen? Why was  
22          my wife not allowed to share her impact statement?

1 Why was I silenced and not allowed to face the  
2 abuser when I tried to advocate for my daughter  
3 and describe the horrific devastation that he  
4 imparted upon our family? In the Marines, I  
5 learned that when it comes to experiencing trauma,  
6 pain shared is pain divided. For many victims,  
7 presenting their impact statement is the first and  
8 only opportunity for them to share that pain and  
9 let their voice be heard.

10 Thank you so much for your time and  
11 this opportunity to speak with you today. At this  
12 time, my wife and I would be more than happy to  
13 answer any questions regarding the testimony that  
14 we presented today.

15 CHAIR SMITH: Thank you so much, Mr.  
16 and Mrs. Perry for sharing your stories. We  
17 really appreciate your being here and Mr. Guilds  
18 as well.

19 Mr. Guilds, you indicated there were  
20 three ways to give a victim impact statement, but  
21 I think I only heard two, so -- and perhaps I  
22 missed it, the first one being live testimony

1 where they're subjected to cross-examination; the  
2 second one being an unsworn statement without  
3 cross-examination. And then what's the third?

4 MR. GUILDS: A sworn statement --

5 CHAIR SMITH: A sworn statement but not  
6 --

7 MR. GUILDS: -- that is subject --  
8 sorry, go ahead.

9 CHAIR SMITH: Sorry. Is that one  
10 subject to cross as well?

11 MR. GUILDS: Yes -- yes, it is.

12 CHAIR SMITH: So how is that different  
13 than the first one?

14 MR. GUILDS: So one is live.

15 CHAIR SMITH: Okay.

16 MR. GUILDS: One is direct cross,  
17 right. One is a sworn statement, therefore,  
18 evidence. Therefore, the rules provide for an  
19 opportunity to cross-examine, so you could imagine  
20 that direct is almost the statement itself and  
21 then there's cross-examination. I candidly have  
22 never seen that happen.

1 CHAIR SMITH: Okay.

2 MR. GUILDS: And then the third is the  
3 unsworn statement.

4 CHAIR SMITH: Do you have, any one of  
5 you -- Ms. Perry mentioned she wasn't sure what  
6 type of education is provided to victims when  
7 they're weighing whether or not to give a victim  
8 impact statement. How are they informed that they  
9 have a right to make a victim impact statement?  
10 If you know, is there a standard requirement for  
11 all the services, you know, that they be provided  
12 with information about giving a victim impact  
13 statement and what that looks like? Or is it kind  
14 of willy-nilly, for lack of a better way of saying  
15 it?

16 MR. GUILDS: I would not describe it as  
17 willy-nilly. There is a form. The military loves  
18 their acronyms and their numbers, so I don't know  
19 the precise number of the form, but there is a  
20 form that's provided to victims. Typically, if  
21 their first contact is with a military  
22 investigative unit, they'll be brought that form

1 at that time, which will list and describe their  
2 rights, among them the right to provide an impact  
3 statement at the conclusion of a successful  
4 conviction. And then trial counsel will advise  
5 victims of that right. Typically, it's my  
6 experience -- and of course, victims legal  
7 counsel, in their role, will provide that. That's  
8 one of the critical roles that victims legal  
9 counsel, special victims counsel provides.

10 Now I would hasten to add -- and this  
11 is one of the concerns at Survivors United -- is  
12 that there -- the provision of victims legal  
13 counsel, special victims counsel is not  
14 comprehensive. It does not provide those services  
15 to civilians who are outside of the DoD or family  
16 structure, so that's the first thing. And that is  
17 based upon this Committee's own data, the  
18 significant minority of the assaults that take  
19 place. So the reason that I exist in this world,  
20 in part, is to fill that gap, and there are many,  
21 many survivors who are not informed of those  
22 services. And that's one of the significant

1 concerns Survivors United has is the ability to  
2 connect survivors with civilian organizations to  
3 provide that victim's legal counsel so that they  
4 can then do what we did for the Perrys, which was  
5 to explain their rights, however limited.

6 MEMBER BASHFORD: In addition -- I just  
7 want to make sure I'm clear. So you don't have to  
8 just provide notice of an intent to give a  
9 statement, you have to provide the actual  
10 statement itself?

11 MR. GUILDS: If the statement is  
12 unsworn, the current rules require that that  
13 statement be provided in advance of being read  
14 either to the members or the court so --

15 MEMBER BASHFORD: So there's no  
16 opportunity for an extemporaneous statement then?

17 MR. GUILDS: In an unsworn statement,  
18 no; right? If you're on direct, of course, if you  
19 were doing direct, then the answer is going to be  
20 the answer, and it would be a normal witness as it  
21 would be any other witness subject to objection  
22 and so forth and follow-up on redirect. But an

1 unsworn statement is something that's provided in  
2 advance to defense and trial counsel, and that's  
3 where the discussion takes place. This -- you  
4 don't need to read this but this is literally an  
5 example of one that I had last month where the  
6 statement was written. Then defense counsel red-  
7 lined it. Then we negotiated it. Then we argued  
8 it in court. That's how the unsworn statement  
9 process works.

10 MEMBER BASHFORD: In my jurisdiction,  
11 all you had to do was give 72 hours' notice and  
12 that was it. The person got to -- within the  
13 parameters of decorum.

14 MR. GUILDS: Sure.

15 MEMBER BASHFORD: You're in a  
16 courtroom. They got to say whatever they wanted  
17 to say.

18 MR. GUILDS: Yes. And I think that's  
19 one of the potential suggested changes is to  
20 eliminate that process, that advanced notice  
21 process. I think, you know, in terms of what to  
22 do, right, like what are the things that we see

1 that are important here to think about. I think  
2 -- number one, I think there is ambiguity as to  
3 whether or not a survivor can speak directly to  
4 the defendant. I think that should be clarified.  
5 I think they should have that opportunity. I've  
6 had courts-martials where it's not been permitted.  
7 I've had courts-martials where it is permitted.

8 But I can promise you that for the  
9 survivors that I've represented, it is an  
10 important component to the process. Speaking to  
11 the person who has taken power from you, because  
12 that's what assault is, and taking that power  
13 back, that is one of the essential elements of the  
14 victim impact statement. And many survivors can  
15 only do that if they can face the person who  
16 caused them the pain. And so it's not an  
17 insignificant moment although it may seem like it  
18 to those who have never been a survivor.

19 In addition, one of the things that we  
20 continue to see is unnecessary limitations on what  
21 happened during the assault. So I'll give you an  
22 example. And this is not unusual that the case



1 gets charges of 120 offense. The case goes  
2 through a very lengthy process and ultimately  
3 results in a plea agreement to a 128 assault  
4 charge. A 128 assault charge is not sexual in  
5 nature, but it's physical in nature, and the  
6 defendant has his narrative, his proffer as part  
7 of that plea agreement.

8 Well, what would the survivor like to  
9 do? The survivor would like to describe what  
10 happened to her, and she would like not to be  
11 limited by what the defendant has to say. She  
12 would like to describe it. This very same  
13 statement that I showed you today significantly  
14 limited her ability to say what happened being  
15 almost beholden to the defense narrative. And I  
16 understand there are important and significant due  
17 process limitations. We can't just simply take  
18 things from 10 years ago that are unrelated to the  
19 crime, but there has been a significant narrowing  
20 of the survivor's ability to describe what's  
21 happened to them as part of the victim impact  
22 statement that I think needs to be addressed.

1                   And then finally, one of the things  
2                   that we've seen recently -- that I've seen  
3                   recently in specific cases is the impact of the  
4                   pretrial and trial process itself. It is common  
5                   parlance to say this and so I hesitate to use  
6                   words that when said so often don't have meaning.  
7                   But the military justice system is as violent, if  
8                   not more violent, than the assault itself for many  
9                   survivors. And having to go through that process  
10                  is something they should be entitled to describe.  
11                  And in at least two of the last three court-  
12                  martial cases that I've appeared in, survivors have not  
13                  been permitted to express the pain, difficulty,  
14                  and challenges confronted by navigating the  
15                  military justice system. And we believe that's  
16                  something that's something that should be changed.

17                  MEMBER WALTON: You indicate that  
18                  victim survivors and advocates are fearful of  
19                  running afoul of the limitations on victim impact  
20                  statements. Are those limitations the subject of  
21                  some legal authority or just judicially imposed?

22                  MR. GUILDS: There is legal authority.

1 You know, there are rules that require --  
2 currently, the rule, 1001(c) requires only victim  
3 impact statement. And then there is a series of  
4 cases that describe what you can say about what  
5 happened in the crime. So there is some case law  
6 out there that suggests some limitations, and  
7 courts are left to try to figure out where that  
8 line is. And that's not unusual to this  
9 particular area of jurisprudence. Often courts  
10 have to interpret case law. So we're not  
11 complaining about it but the ambiguity in the  
12 rules and in some cases, the specific language in  
13 the rules -- for example, the inability to make a  
14 comment at sentencing about what you think should  
15 happen at the sentence, those are things that are  
16 in the rules themselves.

17 So this is not an area that CAAF and  
18 the subordinate courts have not tried to address  
19 in some way, but it is not consistent across the  
20 branches. It's not well understood. And perhaps  
21 more importantly, from our perspective, there is  
22 not a recognition that judges should tread very

1 lightly when they touch a victim impact statement.  
2 And if I could say -- I mean this is every  
3 argument I make, I make without case law, it's one  
4 of the first things I say when they try to limit;  
5 this statement is sacred and unless there is --  
6 and I apologize to keep looking at our defense  
7 colleagues here because I am, by training, a  
8 defense lawyer -- unless there is a specific,  
9 real, meaningful constitutional right implicated,  
10 that survivor should be able to say whatever she  
11 or he wants within the manner of the rules, and  
12 judges should be very reticent to try to interfere  
13 with that process.

14 MEMBER WALTON: What sentence did the  
15 perpetrator actually receive, and did you think  
16 the process had an impact on what that sentence  
17 ultimately was?

18 DR. PERRY: Yes, sir. He -- so he was  
19 dismissed from the Marine Corps, so it's like a  
20 dishonorable discharge equivalent. And I think he  
21 got --

22 MS. PERRY: Five years.

1 DR. PERRY: -- five years in prison.  
2 But then that was overturned in appeal.

3 CHAIR SMITH: The conviction was  
4 overturned, or the sentence was changed?

5 DR. PERRY: Everything.

6 MS. PERRY: Everything, the entire  
7 conviction.

8 CHAIR SMITH: Ms. Goldberg.

9 MEMBER GOLDBERG: Thank you and thank  
10 you very much for sharing your experience and for  
11 sharing what you do. Two questions. One is some  
12 of us on this Committee have taken up reading some  
13 of the examples of cases in which victim impact  
14 statements were limited to see what has happened  
15 to relatively a small number compared to the  
16 overall number of cases, but what you just  
17 described about a lot of the pre -- the sort of  
18 prior to trial limitation on victim impact  
19 statements was something that we were talking  
20 about. And it would be -- or that I've been  
21 thinking about -- it would be helpful to hear more  
22 from your perspective about how this Committee

1 could understand more of what happens pretrial.

2 Is there any way in which we could research this?

3 And related to that, is it -- you  
4 described negotiating with the defendant. Is it  
5 also negotiating with the judge ahead of trial?

6 And so to the extent you could give us any more of  
7 a way to get an empirical window there?

8 And I'll just note my second question.  
9 It's a separate topic and we can come back to it  
10 afterwards, which is what are the arguments  
11 against permitting the victim to speak directly to  
12 the defendant and why don't you find those  
13 compelling?

14 MR. GUILDS: Okay. I'll start with the  
15 empirical question first. I think that's part of  
16 why we asked this Committee to look at it, because  
17 of the challenges we were having in terms of  
18 empirically how to look at particularly the pre-  
19 writeup process. So when I described all of these  
20 changes, right, if you were to read the record of  
21 court-martial in this case, you would not know  
22 that that happened; right? You will see the judge

1 -- this is, in part, to answer a part of your  
2 question -- judges have their own obligation  
3 independent of defense counsel to monitor a  
4 sentencing. And so in the Perrys case as well as  
5 in cases that I've experienced, the judge will  
6 unilaterally, on their own initiative, seek to  
7 edit statements if necessary, if they believe it's  
8 necessary. So that will take place independent of  
9 any defense objections.

10 But the give and take, the back and  
11 forth with defense counsel, that's a process that  
12 you don't see. And I don't see a way to get raw  
13 data on that. I do think the people sitting  
14 perhaps behind the -- from the military detail,  
15 the uniformed victims legal counsel and special  
16 victims counsel, will have perspectives on that.  
17 Are their members actually looking at the law and  
18 self-editing because they understand the law to be  
19 a particular way? What are their experiences in  
20 negotiating with defense counsel and with courts?  
21 That might be outside of the record of trial.  
22 Those are, I think, your best ways, your best

1 avenues would be some sort of survey of their  
2 experiences. I think I forgot the second part of  
3 your question. Apologize.

4 MEMBER GOLDBERG: Let me actually  
5 insert a more directly-related question if I  
6 might, which is I think there's -- it's come up in  
7 some cases a question whether a victim's counsel  
8 has standing to address the court on any  
9 limitations that a judge might be putting on the  
10 victim's ability to speak. And I've certainly  
11 seen in at least one case where there was argument  
12 on whether the victim's counsel did have standing,  
13 and the court ruled no. and I wonder if you had  
14 any view on whether the victim's counsel could  
15 speak on behalf of the victim when -- if their  
16 statement is limited in some way like it was in  
17 your case?

18 MR. GUILDS: I have never -- well, I've  
19 experienced limitations on standing since I  
20 started taking this case. When I started taking  
21 these cases, there was no Article 6(b) and we were  
22 just doing our best. So in terms of this issue,



1 it would be hard for me to understand how now a  
2 victim's legal counsel could not have standing,  
3 because the case law is clear that the victim's  
4 right to sentencing is unique to the victim. And  
5 trial counsel cannot actually present a victim's  
6 legal counsel's statement, because it is  
7 inconsistent with 1001(c). So if you look at the  
8 case law, the CAAF has actually said -- and this  
9 has been a challenge in child pornography cases  
10 where the victims -- the number of offenses is  
11 ubiquitous, those victims are not going to want to  
12 come in. And trial counsel has wanted to find  
13 ways to get those victim impact statements into  
14 evidence, and they -- and the court has held that  
15 that is not permissible unless there is some  
16 evidence that the victim is actually requesting  
17 that and that it's in fact their statement. The  
18 trial counsel's got a separate track which is  
19 aggravation; right? That's entirely distinct from  
20 the victim impact statement.

21 So to answer your question directly, I  
22 have not been limited. In fact, it's been the

1 exact opposite. Trial counsel has been limited in  
2 their ability to advocate with respect to the  
3 victim impact statement.

4 MEMBER GARVIN: Chair, could I ask a  
5 quick follow-up question on that exact narrow  
6 issue of standing? Have you seen limitations on  
7 appellate standing of SVC around some of the  
8 issues, particularly all the way up to CAAF, cause  
9 I think that might be part of where the question  
10 is coming from, the cases we've read, not standing  
11 at the court-martial level but seeking review.

12 MR. GUILDS: I see. I would have to  
13 defer to others in terms of the appellate process.  
14 I am in the soup at the ground level.

15 CHAIR SMITH: Have you seen a gap in  
16 victim support or victim impact statements for  
17 children? In other words, you know, it seems that  
18 the adults can get the support that they need but  
19 what about the children who are victims?

20 MR. GUILDS: So it's a challenging area  
21 for a variety of reasons. I think what happened  
22 to the Perrys and their court-martial, candidly,

1 which generated some of the anxiety in terms of  
2 their ability to speak, I don't think that that  
3 would happen today. We haven't seen -- I have  
4 not seen a definitive ruling from the CAAF on this  
5 issue, but some of the subordinate court of  
6 appeals have indicated that the notion of victim  
7 is not limited to the guardian designated and that  
8 they would both be permitted to express on behalf  
9 of their children the impact. So -- but also  
10 candidly, my experience in representing children  
11 is not significant enough for me to feel  
12 comfortable offering a broader opinion than that.

13 MEMBER GARVIN: Switching gears a  
14 little bit, but at least two of you have mentioned  
15 this when you were talking, and I didn't write  
16 down the note sufficiently, but mentioned that you  
17 also would have something to say about the jury  
18 selection that we were talking about with the last  
19 panel. And so I want to make sure we hold space  
20 for that in case any of you wanted to comment on  
21 that, too.

22 MR. GUILDS: Yes, we do. Thank you.

1 So our experience, my experience, the experience  
2 of Survivors United is that women are  
3 systematically excluded from jury panels. I'm not  
4 professing that there's an intention behind that,  
5 but I see the result. And what we see is that I  
6 have never had a court-martial with more than one  
7 woman on the panel itself, never.

8 We have seen, you know -- and for  
9 whatever reason, I have a disproportionately  
10 larger number of Marine Corps cases than other  
11 cases, and so I recognize that that pool is  
12 smaller than perhaps some of the other branches.  
13 But in our recent experience, what you heard, Ms.  
14 Goldberg, that's what I see, this systematic  
15 exclusion that comes from being a uniformed victim  
16 advocate from experiencing a sexual assault or  
17 simply not being identified and placed on a  
18 potential panel. Those are things that we see in  
19 the real, every single one of our court-martials,  
20 and it has a very significant adverse consequence.

21 So I will give you one specific example  
22 in honor of one of my clients; 19-year-old girl

1 travels to California to go on her very first  
2 vacation. She thinks it's going to be an amazing  
3 experience. She's there with her friend. Her  
4 friend's married to a Marine. They go to a party  
5 and at that party, she's brutally assaulted. She  
6 subsequently reports that assault, and she waits  
7 for over 18 months to go to trial.

8 Now this is a girl who is not a part of  
9 the military justice system. She lives in rural  
10 Tennessee. She doesn't know anything about the  
11 process itself, and she's heard along the way all  
12 of the things that she did as a child or as a  
13 young adult that are going to potentially come out  
14 at that court-martial, and yet she's brave enough  
15 to come forward.

16 And she knows that she's got this  
17 amazing lawyer, because I told her I was amazing.  
18 So she knows that she's got all of that going for  
19 her, and she shows up at the court-martial in the  
20 middle of the desert in California, and she looks  
21 across at the potential members that are going to  
22 decide whether or not to believe her, and there is

1 one woman out of 20, one. That's a problem. I  
2 think she felt defeated in that moment, and it's  
3 an issue that is important and critical for  
4 defendants to receive a fair trial, but it is also  
5 critical for survivors. It is not a binary choice  
6 between supporting defendants and supporting  
7 victim's rights. And we see it every day in the  
8 courts that I attend and the feedback we receive  
9 from our membership that the systematic exclusion  
10 of women from venire panels and from eventual  
11 panels is a compelling and significant problem.  
12 So we appreciate this Committee taking a look at  
13 that issue.

14 MEMBER TOKASH: Hi. This is Meghan  
15 Tokash. I have a question for the Perrys and then  
16 a question for you, sir. So first, for the  
17 Perrys, just so I understand correctly, did you  
18 have Ryan's assistance during the court-martial,  
19 i.e., did you have a victim's counsel assisting  
20 you at the time?

21 DR. PERRY: Yes, ma'am. We had  
22 service-level victim legal counsel, so we started

1 with a captain and then he just -- inexperienced.  
2 We asked for someone else. We got a major and  
3 then my wife contacted Ryan, and Ryan and his team  
4 provided civilian-level victim legal counsel to  
5 us.

6 MEMBER TOKASH: But was that after the  
7 court-martial had concluded that Ryan came on?

8 DR. PERRY: Oh, no, ma'am.

9 MEMBER TOKASH: Oh.

10 DR. PERRY: It was during the process.  
11 It was prior to, when we were go -- when the  
12 investigation was going on, and there were so many  
13 things happening with, you know, evidence  
14 collection, you know, the convening at the "what  
15 are you doing there" thing, and just so much going  
16 on. We needed some guidance. We needed a heavy  
17 hitter and that's when my wife contacted Ryan.

18 MS. PERRY: We were initially assigned  
19 a captain in the Marine Corps as our VLC, and he  
20 was a wonderful, kind gentleman. However, we did  
21 not feel that he was, I guess, experienced enough  
22 to take on our case. So our daughter's abuser was

1 a full bird colonel about to be a brigadier  
2 general. So I mean he had already been passed  
3 over once for brigadier general, so we were  
4 dealing with some very high-ranking individuals.  
5 So when we would have meetings, we did not feel  
6 that he was able to advocate for us in a way that  
7 we needed to be advocated for because rank does  
8 matter in the military. You know your place.  
9 That's just how it is. So we did request a more  
10 senior, more experienced VLC through the military,  
11 and we were assigned a major.

12 But in between that time, I started to  
13 do my own research and sought Arnold & Porter and  
14 ended up with an incredible amazing attorney. So,  
15 you know, we were very grateful for that, and he  
16 was able to -- it was wonderful because he was  
17 able to provide civilian experience that was even  
18 helpful to the trial counsel that maybe they  
19 weren't thinking of. So it ended up being a  
20 really, really great thing for us as far as just  
21 advocating on behalf of our children.

22 MEMBER TOKASH: Thank you. And then



1 have you used interlocutory appeals for  
2 enforcement mechanism of the Crime Victims' Rights  
3 Act for violations that are occurring at courts-  
4 martial? In particular, I'm thinking about the  
5 victim's right to not be excluded from the  
6 courtroom, and the victim's right to be reasonably  
7 heard under 18 U.S.C. 3771?

8 MR. GUILDS: The answer is I have  
9 wanted to many times, but I serve at the pleasure  
10 of the victim, and it is very few victims who want  
11 to delay what they have finally gotten to. So I  
12 have been at court-martial several times where I  
13 thought the issue was of significant moment and as  
14 a matter of broader development of jurisprudence,  
15 it would be helpful to move forward, but -- and I  
16 know you agree with me when I say this but  
17 ultimately, we work for the victim. And so in  
18 those cases, the victims have not wanted to move  
19 forward on interlocutory appeal. And that's one  
20 of the challenges of our appellate system in  
21 addition to the limitations in how things are  
22 reviewed on appeal verse -- by a writ.

1           But it's a real challenge to get some  
2 of these issues up earlier because as we've  
3 described, and as I think this panel understands,  
4 the road that Ms. Perry described in terms of  
5 going forward is so long that the idea you're  
6 going to delay it another six months or something  
7 to deal with an issue, it makes it very difficult  
8 for victims to be willing to move forward.

9           MEMBER WALTON: Let me just ask, Mr.  
10 Guilds, the individual who -- the example that you  
11 gave, the individual who she accused, was that an  
12 officer or an enlisted member? And what was the  
13 ultimate result in the case?

14           MR. GUILDS: It was an officer. If  
15 you're talking about the case where there was a  
16 limitation, sir? Oh, the 19-year-old. He was  
17 acquitted. He was acquitted, interestingly  
18 enough, and I'm a poker player so I feel pretty  
19 good in saying this, on a vote of 5 to 3 in favor  
20 of conviction, the one panel member being one of  
21 the members that we anticipated would have voted  
22 for a conviction. But because of the unanimity

1 requirement, there was no retrial. So we did not  
2 have the necessary numbers to sustain a conviction  
3 despite a significant number of those members  
4 believing in the accused's guilt.

5 MEMBER GOLDBERG: Thank you again for  
6 all that you're sharing. Wondering -- you know,  
7 I know you're familiar with the changes to RCM  
8 1001 -- wondering if -- you know, of course,  
9 there's the proposal to remove the prohibition on  
10 recommending a specific sentence. I assume you  
11 agree with that?

12 MR. GUILDS: We do.

13 MEMBER GOLDBERG: Wondering if there  
14 are other changes that you would recommend? And  
15 this is where I'll come back to that second  
16 question that I asked before, one of the issues  
17 that you -- the three of you all raised was the  
18 ability to speak directly to the defendant and  
19 wondering if that is something that you see as  
20 being important for RCM 1001, or whether you see  
21 that protection you're seeking as being elsewhere?  
22 And the related question to that is what would be

1 the arguments against allowing for the victim  
2 advocate to speak -- or the victim to speak  
3 directly to the defendant and then what your  
4 response is?

5 MR. GUILDS: Thank you for the  
6 question. I think we've reviewed the policy  
7 subcommittee's recommendations or at least  
8 preliminary recommendations that talk about  
9 removing both the limitation on speaking to  
10 sentencing and the advanced turning over of the  
11 victim impact statements. I think those are  
12 important.

13 I think what we would also advocate for  
14 is that standard I described. You know, there is,  
15 in many ways, appropriately assumptions that  
16 benefit defense; right? Like when we talk about  
17 one of the issues that comes around with jury  
18 selection, it's about the liberal grant mandate  
19 which means that if there is any doubt, we're  
20 going to strike a juror. We would ask for a  
21 similar type of assumption that absent some  
22 identifiable meaningful constitutional -- not

1 meaningful -- identifiable and real constitutional  
2 violation of risk to the accused, that the victim  
3 be allowed to say what they want to say. Some  
4 sort of presumption, I think, would be helpful  
5 because I'm saying it now in argument because I  
6 feel it, but I don't have any case law or basis to  
7 support it. So unless the judge -- unless I am  
8 able to convince a judge emotionally, I don't have  
9 the law behind me, and that's a problem.

10 In terms of -- and I know this will be  
11 the third time -- what's the arguments against?  
12 I would imagine the -- as a defense counsel, the  
13 arguments that I -- I have not heard these but, of  
14 course, much more significant risk when you're  
15 talking about panel members that could use  
16 inappropriate considerations in violation of the  
17 defendant's rights, right, with respect to  
18 sentencing. I think that's an issue that's not  
19 present when you have judge sentencing, judge  
20 alone sentencing. So I think the risks there are  
21 significantly limited. If I were to put on my  
22 defense cap and say I would argue that if the

1 defendant is -- has a right, of course, to present  
2 mitigation, but the aggravation actually has to  
3 relate to the offense itself. So if those things  
4 get too attenuated, then that's not -- it's a due  
5 process violation because he's being sentenced for  
6 something that he was not convicted of. Those  
7 would be the arguments that I would imagine. And  
8 we agree that those are significant concerns. We  
9 just don't think the line is being drawn anywhere  
10 close to where there's a real meaningful  
11 constitutional risk to the accused.

12 MEMBER GOLDBERG: The other issue is  
13 around facing the defendant.

14 MR. GUILDS: Oh, and in terms of facing  
15 the defendant, yes, I mean I think that certainly  
16 I could see some language to that. I think it  
17 might also be an educational piece. I think that  
18 what the Perrys experienced and what the judges  
19 see is they have this independent obligation for  
20 decorum, right, and they have an independent  
21 obligation to ensure that the sentencing statement  
22 fits within the prescribed parameters, but they

1 don't really have any guidance. So whether that's  
2 specific within the rule itself, whether it's in  
3 the committee notes, I think real meaningful  
4 guidance that both empowers the victim statement  
5 and then creates examples of things that should be  
6 permitted I think would be beneficial.

7 MEMBER SCHWENK: This is Jim Schwenk.  
8 I have a question when I get a chance.

9 CHAIR SMITH: Yes. Go ahead.

10 MEMBER SCHWENK: Thank you. Ryan, how  
11 wide do you think the rule ought to be for the  
12 victim impact statement? Right now it says the  
13 victim talks about harm to the victim. We've  
14 heard that some judges allow the victim to talk  
15 about harm to the victim's children in a child  
16 abuse sex abuse case. What about harm to parents,  
17 harm to spouses, harm -- do you think it should be  
18 broadened in some way, or you think you should  
19 have to tie it back to yourself -- "and my spouse  
20 was all upset and this has affected me this way,"  
21 any comments on --

22 MR. GUILDS: Thank you for the

1 question. I don't think it -- we know the case  
2 law doesn't require -- the current case law does  
3 not require that the victim be named. The CAAF  
4 has held that. And I think what flows from that  
5 is this broader notion that crime does impact more  
6 than just that person. And I do think, you know,  
7 with some understandable limitations, but I do  
8 think that those beyond the victim -- and I'm not  
9 just talking about guardians -- the crimes that  
10 occur impact families, they impact relationships,  
11 and I think it's important for those individuals  
12 who are also affected to have an opportunity to  
13 speak.

14 So I do think it could be broader. I  
15 think that there is nothing wrong or inappropriate  
16 about getting the full measure of the impact of a  
17 convicted accused's actions on the community and  
18 the individuals that it impacted. So I would  
19 advocate for the broadest possible expanse of that  
20 narrative at trial.

21 MEMBER SCHWENK: Another question I  
22 have is you mentioned the difference between judge



1 alone sentencing and member sentencing and the  
2 concerns. In your practice, do you see a  
3 difference in the oversight by the judge of the  
4 victim impact statement when it's a member's case  
5 compared to the oversight by the judge of a victim  
6 impact statement when it's a judge alone  
7 sentencing --

8 MR. GUILDS: I would expect -- sorry.  
9 I didn't mean to interrupt. I would expect there  
10 to be a difference but I candidly have not seen a  
11 difference. This case was a judge alone trial.  
12 The last court-martial that I had in the Air Force  
13 was a -- I mean granted, it was a two star general  
14 and so it had attention but that was judge only  
15 trial. There was still limitations that were  
16 imposed. And in terms of the jury, in terms of  
17 members themselves, I've seen those limitations.  
18 I think courts would be more likely to place those  
19 limitations, but I have not seen it in my  
20 practice.

21 MEMBER SCHWENK: Thank you very much.

22 CHAIR SMITH: I think that concludes

1 our questioning. Thank you so much for being  
2 here. We really appreciate it.

3 MR. GUILDS: Thank you for having us.

4 DR. PERRY: Thank you.

5 COL BOVARNICK: I recommend we have  
6 like a 10-minute break, and then we'll get the  
7 next panel situated if that works for everyone.  
8 So 11:45 we'll reconvene.

9 (Whereupon, the above-entitled matter  
10 went off the record at 11:35 a.m. and resumed at  
11 11:46 a.m.)

12 MS. SAUNDERS: We now welcome the  
13 program managers from each of the Service's  
14 Victims' Counsel Programs. They're here to  
15 provide information on victim impact statements  
16 and appellate issues related to victim impact  
17 rights, or related to victims' rights.

18 Their biographies can be found at tab  
19 4-A in your materials and each representative will  
20 provide a brief introduction and then will address  
21 questions from the Committee. Our first presenter  
22 will be Colonel Carol Brewer, the Chief of the

1 Army's Special Victim Counsel Program, followed by  
2 Captain Dan Cimmino, the Chief of the Navy  
3 Victims' Legal Counsel Program; Lieutenant Colonel  
4 Iain Pedden, the Chief of the Marine Corps  
5 Victims' Legal Counsel Program; Colonel Tracy  
6 Park, the Chief of the Air Force Victims' Counsel  
7 Program; and Ms. Elizabeth Marotta, the Chief of  
8 the Coast Guard's Office of Member Advocacy.

9 So we'll turn it over to you, Colonel  
10 Brewer.

11 COL BREWER: Good morning. We were  
12 asked to first tell you a little bit about  
13 ourselves, so thank you for giving me that  
14 opportunity. I just wanted to -- currently the  
15 Chief of the Army's Special Victim Counsel  
16 Program. Very proud of that position. So far  
17 since 2016 the Army has assisted over 13,000  
18 victims as they go through the investigative and  
19 disciplinary process.

20 I've been in this position since June  
21 of 2021 and that's given me the opportunity to  
22 oversee two certification courses, and we're

1 currently planning one for February and then this  
2 upcoming summer as well, in addition to five  
3 regional trainings as all of our regions are  
4 required to do an annual refresher every year.

5 We were also asked to tell you a little  
6 bit about our past litigation experience. I've  
7 had great opportunities to serve in several  
8 different roles in the military justice process  
9 over my 21 years in the Army. Most recently I was  
10 a special victim prosecutor for three years.  
11 Before that I was a defense counsel for three  
12 years. I was also a trial counsel earlier in my  
13 career. And also participated as lead counsel in  
14 trials as a brigade judge advocate and oversaw  
15 trials as a deputy SJA and SJA. So for a total  
16 I've worked on about 57 different trials.

17 We were finally asked to discuss our  
18 recent experience with victim impact statements.  
19 So there's two areas really, and I think some of  
20 them we'll get to address more depending on your  
21 questions, but I am involved in the training of  
22 that at the -- at our certification course.

1       Because that's such a critical thing that our  
2       special victims' counsel assist victims with, I am  
3       the trainer for one of the two classes we present  
4       on that during our training, and I'd be happy to  
5       answer any questions on that.

6               And as an SVP I was very involved with  
7       not only our special victim counsel, our civilian  
8       victims' counsel like Mr. Guilds who I had the  
9       honor to work with while I was in that role, but  
10      working directly with victims, whether represented  
11      or not, to make sure that they understood fully  
12      what they were able to present, how best to  
13      present it and how I could assist them in  
14      presenting that. And I used those lessons when  
15      training our special victim counsel.

16              I provided them with an example of one  
17      of the best unsworn statements I ever heard in a  
18      court-martial. They can use that example and use  
19      that with the victims that they represent. And so  
20      that's both my recent experience as a trainer and  
21      as a litigator. And then I'm happy to answer any  
22      other questions you all have as we move

1 throughout. Thank you.

2 CAPT CIMMINO: Good morning, Madam  
3 Chairwoman and distinguished panel members. I am  
4 the Chief of the Navy Victims' Legal Counsel  
5 Program. I have been serving in this position  
6 since October of 2021.

7 Prior to assuming leadership of the  
8 Navy VLC Program I was the Chief of Staff for  
9 Defense Service Offices. During my 25-year Navy  
10 career I have served in a variety of assignments  
11 including as a defense counsel, assignments  
12 officer, staff judge advocate, legislative counsel  
13 in the Office of Legislative Affairs, as an  
14 executive officer, a commanding officer, and as  
15 the Executive Assistant Special Counsel to the  
16 General Counsel of the Department of the Navy.

17 As the Chief of the Navy Victim Legal  
18 Counsel Program I have the privilege to lead a  
19 global organization supervising 44 zealous Navy  
20 victim legal counsels serving in the field as well  
21 as civilian paralegals and administrative support  
22 staff. Since January of 2022 I have traveled

1 extensively and by the end of this month I will  
2 have visited 23 of our 27 locations where Navy VLC  
3 work. I expect to visit the remaining four  
4 overseas locations in January of 2023.

5 I meet individually with each of my VLC  
6 either in person or via Teams at least one time  
7 per quarter. I meet with my VLCP officer in  
8 charge at least twice monthly, and I conduct  
9 frequent synced calls with the Chief Trial Judge  
10 of the Navy and Marine Corps, the Chief Judge of  
11 the Department of the Navy, as well as other  
12 military justice leaders including the leadership  
13 of the new Office of Special Trial Counsel. I  
14 speak frequently with the Judge Advocate General  
15 of the Navy and Commander -- Naval Legal Service  
16 Command who is my reporting senior.

17 For today's testimony I look forward to  
18 discussing the issues proscribed by the DAC-IPAD  
19 regarding victim impact statements, VLC training  
20 with regard to victim impact statements, and VLC  
21 involvement with the appellate practice, as well  
22 as any other areas you may raise. Thank you.

1 LTCOL PEDDEN: Good morning, Your Honor  
2 Madam Chairwoman, members of the Committee. My  
3 name is Lieutenant Colonel Iain Pedden. I'm the  
4 Chief Victims' Legal Counsel of the United States  
5 Marine Corps. In the interest of judicial economy  
6 and brevity I'm going to minimize the introduction  
7 and say only that the mission of the Navy Victim  
8 Legal Counsel organization is to provide legal  
9 advice, legal counseling, and representation to  
10 victims of sexual assault, domestic violence, and  
11 other offenses at all phases of the military  
12 justice process.

13 And if you'll permit me one point of  
14 order, which I did speak to Mr. Guilds about after  
15 his remarks, that includes specifically civilians  
16 that are otherwise unaffiliated with the military.  
17 I grant exception to policy requests every time  
18 they request it. And so that includes many  
19 victims who would have otherwise no affiliation  
20 with the military whatsoever.

21 Again beyond that, in the interest of  
22 time, I'll defer any further comments. I very



1 much look forward to your questions. Thank you.

2 COL PARK: Good morning, Madam Chair,  
3 ladies and gentlemen. I'm Colonel Tracy Park and  
4 I am the Chief of the Victims' Counsel for the  
5 Department of the Air Force. I have been in this  
6 role since July of 2021. In this capacity I'm  
7 responsible for strengthening support to victims,  
8 advancing the overall effort to building a culture  
9 of trust and respect, and eliminating barriers to  
10 full participation by victims of violent crimes.

11 My team is comprised of 60 judge  
12 advocates, 52 paralegals, and one civilian  
13 appellate counsel at 49 locations worldwide. Our  
14 victims' counsel and paralegals are detailed to  
15 represent victims of sex-related offenses and  
16 domestic violence crimes for military courts-  
17 martial and in administrative legal matters, as  
18 well as provide confidential legal advice to  
19 victims of interpersonal violence including  
20 victims of sexual harassment.

21 Our mission is to advise, advocate for,  
22 and empower victims of violent crime. We

1 represent the victim and only the victim and not  
2 the chain of command at any particular base. In  
3 this way no one in the chain of command of either  
4 the victim or the offender will influence a  
5 victims' counsel's representation.

6 I have served as a prosecutor involved  
7 in the investigation and pretrial preparation of  
8 victim-centric offenses such as assault, child  
9 pornography, and sexual assault. I've also served  
10 as a special assistant United States attorney and  
11 liaison to the local prosecuting attorney's  
12 office. I have also been a staff judge advocate  
13 advising convening authorities and commanders on  
14 a variety of disciplinary and military justice  
15 matters including victim care and support.

16 In this capacity I've trained  
17 commanders and discussed policies and procedures  
18 working to ensure victims are treated with dignity  
19 and respect and have access to the proper  
20 resources. My recent experience with victim  
21 impact statements have been through oversight of  
22 the victims' counsel training and issues raised

1 through victims' counsel in this role.

2 Thank you for inviting me. I am  
3 honored to be here and look forward to answering  
4 your questions.

5 MS. MAROTTA: Good morning. I'm  
6 Elizabeth Marotta, the Chief of Office of Member  
7 Advocacy for the United States Coast Guard. I'm  
8 responsible for both Special Victims' counsel  
9 Program and the disability attorney function.

10 Prior to the Coast Guard I served 25  
11 years in the Army and retired at the rank of  
12 colonel. While in the Army I most recently served  
13 as the Chief of Defense Appellate Division and the  
14 Special Victims' Counsel Program manager. I also  
15 served in numerous other positions including staff  
16 judge advocate, Deputy Government Appellate  
17 Division, Government Appellate Division, Chief of  
18 Justice and trial counsel on two occasions.

19 My experience with victim impact  
20 statements in the Coast Guard is limited as only  
21 a small number of cases make it that far,  
22 therefore it's difficult to capture trends as how

1 judges are treating victim impact statements.  
2 However we believe the judges are following the  
3 rules as written. I look forward to answering  
4 your questions.

5 MEMBER LONG: My question is for  
6 Lieutenant Colonel Pedden. I want to make sure I  
7 understood. Did you say that the special victims'  
8 counsel can represent non-military victims? Is  
9 that what you were clarifying?

10 LTCOL PEDDEN: Yes, ma'am, that's  
11 correct. The general policy is that ordinarily we  
12 wouldn't offer those services as a matter of right  
13 as opposed to military service members who are  
14 entitled to those services as a matter of right.  
15 However, when it's in the best interest of the  
16 client, when a client requests, I can make an  
17 exception to policy. I've never denied one.

18 MEMBER LONG: Thank you very much. And  
19 I was curious about the other members, if you  
20 could respond to that?

21 COL BREWER: Sure. On behalf of the  
22 Army I do have that authority to grant those

1 exceptions to policy. We get those pretty  
2 frequently from someone -- the most common that we  
3 get are people who were previously entitled to our  
4 services because they're either a dependent or a  
5 service member and they've lost that eligibility  
6 because they've left the service for one reason or  
7 another, or in many cases have divorced the person  
8 who's currently under investigation for assaulting  
9 them. Those are granted 100 percent of the time.

10 We do also get requests from people who  
11 have had no prior affiliation with the Department  
12 of Defense and are therefore not by right entitled  
13 to our services. And those we approve depending  
14 on the circumstances. If there's a reason to  
15 believe that that victim's interests are not going  
16 to be aligned with the government, if there's some  
17 very strong military nexus based upon their  
18 employment or how this assault occurred, we  
19 generally approve those. We approve those in the  
20 vast majority of the cases. Probably about 1 out  
21 of every 10 requests of that type is rejected.  
22 Every other one where they were prior-entitled to

1 our services are approved.

2 CHAIR SMITH: Is there a process for  
3 referring non-military victims for -- to get that  
4 victim assistance?

5 COL BREWER: Yes, ma'am. Whenever a  
6 victim meets with either an investigator or any  
7 other victim support services they're made aware  
8 of our program. And if they request a special  
9 victim counsel, they're forwarded to that office  
10 and those people conduct an initial inquiry and  
11 then will forward a memorandum to my office  
12 explaining why they believe an exception to policy  
13 should or should not be approved. My team will  
14 conduct any follow-up questions, and then usually  
15 within about a day we either approve or deny that  
16 request and make sure that the victim and their  
17 assigned SVC are informed of that.

18 CAPT CIMMINO: For us in the Navy the  
19 similar process to our colleagues. Since I've  
20 been in the position I have not denied any request  
21 as a VLC has submitted the package, giving their  
22 advice on whether they should be represented.

1 Anyone that has requested representation and my  
2 counsel believe it's necessary. We have just  
3 approved every single one of them. Thank you.

4 COL PARK: Good morning. So we have a  
5 similar process called the extraordinary  
6 circumstances request. So we will see quite  
7 frequently folks who -- civilians who are not  
8 otherwise authorized services. Frequently I do  
9 approve them. My subordinate district chiefs are  
10 also authorized to approve those and frequently do  
11 so. We typically look at a couple of factors,  
12 which is the status of the victim, the status of  
13 the accused, the nature of the offense and the  
14 legal needs that are described, and to find out  
15 whether or not there are other avenues for a  
16 victim to receive legal services before detailing  
17 a victims' counsel.

18 MS. MAROTTA We also have the same  
19 process and do similar analysis. We've gotten to  
20 the point where our investigative services will  
21 routinely contact us and say we have a victim here  
22 who would like your services. And then we'll

1 coordinate with the victim and make sure that they  
2 understand and are asking for our assistance.

3 MEMBER TOKASH: This is Meghan Tokash  
4 for the record. My question for each of the panel  
5 members is what training are you providing to your  
6 counsel with respect to enforcement mechanisms for  
7 the CDRA? And if you know now, what is the data  
8 with respect to each of your services for numbers  
9 of appeals filed when there are actual or  
10 perceived violations of 18 U.S.C. 3771? Thank  
11 you.

12 COL BREWER: So during our  
13 certification course our SVCs receive training on  
14 kind of a historical perspective of how victims'  
15 rights have developed and what victim rights are  
16 applicable to their client. So if they understand  
17 what those are and can then explain that to their  
18 clients so their clients understand why their SVC  
19 is bringing up certain matters, why we're  
20 encouraging them to do certain things, and what  
21 our recommendations are going to be, but -- so  
22 that they understand what their rights are



1 regardless of whether or not the SVC is even  
2 thinking about it, the victim. We want them to be  
3 empowered by understanding what their rights are.  
4 So that's our primary focus when we train them on  
5 those.

6 What they are also training on is that  
7 when they perceive that there's a violation and  
8 have done what they can at the local level to  
9 alert trial counsel, defense counsel, staff judge  
10 advocates, judges to that perceived violation and  
11 then -- and are not receiving a remedy, that they  
12 would then alert us and then would consider  
13 whether or not a writ or some other assured relief  
14 is the right path.

15 Our SVCs routinely assist their clients  
16 with filing congressional inquiries, other  
17 complaints against the chain of command for those  
18 violations. We have not had a writ filed in quite  
19 some time. I am not aware of any since I have  
20 been in the seat. We do have a file cabinet of  
21 those that were filed because -- and what that  
22 indicates to me is that as this has become a more

1 settled area of law there have been fewer  
2 situations where we cannot remedy this by the  
3 normal negotiations and bringing matters to the  
4 judges' attention.

5 And we have seen it in general when we  
6 reach out to a trial counsel and say you are  
7 failing to do X, Y, or Z. In general it's not  
8 through malice, but through an oversight or just  
9 someone being new to the position and not  
10 understanding that and once made aware have  
11 complied and have been provided whatever notice or  
12 access has been available. So that's been the  
13 experience that I've seen in my year-and-a-half  
14 with the Army program.

15 CAPT CIMMINO: Similar to us, ma'am, on  
16 this historical trend and the training that we do  
17 in our certification course and then building up  
18 as they go through if we have monthly trainings  
19 that may be necessary to remind folks. But I am  
20 unaware of any situation since I've been in the  
21 seat in October where we haven't been able to  
22 resolve those issues at lower levels. So I'm not

1 aware of any data, but I can -- I could take that  
2 question back and see if there's anything we could  
3 provide back, if I have anything. Over.

4 LTCOL PEDDEN: Thank you for the  
5 question and it's an interesting one. I'll  
6 respond I guess in two different ways: First, I  
7 don't know exactly what the empirical data is,  
8 although you've got me curious enough to ask now.  
9 I suspect that the numbers are very low.

10 I will tell you that we currently have  
11 one case that is docketed. It is a written appeal  
12 that was the subject of a summary denial by the  
13 NMCCA about a month-and-a-half ago and that case  
14 is now docketed at CAAF. Whether or not they're  
15 going to grant or direct briefing or anything else  
16 we don't know and I don't want to comment on the  
17 facts and circumstances of the case for obvious  
18 reasons. But that's the one of which I'm aware at  
19 this moment.

20 As to training that you asked about, we  
21 provide about four hours of training during the  
22 VLC certification course on a combination of writ

1 and appellate practice with respect to the matters  
2 that you're asking about. I would draw an  
3 important distinction here between writs as what  
4 I view as routine practice, not necessarily  
5 exceptional or extraordinary, and then appeals.

6 And so for example, a writ taken from  
7 the decision of a military judge and contrary to  
8 a victim's rights pursuant to say MRE 412, I would  
9 view that as a routine practice to file a request  
10 for the grant of a writ at the Court of Criminal  
11 Appeals. I don't necessarily view that as an  
12 appeal of what the judge said. That's the last  
13 means by which the victim can vindicate their  
14 interest at trial before the information, for  
15 example, that's protected by MRE 412 is actually  
16 made public or otherwise disclosed or made  
17 available for use by defense at trial. And so  
18 that's routine practice.

19 A writ appeal from the CCA to CAAF I  
20 would view as appellate practice, much as I would  
21 view appellate practice and perhaps the VLC role  
22 in an appeal on a case that resulted in a

1 conviction of an accused that was the subject of  
2 an automatic appeal, for example, at the CCA. The  
3 VLC and the victim may well need to have a voice  
4 in that process as well. And so there are some  
5 distinct areas here that I think merit  
6 exploration.

7 I will get back to you and to the  
8 Committee on the empirical number. I think it's  
9 actually very small.

10 COL PARK: Good morning again. So we  
11 actually have an appellate -- civilian appellate  
12 counsel. So Ms. Devon Wells. She's sitting in  
13 the back. She has been with us since April of  
14 2021 and she brings invaluable experience. She  
15 served as a victims' counsel in the Army while on  
16 active duty before coming to us.

17 In terms of training she really  
18 spearheads the training for our victims' counsel  
19 and victims' paralegals on appellate matters. She  
20 teaches at our victims' counsel certification  
21 course. She does regular division training and  
22 she teaches at our advanced sexual assault

1 litigation course as well. And she also supports  
2 other services when requested to speak about her  
3 practice as appellate counsel. To date she's  
4 actually represented 32 victims on appellate  
5 matters.

6 In terms of the writs she's actually  
7 filed in the last 18 months five -- I'm going to  
8 skip back to my notes -- five petitions for  
9 extraordinary leave to the Air Force Court of  
10 Criminal Appeals and the court ordered answers in  
11 all of the cases. The petitions addressed  
12 differing rights and concerns under Article 6(b)  
13 and generally involving victim standing, privacy,  
14 and fairness. She filed one writ appeal at the  
15 Court of Appeals for the Armed Forces on the case  
16 for standing, but it was summarily denied. And  
17 that is all I have.

18 MS. MAROTTA: In the Coast Guard we  
19 attend DoD certification courses because we don't  
20 have our own schoolhouse. So the -- we rely on  
21 what is taught at the DoD courses for our SVC,  
22 however we also conduct bimonthly training where

1 we all come together and we do refresher training  
2 or deep dives on topics.

3 As far as writs goes we do have a  
4 civilian attorney who does our appellate practice,  
5 works with the SVCs if they have an issue that  
6 comes up during trial and most recently we had a  
7 writ last month and it was granted.

8 MEMBER GOLDBERG: Thank you very much  
9 for your presentations. So I have a little --  
10 small bucket of questions that go to the -- I  
11 don't know if you were here for the earlier  
12 discussion about jury selection, panel selection,  
13 but one question goes to what -- again what I had  
14 heard, which is that women are disproportionately  
15 excluded from being -- is juror the right word?  
16 I think I was using the --

17 PARTICIPANT: Panels.

18 MEMBER GOLDBERG: Sorry?

19 PARTICIPANT: Panel.

20 MEMBER GOLDBERG: Panel? See I --  
21 right. I mean the panel that is making the  
22 decision in a specific court-martial, not the

1 panel from which all of the members are drawn.

2           So I heard that women were being  
3 disproportionately excluded in part because  
4 they're more likely to be -- have experienced  
5 sexual assault and in part because they're more  
6 likely to have been trained as a victim advocate.  
7 And I'm wondering if that is consistent with your  
8 experience. And if it is: (A) whether you think  
9 people with the training can be impartial; and (B)  
10 do you have thoughts on how to address that,  
11 whether it's an Article 25, or Rule 25, or  
12 whatever, or any -- in any other way?

13           And then second, did you have -- or in  
14 the voir dire process if there are additional  
15 constraints that you would recommend for that  
16 process?

17           And then second, whether you have any  
18 recommendations related to RCM 1001 that we  
19 haven't already discussed? And no need to go --  
20 and if others agree with what a person has said,  
21 that would be fine, or happy to hear from all of  
22 you, whatever you think best.



1 COL BREWER: And yet we'll still start  
2 at one end of the table and move down.

3 (Laughter.)

4 COL BREWER: No, thank you for that  
5 question. From my experience in the courtroom  
6 there are definitely fewer women on panels than  
7 we'd like. And I think it's very clear from the  
8 description that you heard earlier of how panels  
9 are selected that obviously if you're pulling from  
10 the senior of both enlisted and officers the  
11 number of women in that pool is much less. So  
12 there are going to be fewer women even just  
13 available to be on those panels.

14 And then if we look within the other  
15 part of that, how many are going to be subject to  
16 even just the questions about that prior training  
17 as a victim advocate, as a prior victim. Women I  
18 think do volunteer for those positions at a high  
19 rate, however what we've seen is just because of  
20 the breakdown of who exists in the military in  
21 terms of male and female we have lots of men who  
22 are also victim advocates and work throughout the

1 SHARP Program.

2 I have seen both men and women receive  
3 harsh questions and very, very deep dives into the  
4 impact of that training on them as a panel member.  
5 Does this impact how they view a victim's report  
6 of a crime? And then what I would do as a special  
7 victim prosecutor during voir dire would be to ask  
8 those rehabilitating questions about the fact that  
9 they're still fair, they're still open as a matter  
10 of fact that they're received education on how  
11 trauma impacts the way a person reports over the  
12 period of time. And the problem is that yes, that  
13 may bias them, but it biases them to have -- to be  
14 educated about an area that's critically important  
15 to those types of trials as we proceed.

16 So we can argue for the fact that that  
17 prior experience is not a bias. It then falls to  
18 a judge whether or not they find that that  
19 supports a -- them being excluded for cause or --  
20 and whether or not -- or forces the person doing  
21 that deep inquiry into using their preemptory  
22 challenge, which as we've already discussed

1 there's just that one. So I have seen far too few  
2 women on panels. Very frequently if there is a  
3 woman on the panel it's just one. I can only  
4 think of one case where there were two.

5 And so that is definitely something  
6 where, as the panel members earlier discussed --  
7 having inclusion being part of what's permitted I  
8 think would go a long way towards making sure that  
9 our commanders have that tool to be able to reach  
10 into their formation and specifically look for  
11 women to be on their panels. When I've had that  
12 experience of helping commanders pick those panels  
13 I've been lucky that I had commanders who already  
14 did that on their own. They wanted them to be an  
15 inclusive group and did their best to make sure  
16 they were.

17 And so I think that's probably the best  
18 remedy is just continuing to train on how to do  
19 voir dire, how to rehabilitate, and for our judges  
20 on why someone being smart doesn't mean that  
21 they're biased. And I think that would help a  
22 great deal across the board. And I'll pass it

1 along to anybody else.

2 CAPT CIMMINO: Just as a follow up, I  
3 think anyone could be impartial as they go through  
4 the process, but just by her training or that  
5 individual's training I hope that's not the  
6 limiter. I don't have the specific empirical data  
7 to show what the numbers were, but I did ask that  
8 question in the back, are we really under-  
9 represented in gender or race? What are the  
10 numbers? So I'd like to see the numbers before I  
11 commented on the specifics.

12 But I think as Colonel Brewer said,  
13 throughout any process I would hope that folks  
14 understanding the rules could be impartial. Just  
15 because they have that training doesn't mean they  
16 would have a specific situation how they would  
17 work on the panel.

18 LTCOL PEDDEN: I would agree with  
19 Captain Cimmino's assessment in that regard. I  
20 mean voir dire is the appropriate and transparent  
21 process for determining whether or not a person is  
22 qualified to sit after applying the Article 25

1 criteria. I'm not sure that Article 25 would be  
2 the right place to assert modifications to that.

3 But with respect to under-  
4 representation I think without seeing specific  
5 numbers, I think as a general rule that's true and  
6 likely more so in the Marine Corps than elsewhere.  
7 I believe that we have fewer women serving in the  
8 Marine Corps proportionately than in the other  
9 services. And women are more likely to experience  
10 sexual assault. And so those two factors combined  
11 might operate to minimize the representation of  
12 women on our various panels and courts-martial.

13 I'd want to look carefully at numbers.  
14 And I believe if I'm not mistaken, the Government  
15 Accountability Office has looked at some of those  
16 issues in the past. And they're presenting I  
17 think tomorrow or later today. That might be an  
18 important question for them, too. But that was  
19 probably a very long yes. I think there's under-  
20 representation, Madam Secretary. And I'm not sure  
21 that it's within the purview of the victims' legal  
22 lane to propose changes to Article 25, but I would

1 certainly welcome better representation on the  
2 panels.

3 COL PARK: I don't have anything to  
4 add.

5 MEMBER GOLDBERG: If you had anything  
6 on 1001, RCM 1001? I should also say that what I  
7 was -- part of the prompt for the question related  
8 to over-representation of women among victims'  
9 legal counsel and SVCs was -- and those who have  
10 that training was -- it was suggested to me that  
11 a number of women over their careers have been  
12 volun-told that these are positions they should  
13 take so that it's not only a disproportionate  
14 expression of interest, but a kind of guiding of  
15 women into these roles.

16 I'm not asking you to address that  
17 question, although I see several of you nodding,  
18 but that's where that question came from.

19 COL BREWER: Ma'am, I'll say that  
20 amongst our program, the Special Victims' Counsel  
21 Program, it's not disproportionately female. We  
22 have many, many men within the system.

1           And what we found interesting was that,  
2 while female victims, we don't have a high  
3 prevalence of them expressing a preference as to  
4 the gender of their counsel, we have seen that  
5 with male victims, that they really do appreciate  
6 being able to have a male SVC. But we have a  
7 large number of men within our team.

8           In terms of the proposals from JSC, we  
9 fully support the idea of specifically allowing  
10 the SVCs to be definitively heard on the  
11 objections regarding victim impact statements. It  
12 just was not -- it's been judge dependent.

13           Many judges allow counsel to be heard  
14 on that matter. And it just seems that obviously  
15 that is the person best equipped to be heard on  
16 that matter as to why something is, in fact,  
17 victim impact and not something objectionable to  
18 ask a trial counsel, who's representing the  
19 government's interests, to be able to have that  
20 in-depth knowledge and be prepared to answer that.  
21 It's just not the best answer. So we fully  
22 support that.

1           We also supported the other changes of  
2 allowing a broader definition of victim impact,  
3 because it just seems that why would the person  
4 deciding what the appropriate sentence is not  
5 benefit from hearing about all the different areas  
6 of impact that that crime had on not only that  
7 victim but those close to her.

8           The only caution I saw personally was  
9 when it defined other people who could speak as  
10 the victim's family, just to keep in mind that  
11 every victim may define that word very  
12 differently, and that left to kind of a  
13 traditional definition of family we might leave  
14 people out who we're not intending to, such as  
15 fiances, caregivers, and even I can imagine the  
16 soldier who takes that first report from their  
17 friend and escorts them through that process,  
18 encourages them to report. The impact on that  
19 person is also something I, as a prosecutor, would  
20 absolutely put on the stand to talk about the  
21 impact to the military.

22           And I'll defer to the rest of the team



1 for some of the other changes to RCM 1001 that I'm  
2 sure I'm not thinking of right now. But we just  
3 thought in general, as we talked about it as a  
4 team, because we do tend to talk amongst  
5 ourselves, that in general granting greater rights  
6 to victims to speak before these proceedings is an  
7 incredibly positive change.

8 CHAIR SMITH: Do you think that having  
9 judge sentencing versus panel sentencing will  
10 alleviate some of the concern with respect to  
11 allowing victims to freely speak about their  
12 experience?

13 LTCOL PEDDEN: Thank you for the  
14 question, Your Honor. I think the short answer to  
15 your question is yes or at least it should.

16 With respect to the proposed  
17 modifications to RCM 1001, the removal of that  
18 language doesn't quite persuade me that the new  
19 rule says what we think it would, right. And so,  
20 if you just read the rule on its face after the  
21 removal of that language, what it says is that the  
22 victim may only offer victim impact and

1 mitigation, which presumptively means nothing  
2 else.

3           And so I think that the -- I didn't  
4 make it through all 826 pages, but the read-ahead  
5 materials had some questions about that, too. And  
6 we think that very expressing directive language  
7 to the effect that the victim may express a view  
8 with respect to an appropriate sentence on an  
9 offense would be more constructive and better able  
10 to accomplish that goal.

11           With respect to judge-alone sentencing,  
12 Your Honor, I think that should alleviate a lot of  
13 those questions. And it's probably a good  
14 opportunity to point out the irony of judge-alone  
15 proceedings now.

16           And so several other panel members have  
17 expressed concerns about the submission of a  
18 statement, for example, in advance and that the  
19 statement is given to the military judge, given to  
20 the defense counsel, and counsel for the  
21 government. They all read it. There are  
22 potentially arguments about its prudence or

1       admissibility. The statement may or may not be  
2       redacted. And then it's returned to the victim  
3       for a recitation into the record.

4               In a judge-alone proceeding, the judge  
5       has already seen every word on that document. The  
6       only person that's not allowed to speak those  
7       words is the victim.

8               And that strikes me as a little bit  
9       ironic, especially in a scenario where the judge  
10      is presumed to be able to faithfully apply the law  
11      and to ignore those portions of a statement that  
12      are impermissible, as would a judge with those  
13      portions of a statement of an accused which are  
14      impermissible during the unsworn statement of that  
15      party to the proceedings.

16              And so I think it would alleviate some  
17      of the concerns. I'm not convinced that without  
18      specific language in RCM 1001 that those concerns  
19      will actually be furthered by the rule.

20              MEMBER WALTON: Regarding individuals  
21      who identify differently than their biological  
22      sex, are there any unique issues related to that

1 population that we need to be concerned about, who  
2 are purported victims?

3 COL BREWER: I will just say that we  
4 don't track our client, victim clients by whether  
5 they are transgender, identify by any way that  
6 they choose is appropriate, or by their given  
7 gender. We don't track by that. So we don't  
8 really have statistics to show that. I can tell  
9 you I get very few reports from my team about that  
10 issue.

11 I will say during the Air Force  
12 certification course last May one of the SVCs in  
13 training was transgender and offered to them that  
14 she believes there are unique issues.

15 And so I think having someone who's got  
16 that experience is probably the best place to go  
17 for that, because she very generously offered that  
18 anybody who had that issue, where that was a topic  
19 that was part of the climate they were supporting  
20 a victim through, could reach out to her  
21 regardless of branch to get that support and that  
22 assistance from someone who comes from a place of

1 knowledge.

2 But we don't track that, nor am I aware  
3 of any circumstances where we've addressed it.

4 COL PARK: So we did, so at the Air  
5 Force certification course, we did have a block on  
6 LGBTQ and male victimization. And we've had  
7 training in the past just to identify some  
8 sensitivities and other legal issues that may  
9 arise.

10 We don't, again, track any of the  
11 statistics on -- I don't get the information on  
12 our particular victims that we represent. But we  
13 have identified it as an area that probably needs  
14 to be further developed in terms of training our  
15 teams.

16 LTCOL PEDDEN: If I may, Judge Walton,  
17 I would offer only -- and I don't want to over-  
18 disclose on behalf of any of my counsel. But one  
19 of my counsel, among my best, is a transgender  
20 woman, who has an extraordinary background and  
21 experience not only in those issues as a matter of  
22 personal experience but also as a matter of law.

1           One of her civilian objectives in her  
2 professional practice there was helping folks go  
3 through name change processes and alleviate a lot  
4 of the built in legal discrimination that's in the  
5 system that those folks face.

6           I'd be happy to get you a point paper  
7 back on that from somebody who has a much better  
8 view of it than I do.

9           MEMBER WALTON: Thank you.

10          MEMBER GARVIN: I wanted to make sure  
11 no one else was coming back in. Okay.

12          So I want to go back to the writ  
13 practice and the appellate practice for just a  
14 moment and ask you all to, this won't be a pure  
15 hypothetical, but to think beyond kind of maybe  
16 the data you currently have, although I'd like to  
17 come back to the interpretation of the data you  
18 currently have at some point.

19          But the thing about victim impact  
20 statements as we currently are talking about that  
21 as an example of right of a victim, I want to ask  
22 a two-part appellate question.

1           The first part is if you know or  
2 reasonably, or one of your SVCs or VLCs know or  
3 reasonably should know that there will be a  
4 discussion, debate over the statement in that  
5 particular location about the context of it or  
6 content of it, are you prepping that VLC and SVC  
7 for either a writ in the moment or doing any  
8 anticipatory work around a writ, around what is  
9 allowed or disallowed, because what we know is  
10 that this area of law is still emerging and  
11 evolving. And if we don't take appeals, writs, we  
12 won't get clarity of law.

13           And so are you working with your SVCs  
14 and VLCs around kind of anticipating and then  
15 teeing up possible writs, rather than waiting in  
16 the moment and then putting a victim to the  
17 decision in this moment of, oh my gosh, can we  
18 reasonably try to stop this proceeding and take a  
19 writ and the trauma that imposes, or is there  
20 anything you're doing proactively around  
21 litigation like we do in the civilian side around  
22 victims' rights?

1                   And then the second question of, if  
2 things are allowed and the now-convicted person  
3 raises error on their ordinary appeal for what was  
4 brought in, are your SVCs and VLCs participating  
5 in that ordinary appeal as anything other than  
6 amicus, because, of course, the victim's right is  
7 actually at issue? So two parts.

8                   COL BREWER: I'll get us started. And  
9 so the Army system, we don't have typically  
10 appellate SVC representation. What we do have is  
11 at the Army Court for Criminal Appeals, the deputy  
12 clerk is also an appellate victim liaison. And  
13 when there's an issue that, she provides the  
14 normal notices to victims that just go throughout  
15 the appellate process.

16                   However, when there's an issue where  
17 either the victim is asking questions that  
18 indicate that that victim would need additional  
19 support or if either defense appellate or  
20 government appellate sees that issue, they contact  
21 us directly. And then we consider whether or not  
22 we have somebody who can take on that issue.



1           We would communicate obviously with, as  
2 Colonel Park mentioned, their appellate counsel.  
3 We'll talk with Ms. Wells. We'll talk with those  
4 attorneys at GAD-DAC and at the clerk to make sure  
5 that not only if we do provide that representation  
6 that it's competent representation, because we  
7 don't do much work in the appellate world from  
8 this program.

9           We don't do a lot towards having like  
10 writs kind of ready to go. We do keep the writs  
11 that have been filed in the past. And those are  
12 obviously available to our team.

13           We talk to them about how if they have  
14 issues they can coordinate with us, and if they  
15 see them coming because there's some kind of a  
16 conflict, that we want to be a part of that team.  
17 And thankfully our team is very communicative and  
18 would reach out to us when they see those issues.

19           What our training and what our practice  
20 has shown has been very effective, though, has  
21 been to work with counsel ahead of time. And this  
22 is where not because we're required to provide it

1 ahead of time, because that pre-advanced notice of  
2 the unsworn statement can be after findings. It  
3 can be just before it's presented. And then the  
4 judge would give everybody time to consider, and  
5 then it would go forward.

6           However, what we found is much more  
7 helpful for all the parties involved, but  
8 specifically our client, is to discuss it ahead of  
9 time so that if somebody does have a change if  
10 they want to request or someone says I will object  
11 to this, we can discuss it ahead of time.

12           And the training we provide and the  
13 assistance we provide is how to articulate within  
14 the bounds of that unsworn statement why it's tied  
15 to what's permissible.

16           So, if you're going to talk about how  
17 you still have fear in the future for X, Y, and Z,  
18 a judge could say, well, that's about, you know,  
19 recidivism, I'm not going to allow you to talk  
20 about that, that's not impact to you.

21           Teaching the team how to phrase it in  
22 a way, I worry about my future because I'm still

1       afraid of X, Y, Z, that's something that's  
2       different because of the assault that happened,  
3       like tying it back in there and helping them use  
4       that language to even avoid it being  
5       objectionable.

6                 So I think we're kind of hitting it  
7       kind of, as was said earlier, like in the kind of  
8       battle situation during the trial process. But  
9       our appellate, kind of how we help, is really  
10      still developing I would say in the Army program.

11                CAPT CIMMINO: As for our appellate  
12      practice, it's evolving. So we have four to five  
13      VLC that are assigned to our appellate team. And  
14      we have them stood up. And some were formerly  
15      appellate counsel that are now VLC. So, and  
16      they're scattered around the world.

17                We actually just, as of earlier this  
18      week, I've confirmed we have hired a GS-14 who  
19      will oversee our entire appellate practice. And  
20      that's one of her primary duties is to assist on  
21      the appellate side. But we're getting very  
22      active, separately from appellate government, to

1 work with our counsel, to work up packages.

2 On victim impact statements, we have  
3 not filed any appeals in that area. Mostly we're  
4 dealing with 412 issues or things dealing. That's  
5 where the appellate side is spending a lot of our  
6 time.

7 But the collaboration, our team is made  
8 up of former civilian prosecutors on Reserve  
9 recall to former appellate counsel to folks that  
10 are just military justice experts. So we are  
11 evolving in the area.

12 But specifically to the victim impact  
13 statement side, we're not proactive on the  
14 appellate side yet, but we are evolving into that  
15 area. And it may be somewhere where our practice  
16 will take us, ma'am.

17 LTCOL PEDDEN: We haven't seen specific  
18 appeals or writs related to victim impact  
19 statements. That could be a function of how late  
20 in the process those things emerge. But it's  
21 something I'll definitely keep my eyes open for.

22 I will say I anticipate a rise in writ

1 and appellate litigation from Marine Corps VLC  
2 community writ large, mainly because that's what  
3 I've asked them to do. I have asked them to  
4 litigate the fringe and to be very aggressive in  
5 the means by which they seek to assert the rights  
6 of their clients.

7 To that end, and I'd be remiss, I  
8 failed to mention it earlier. I appreciate the  
9 second bite at this apple. Our appellate program  
10 is actually sort of under construction as it were.

11 We recently hired a GS-15 litigation  
12 attorney-adviser and expert, who concluded nearly  
13 three decades of service in the Army JAG Corps  
14 with duty as the SVC program manager and then  
15 worked on the MJRG for a while and then came to  
16 advise this community. His name is Mr. Peter Yob.  
17 He's seated behind me to my left.

18 And so that's, one of his primary tasks  
19 is to make sure that our folks are trained and  
20 equipped to conduct writs and appellate practice.  
21 And we're already seeing a rise in those numbers.  
22 I expect that trend to continue.

1 COL PARK: So two things, number one  
2 is, in terms of filing the writs, it really  
3 depends on the victim. So we've seen cases where,  
4 as you said, we want to advance. You know, we  
5 think that there is good room for us to grow as a  
6 program or expand the rights of victims or get a  
7 court to just make a decision. But the victims  
8 don't want to. And ultimately, we respect the  
9 victim's decision, even in terms of filing those  
10 writs.

11 On the second question, I might have  
12 flipped them, but the Air Force Court of Criminal  
13 Appeals distinguishes between the interlocutory  
14 appeals on behalf of victims and post-trial victim  
15 appeals.

16 So the court's rules of practice  
17 specifically provide for interlocutory petitions  
18 for extraordinary relief by victims. But for  
19 post-trial appeals, I think this is what you might  
20 have noted, there is no specific provision for  
21 appellate victims' counsel to practice. And as  
22 such, victims are treated as amicus. So it

1 remains untested as to whether or not they would  
2 accept this substantive motion from a victim.

3 MS. MAROTTA: I have nothing to add.  
4 I agree that, you know, our practice, even though  
5 we have an appellate attorney who will enter an  
6 appearance and receive copies of pleadings, our  
7 participation is on an amicus basis.

8 So it's more information passing to the  
9 victims should they choose to get that information  
10 throughout the appeal. Some victims are done  
11 after the trial. But about a third of them want  
12 somebody to monitor the case and provide them  
13 information.

14 MEMBER TOKASH: This is Meghan Tokash.  
15 Would it be a helpful recommendation to the  
16 services if this committee recommended augmenting  
17 your offices with more civilian expertise?

18 From your testimony, it seems like each  
19 of the services have some type of a civilian  
20 component. In particular, the Air Force  
21 highlighted what seems to be a very successful  
22 attorney handling these types of appeals.

1           Would that be something that would be  
2 helpful, that would help buttress this particular  
3 area of law and make sure that crime victims'  
4 rights in the military are being protected in a  
5 more full-throated way?

6           COL BREWER: I will just say that I  
7 don't think anything in the current rules prevents  
8 any of us from taking that step. And so I think  
9 obviously if this organization recommended it, I  
10 think it's something that could be executed.

11           I know we've talked about like how we  
12 can best utilize civilian positions within our  
13 program. And so we're always open to great ideas  
14 for how we can better serve the community.

15           So I don't think there's anything that  
16 currently is stopping us. And we do learn from  
17 each other, because we've all been, as Colonel  
18 Park said, like we use their great counsel to, not  
19 only in our training but as we go through the  
20 process. So all of us having, you know, that  
21 person in our team I think is only going to make  
22 us better able to serve.



1           CAPT CIMMINO: Because we haven't --  
2           our person just got hired, so she'll be coming up  
3           hopefully by January. Obviously, we're new to the  
4           game with bringing her on board. I think to say  
5           we would need more right now, the Navy has been  
6           very supportive of us to provide us this resource.  
7           So personally, as I sit right now, I think we're  
8           adequate, given they've just hired us the person  
9           to do what the language would authorize us to do.

10           MEMBER TOKASH: We'll have you report  
11           back to us on how that's going.

12           CAPT CIMMINO: Yes, ma'am.

13           LTCOL PEDDEN: I think we're in the  
14           same position, ma'am. You know, having just hired  
15           Mr. Yob, I'm thrilled with the experience and  
16           expertise he's lent us so far. I'd like an  
17           opportunity to observe where that takes us for a  
18           few months.

19           MS. MAROTTA: I can just add that  
20           obviously the Coast Guard is very supportive of  
21           having civilian attorneys. Our Deputy Judge  
22           Advocate General is even a civilian attorney. And

1 we have two civilians in our SVC program. And we  
2 have a request in for the Coast Guard for three  
3 additional civilian attorneys.

4 So we do recognize that having that  
5 continuity and the expertise is invaluable to  
6 training the active duty counsel that come in and  
7 out of the role and developing them.

8 MEMBER GOLDBERG: Thank you. I'd like  
9 to just toss out a general question, which is, if  
10 you were to prioritize other issues related to  
11 SVCs and VLCs that you think the DAC-IPAD should  
12 be thinking about, what would you put at or near  
13 the top of your list? And you're welcome to  
14 follow up if you don't have them right at the top  
15 of your mind right now.

16 COL PARK: I think it was one of our  
17 prep questions. But I think an interesting  
18 concept would be the restorative justice and  
19 engagement. And it is something that victims have  
20 noted, to have a different avenue to have their  
21 voices heard or some other type of mechanism to,  
22 you know, in some cases meet with the accused

1 and/or senior officials and to get what they want  
2 to get out of it, sometimes an apology versus what  
3 they get through a conviction at a court-martial.  
4 You know, they don't necessarily get that.

5 So justice looks different to every  
6 victim. And from some of the feedback we've  
7 received, that would be I think a program worth  
8 exploring.

9 COL BREWER: I'm just going to say that  
10 like we totally agree. As I said, we talked about  
11 a lot of this ahead of time, that we all agree  
12 that that's great.

13 I also just think having the ability  
14 to, if we are given questions that you all have  
15 about are these problems or, you know, you've  
16 heard one anecdote, you'd like more data, we've  
17 learned a lot just by having to look into that, by  
18 asking our teams.

19 We've started in the Army an exit  
20 survey for all of our clients. And the data is  
21 new. But we're starting to get that great data  
22 back, very positive but informative.

1                   And so we can continue to expand that  
2                   and to ask them questions, like do you feel that  
3                   your victim impact statement was limited and to  
4                   explain it to us. But like whenever we get those  
5                   questions from you and from other sources about  
6                   potential problems, that's been a great  
7                   opportunity.

8                   And to have this forum, and really I  
9                   think all of our services are very supportive of  
10                  what we can do. When we say this will help us  
11                  better serve our victims, we get very little  
12                  pushback. Most people want to be a part of that  
13                  positive change.

14                  And so it's just when those ideas and  
15                  questions trigger those great ideas, like  
16                  restorative justice and how we could expand that  
17                  into the military, we've gotten mostly positive,  
18                  yeah, let's talk about how to implement it, very  
19                  little pushback onto how to do it.

20                  So just, you know, whatever, whenever  
21                  there's those questions, we're open to being a  
22                  part of that conversation, and so are our teams.

1 They've provided us great feedback about all the  
2 questions that you all had.

3 MEMBER BASHFORD: I noticed you're all  
4 very accomplished, very senior members. But when,  
5 at least four of you said when you started, three  
6 of you started last year. One of you started this  
7 year. Is this a short-term assignment? And if  
8 so, do you think it should be longer?

9 COL BREWER: I'll say for the Army like  
10 most of our senior positions it's a two-year  
11 position. I can say, because I have experience  
12 with both special victim counsel and different  
13 areas of litigation, it doesn't appear to be, from  
14 my perspective, it's not too short. If asked to  
15 do it longer, I would be more than happy to  
16 because it's very rewarding.

17 But I didn't feel like it was the type  
18 of job where because it's only two years I just am  
19 starting to understand what the challenges are as  
20 I, you know, only have six months left in the  
21 position. I've definitely had positions like that  
22 over my time in the military where as soon as I

1 understood it was about time for me to go try  
2 something else exciting.

3 But this job, because we're I think  
4 very senior people, I think because we're  
5 experienced in the justice process, you come into  
6 it where I certainly learned much more than I  
7 expected, but when I started it was pretty easy to  
8 understand where our mission was, what we needed  
9 to do to move forward, and how I could be a  
10 positive part of that.

11 CAPT CIMMINO: So I'm scheduled to be  
12 here through the summer of '24 at least, ma'am.  
13 I can say it's been probably the most fulfilling  
14 job I've had in my career.

15 So my predecessors did four years on  
16 average. So I don't envision -- the JAG Corps at  
17 least on the Navy does not look at this as a  
18 skipping point, partly because I'm the supervising  
19 attorney for all of the VLC. Everyone reports to  
20 me. So I sign all their fitness reports. It's  
21 important they have longevity. If I was just  
22 coming in and out, it would affect their careers.

1           So, generally, I will be at least three  
2 years until the summer of '24.

3           LTCOL PEDDEN: As the junior and newest  
4 member of the panel here, ma'am, I would say a  
5 couple of things. First, I work directly for the  
6 Staff Judge Advocate to the Commandant. And he  
7 posted me to this position pursuant to my request.  
8 I don't just enjoy the work. I'm passionate about  
9 it. And I'd like to stay for as long as I  
10 possibly can.

11           I think it's foreseeable that a two- to  
12 three-year assignment or tour length is probably  
13 what's in the cards for the Chief Victims' Legal  
14 Counsel in the Marine Corps. If they let me stay  
15 longer than that, I will.

16           COL PARK: I anticipate the same. It's  
17 a two- or three-year assignment. And I think it  
18 is good to have change. This program is  
19 constantly changing. There's one thing to be said  
20 for continuity. But there is something else to  
21 see and explore.

22           I came in with a different background

1 from my predecessor. And I wanted to move the  
2 program forward in different ways. So allowing us  
3 to do that in a two- to three-year cycle I think  
4 works. And my victims' counsel and my mid-level,  
5 those district chiefs, are on a two- to three-year  
6 cycle as well.

7 MS. MAROTTA: I would just add that  
8 adding a civilian to each of the services will  
9 accomplish the continuity and, you know, assist  
10 with the training and things like that. I think  
11 that that will most likely get more at what's  
12 needed rather than necessarily keeping one person  
13 or keeping the active duty folks longer.

14 LTCOL PEDDEN: Could I follow up on  
15 that very briefly, ma'am?

16 Only to say that I think there's also  
17 some independent value to be gained from having a  
18 person who's been the Chief Victims' Legal Counsel  
19 or in a senior SVC billet then go to other  
20 billets, then cross-pollinate and make sure that  
21 those practice communities are aware of some of  
22 the specific challenges that our clients face and



1 that our attorneys face from a personnel  
2 management perspective, that that's useful in  
3 other areas of the institution, too.

4 COL BAVARNICK: Judge Smith, before  
5 everyone gets up and breaks, General Anderson just  
6 had one clarifying comment just before everyone  
7 starts getting up and moving around. So, General  
8 Anderson.

9 MEMBER ANDERSON: Thank you very much,  
10 and I appreciate the opportunity.

11 I just wanted to clarify the question  
12 I asked regarding Article 25 and using Reservists  
13 and Guard personnel as members of panels.

14 Basic question on some earlier comments  
15 about the concerns about diversity, and just  
16 wanted to determine whether or not that was being  
17 used as an opportunity to increase the pool to  
18 provide more diversity by adding more people of  
19 color and women to the standing pools. And I only  
20 heard from one service about their actual process  
21 to include members of the Guard and Reserve.

22 So at least my sense is that making

1 this maybe a standard requirement or having a  
2 process to provide for that opportunity for active  
3 members of the Guard and Reserve at certain  
4 installations where they have, are tenants or are  
5 subordinate organizations, and also in a larger  
6 sense for cases involving senior enlisted  
7 personnel and senior officers when it can be  
8 difficult to find peers who haven't worked  
9 directly with them or maybe have a personal  
10 relationship.

11 So that was my clarification. Thank  
12 you.

13 COL BAVARNICK: Thank you, ma'am. So,  
14 Judge Smith, we're going to break for lunch now  
15 until 1330.

16 CHAIR SMITH: Thank you so much for  
17 appearing.

18 (Whereupon, the above-entitled matter  
19 went off the record at 12:43 p.m. and resumed at  
20 1:36 p.m.)

21 COL BOVARNICK: Chair Smith and  
22 Committee members, I'd like to welcome back our

1 distinguished visitors who provided the Committee  
2 an initial assessment in June on the establishment  
3 of the Offices of Special Trial Counsel, and  
4 they're here to provide an update.

5 I want to welcome the General Counsel  
6 of the military departments, Honorable Ricci for  
7 the Department of the Army, Honorable Coffey for  
8 the Department of the Navy, and Honorable Beshar  
9 for the Department of the Air Force.

10 And welcome to Lieutenant General  
11 Risch, the Judge Advocate General of the Army;  
12 Vice Admiral Crandall, the Judge Advocate General  
13 of the Navy; Major General Bligh, the SJA to the  
14 Commandant of the Marine Corps; and we have a late  
15 addition with the Deputy Judge Advocate General of  
16 the Air Force, Major General Vernon, who's joining  
17 us virtual.

18 Literally, as of this morning,  
19 Lieutenant General Plummer was going to join us,  
20 the Judge Advocate General Of the Air Force, but  
21 he couldn't make it.

22 And, ma'am, I recommend we start with

1 opening remarks, and we'll go right down the line  
2 with the Department of the Army, Department of the  
3 Navy, and Department of the Air Force. And we  
4 have plenty of time for questions and answers from  
5 the Panel members.

6 So, with that, I'll turn it over to  
7 Honorable Ricci for the Department of the Army.

8 MS. RICCI: Thank you. Appreciate it,  
9 Colonel Bovarnick.

10 Good afternoon, Judge Smith and  
11 esteemed Committee members. Thank you for  
12 providing Lieutenant General Risch and I the  
13 opportunity to update you once more on the  
14 progress made, as directed by Secretary Wormuth,  
15 to establish the Army's Office of Special Trial  
16 Counsel and its integration across the Force.

17 We are happy to report that the  
18 implementation of the NDAA and DoD requirements  
19 are ahead of schedule, and we do not anticipate  
20 any impediments to reaching established milestones  
21 and achieving full operating capability by  
22 December 2023.

1           The Army's effort in establishing the  
2 Office of Special Trial Counsel are focused on  
3 structural change that will ensure independence,  
4 expertise, and preservation of the Army's  
5 commitment to good order and discipline. The  
6 OSTC, or -- the Army likes acronyms, so we call it  
7 the OSTC -- enhances our ability to hold offenders  
8 appropriately accountable, provide a victim-  
9 centered response, and develop a culture of  
10 respect and prevention in direct alignment with  
11 the Secretary of the Army's stated objective to  
12 reduce harmful behaviors.

13           Since we last spoke in June, the Army  
14 OSTC was established as a field operating agency  
15 through a collaborative effort between my office  
16 and the Office of the Judge Advocate General. In  
17 furtherance of the establishment of the OSTC, a  
18 transition team led by a senior Army prosecutor  
19 and a civilian attorney, both experts in special  
20 victim prosecution with experience in transforming  
21 policy and process, continue to work to prepare  
22 the OSTC for the successful transfer of

1 disposition authorities.

2 The Army nominated a highly qualified  
3 individual to serve as its first Lead Special  
4 Trial Counsel in compliance with the statutory  
5 requirements set by Congress for general officer  
6 promotions. The Senate recently confirmed Colonel  
7 Warren Wells as the U.S. Army's first Lead Special  
8 Trial Counsel and for the promotion to the rank of  
9 Brigadier General.

10 Now, achieving independence for both  
11 the Trial Judiciary and Trial Defense Service has  
12 long been a part of the Army JAG Corps's  
13 operational structure. I'm confident that the  
14 OSTC will likewise operate independently and that  
15 it will reach referral decisions free from  
16 improper influence.

17 The OSTC is a unique Army organization  
18 where the lead prosecuting attorney is directly  
19 supervised by the Secretary of the Army. While  
20 there is no question that this organization is  
21 civilian led, there will be specially trained and  
22 certified military Special Trial Counsel working

1 across the Army that will zealously execute its  
2 mission as intended by Congress.

3 Independence and victim-centered expert  
4 prosecutions will be the hallmark of the system  
5 envisioned by Secretary Wormuth. A successful  
6 system that addresses accountability, response,  
7 and, most importantly, prevention will be both  
8 independent from but fully supported by the chain  
9 of command, convening authorities, and offices of  
10 the Staff Judge Advocate across the Army.

11 The Judge Advocate General, the  
12 incoming Lead Special Trial Counsel, and I will  
13 work in partnership with complementary and defined  
14 roles which emphasize the requirement for  
15 independent decision-making on the litigation of  
16 covered defenses free from improper influence  
17 while ensuring the military justice enterprise is  
18 optimized for the effective administration of  
19 justice and good order and discipline.

20 I will continue to monitor and assess  
21 progress. And as I stated in June, you have my  
22 deepest commitment to ensuring the independence

1 and proper resourcing of the Office of Special  
2 Trial Counsel.

3 I will now yield the floor to  
4 Lieutenant General Risch to provide more detail on  
5 the training and experience of counsel and  
6 timeline, all of which has my full support.

7 LTG RISCH: Thank you, ma'am.

8 Good afternoon, Madam Chairwoman and  
9 members of the Committee. Thank you again for the  
10 opportunity to provide additional details on the  
11 progress already achieved, as well as the plans in  
12 place, for the successful implementation of the  
13 Office of Special Trial Counsel by December 27th  
14 of 2023.

15 Bottom line, I am confident that the  
16 Army is on track in effectively implementing the  
17 Fiscal Year '22 NDAA and the related DoD  
18 requirements. As I have traveled across our  
19 installations over the past year, I am buoyed by  
20 the enthusiasm that our Judge Advocates and our  
21 paralegals are expressing and demonstrating over  
22 the transformation of our practice and the



1 increased demand for litigation assignments and  
2 expertise within our new Office of Special Trial  
3 Counsel.

4 As the General Counsel mentioned, the  
5 Senate has recently confirmed the selection by an  
6 Army Promotion Board of our Lead Special Trial  
7 Counsel, or LSTC, Colonel Promotable Warren Wells.  
8 He is eager to assume this new assignment and is  
9 well prepared to establish and then lead this  
10 organization responsible for the investigation and  
11 trial-level prosecution of all covered offenses,  
12 and he is already in transition to do so.

13 Our new LSTC holds our highest-level  
14 military justice skill designator and has served  
15 in multiple litigation and supervisory positions  
16 on both the prosecution and defense sides of the  
17 bar. He also served as a Staff Judge Advocate for  
18 two of our largest jurisdictions with robust  
19 criminal law dockets, routinely advising on  
20 referral decisions.

21 This combination of military justice  
22 expertise and organizational leadership experience

1 makes him an ideal choice to serve as the LTSC.

2 I am certain that Colonel Wells will excel in the  
3 execution of his statutory obligation to supervise  
4 and oversee all prosecutors within the Office of  
5 the Special Trial Counsel.

6 Now, the Army's near-term focus is on  
7 the education, training, and certification of  
8 Special Trial Counsel and on the development and  
9 refinement of business rules for the OSTC. The  
10 statutory requirement to establish training  
11 criteria and certification standards is entrusted  
12 to the service TJAGS.

13 As such, I directed our current Chief  
14 of our Trial Counsel Assistance Program, Colonel  
15 Rob Stelle, from whom you will hear tomorrow, to  
16 lead the effort as the acting LSTC in standing up  
17 the Office of Special Trial Counsel and to develop  
18 a thorough certification course and additional  
19 training requirements. He partnered with our  
20 civilian attorney highly qualified experts, each  
21 of whom have decades of experience in prosecuting  
22 felony crimes special victims cases, to develop

1 business rules that ensure a sound, efficient,  
2 victim-centered assessment is provided in every  
3 reported case.

4 In creating our OSTC structure and  
5 drafting all of our business rules and  
6 certification standards, Colonel Stelle and the  
7 OSTC Operational Planning Team have taken into  
8 account best practices from civilian jurisdictions  
9 and the substantial experience that our civilian  
10 attorneys bring to the discussion and planning  
11 effort.

12 Together, we have developed an initial  
13 four-week certification course and overall process  
14 that sets rigorous standards for education,  
15 training, experience, and temperament. I  
16 recognize that Committee members are keenly  
17 interested in observing such training, and to that  
18 end, the Army has provided you with a list of over  
19 90 military justice training events scheduled for  
20 2023.

21 Training in the Army JAG Corps has for  
22 years been a joint enterprise with our sister

1 services. Our schoolhouses are shining examples  
2 of this jointness. As a perfect example, Colonel  
3 Wells, our incoming LSTC, served as an instructor  
4 at the Air Force JAG School at Maxwell Air Force  
5 Base for three years and was tapped to serve as  
6 the Chief of their Military Justice Division.

7 As you may recall, in my prior  
8 statement to you last June, I discussed the  
9 opening of the state-of-the-art Army Advocacy  
10 Center. And since that time, the Center has  
11 already hosted two joint events, one hosted by the  
12 Coast Guard, and another designed to train Judge  
13 Advocates serving as special assistant U.S.  
14 attorneys in each of our services.

15 The Army, just like the other services,  
16 has historically welcomed both students and  
17 instructors from other services to share expertise  
18 at our schoolhouse. Detailed planning is well  
19 underway for both faculty and students from all  
20 services to both teach and train at our Advocacy  
21 Center, learning from each other's unique  
22 experiences, practices, and cultures.

1                   Jointness has many benefits,  
2 particularly for training. My counterparts on  
3 this Panel and I routinely search for commonality  
4 and consistency in education, training, policy,  
5 and practice. Nevertheless, I believe it is  
6 important to maintain an agile system that  
7 accounts for the unique characteristics and  
8 mission of each individual service.

9                   Just as the federal, state, and even  
10 county judicial systems are governed by common  
11 statute, policy, and process, and at times conduct  
12 joint training as such, individual jurisdictions  
13 still operate with autonomy to suit the unique  
14 needs of their community and constituency. The  
15 Department of Defense and its military departments  
16 are no different. Congress has long recognized  
17 the unique missions and character of each service  
18 and the need for independence in many of our  
19 functions, including military justice.

20                   I close by thanking you again. We  
21 greatly appreciate the insights provided by  
22 members of this Committee and by the Panel of

1 civilian prosecutors that preceded our appearance  
2 at the June meetings. We have benefitted from the  
3 lessons learned and shared across federal, state,  
4 and local jurisdictions to develop a structure and  
5 launch a system that features transparency,  
6 efficiency, and victim focus as well as education,  
7 training, experience, and expertise.

8 We are committed to continuously taking  
9 a hard look at ourselves with an eye toward  
10 constant improvement in both the investigation and  
11 adjudication of covered and non-covered offenses.  
12 This look is both internal and external. We  
13 purposely included civilian subject-matter experts  
14 in our planning process and have listened  
15 carefully to their recommendations, adopting many  
16 with a view toward opportunities for change and  
17 improvement.

18 Additionally, our regiment has hired a  
19 Director of Diversity, Equity, and Inclusion and  
20 are in the process of hiring a wellness  
21 coordinator and a data analyst, all of whom I  
22 believe will fill current voids in our ability to

1 both accurately see ourselves and then plan,  
2 train, and execute policies and programs to  
3 address identified deficiencies.

4 Additional personnel in our recruiting  
5 and retention offices and intensified and novel  
6 efforts in those arenas will allow us to attract  
7 more and more diverse applicants and retain the  
8 experienced counsel we already have to address the  
9 growth in personnel that the Army's leadership has  
10 provided to us to support our OSTC's success.

11 I am confident that the OSTC and our  
12 overall military justice system will continue to  
13 emphasize experience, expertise, diversity, and  
14 wellness for not only our litigators but everyone  
15 within our structure while simultaneously  
16 providing support, transparency, continuity, and  
17 compassion for our victims, all while ensuring the  
18 due process that has been and must continue to be  
19 its foundation.

20 Our ultimate goal is to restore the  
21 trust of everyone involved in the process, a trust  
22 that is absolutely vital for our system to be

1 successful. I look forward to your insights and  
2 questions. Thank you.

3 MR. COFFEY: Madam Chair, distinguished  
4 members of the Committee, Committee staff, fellow  
5 Panel members, Vice Admiral Crandall and Major  
6 General Bligh are pleased to appear before you  
7 once again. Together, we will update you on the  
8 Department of the Navy's progress to implement the  
9 requirements of the Fiscal Year '22 National  
10 Defense Authorization Act as they relate to the  
11 Office of Special Trial Counsel or, as we say in  
12 the Department of the Navy, OSTC. There are weeks  
13 where the Navy may follow the Army's lead, but  
14 this is not that week.

15 I want to begin by reiterating Navy  
16 Secretary Carlos Del Toro's commitment to  
17 eradicate sexual misconduct from our ranks. When  
18 we last appeared before the Committee, I described  
19 Secretary Del Toro's Implementation Advisory  
20 Panel, or IAP, a meeting of senior leaders of the  
21 Department of the Navy chaired by the acting  
22 Assistant Secretary of the Navy For Manpower and



1 Reserve Affairs.

2 The IAP continues to meet biweekly to  
3 monitor progress on the Department's efforts to  
4 implement military justice reforms in the FY '22  
5 NDAA and to advise Secretary Del Toro on how to  
6 best improve prevention response and  
7 accountability through implementation of the  
8 Independent Review Commission's approved  
9 recommendations.

10 Since our last appearance before this  
11 Committee, the IAP expedited several important  
12 departmental improvements, including its Safe-To-  
13 Report policy and its No Wrong Door policy. These  
14 two policies encourage victims to come forward  
15 without fear of being punished for minor  
16 collateral misconduct and to ensure that victims  
17 receive response services regardless of what  
18 supporting agency they first approach.

19 The IAP receives frequent updates on  
20 the OSTC because we all understand that these  
21 independent, specialized, and expert officers are  
22 essential to ensuring a fair system that our

1 sailors and Marines trust to deliver just results.

2 Admiral Crandall and General Bligh will  
3 update you on the specific progress the Navy and  
4 Marine Corps have made in establishing the  
5 Departments' two OSTCs. But before turning the  
6 microphone over to my colleagues, I want to first  
7 describe some Department-wide accomplishments in  
8 the implementation of this reform.

9 The Navy and Marine Corps OSTCs reached  
10 initial operational capability before Secretary of  
11 Defense Austin's deadline of mid-July this past  
12 year. Following that important step and upon the  
13 advice of his IAP, Secretary Del Toro issued his  
14 policies governing the Navy and Marine Corps  
15 Offices of Special Trial Counsel.

16 This bedrock document lays out roles,  
17 responsibilities, and expectations for the  
18 Departments' two OSTCs and their assigned  
19 personnel. In it, Secretary Del Toro stresses  
20 that the OSTCs must be independent, specialized,  
21 expert, and ethical.

22 To facilitate independence, the Lead

1 Special Trial Counsel of the Navy and the Marine  
2 Corps will report directly to Secretary Del Toro  
3 without intervening authority. The two Lead STCs  
4 will independently oversee all case-specific  
5 activities and be responsible to the Secretary for  
6 the effective operation and administration of  
7 their respective office.

8 Each must independently identify  
9 requirements for organizing, manning, training,  
10 resourcing, and equipping their organizations.  
11 Consistent with the provisions of Article 6 of the  
12 Uniform Code of Military Justice, the Judge  
13 Advocate of the Navy and the Staff Judge Advocate  
14 to the Commandant of the Marine Corps will be  
15 responsible for addressing those requirements.

16 The LSTCs will each serve for a  
17 specified fixed term of three years, which could  
18 be further extended at the Secretary's direction  
19 for a fixed term of any length. Like the Lead  
20 Special Trial Counsel, each Special Trial Counsel  
21 shall be assigned to the OSTC for a fixed term of  
22 not less than three years, which may be extended.

1                   Special Trial Counsel will similarly be  
2 independent of the chains of command of both the  
3 accused and the victim of any covered offense. To  
4 reinforce their independence, Special Trial  
5 Counsel shall be supervised by a superior Special  
6 Trial Counsel and evaluated only by personnel  
7 assigned to the OSTC. Secretary's policy is  
8 clear; no person from outside the OSTC may attempt  
9 to influence a Special Trial Counsel's  
10 determination regarding the disposition of any  
11 offense.

12                   The Department of the Navy's OSTCs will  
13 maintain specialization expertise by focusing  
14 their efforts on the investigation and litigation  
15 of covered offenses. This emphasis on  
16 specialization and expertise will be reflected in  
17 the OSTC's initial training and education  
18 policies. In accordance with the Secretary's  
19 policy, those will be promulgated by the end of  
20 this month. Standard operating procedures will  
21 follow by July 1st of next year.

22                   By Secretary Del Toro's policy, Special

1 Trial Counsel will not perform duties outside the  
2 OSTC. In fact, only the Lead Special Trial  
3 Counsel may approve the request to detail a  
4 Special Trial Counsel to a court-martial in which  
5 the OSTC has not exercised its authority. The  
6 Lead Special Trial Counsel's authority here is  
7 non-delegable, and the decision may not be  
8 reviewed or appealed.

9 Admiral Crandall and General Bligh will  
10 tell you more about the Departments' selections  
11 for Lead Special Trial Counsel, Captain Jonathan  
12 Stephens and Colonel K. Scott Woodard, both of  
13 whom have been nominated by the President. On 30  
14 November, the Senate confirmed Colonel Woodard's  
15 nomination, and we anticipate a confirmation vote  
16 on Captain Stephens in the very near future.

17 You'll hear from my colleagues that  
18 these two officers possess the expertise and  
19 acumen to faithfully execute Secretary Del Toro's  
20 policies and will capably lead their OSTC to full  
21 operational capability before the statute's  
22 December 27, 2023, deadline.

1           I am proud to serve as Navy GC, in  
2 particular during this period of reform of the  
3 military justice system. I know from my extensive  
4 interaction with them that Admiral Crandall and  
5 General Bligh each bring considerable energy,  
6 experience, and determination to every aspect of  
7 this task, and I endeavor to do my part as well.  
8 But the Department's success depends on more than  
9 just commitment.

10           To institutionalize transformational  
11 change, we need sustainable resourcing to move  
12 beyond the status quo in prevention, response, and  
13 accountability. Using the OSTC and other military  
14 justice reforms codified in the FY '22 NDAA as an  
15 example, we expect the Department's Judge Advocate  
16 community to grow by more than 150 personnel with  
17 related information technology, equipment, travel,  
18 training, and facility requirements.

19           The Department's detailed planning  
20 accounts for this growth, but as the Committee  
21 knows, the Fiscal Year '23 NDAA may expand the  
22 definition of covered offenses to additional

1 crimes, including sexual harassment. Our ongoing  
2 assessment suggests that adding sexual harassment  
3 as a covered offense would, unsurprisingly,  
4 increase the investigative and prosecutorial  
5 workload of the OSTCs beyond what we have  
6 currently planned and might require more growth  
7 than currently budgeted.

8 This change may not only impact the  
9 OSTC but would also increase the workload of Judge  
10 Advocates who defend Sailors and Marines accused  
11 of sexual harassment. My concerns about  
12 sustainable resourcing are not limited to the  
13 Judge Advocate community but instead pervade all  
14 aspects of the Department of the Navy's  
15 prevention, response, and accountability programs.  
16 And specifically, I want to apprise you of the  
17 following.

18 We have, at the Department of the Navy,  
19 decided that the Navy Criminal Investigative  
20 Service, NCIS -- its professional cadre will be  
21 tasked to investigate formal complaints of sexual  
22 harassment throughout the Department. To expand

1 its mandate and ensure that sexual harassment  
2 complaints are independently, professionally, and  
3 thoroughly investigated, NCIS will have to receive  
4 resourcing commensurate with that critical  
5 mission.

6 I am confident that Secretary Del Toro  
7 and other senior civilian and military leaders  
8 throughout the Department will continue to  
9 prioritize these reforms in our plans and our  
10 budgets. But I share this with the Committee  
11 because I hope that as you discharge your  
12 important responsibility to provide advice and  
13 recommendations on the investigation, prosecution,  
14 and defense of criminal misconduct in the Armed  
15 Forces, that you will take to heart this message.  
16 The military departments need sustainable  
17 resourcing to end this scourge of sexual  
18 misconduct which has plagued us for far too long.

19 With that, I'll turn to Admiral  
20 Crandall and General Bligh for specific updates on  
21 the Navy and Marine Corps Offices of Special Trial  
22 Counsel.



1 Admiral?

2 VADM CRANDALL: Thank you, Mr. Coffey.

3 Madam Chair Smith and distinguish  
4 members, thank you for the opportunity to update  
5 you on the significant progress we've made to  
6 successfully implement the Navy's Office of  
7 Special Trial Counsel. As Mr. Coffey stated, we  
8 remain fully on track to establish the Office of  
9 Special Trial Counsel by December 2023.

10 At our last meeting in June, General  
11 Bligh and I laid out our four-phase approach to  
12 reach full OSTC operational capability. We  
13 previously completed Phase 1 planning and remain  
14 deeply involved in Phase 2, the building phase, as  
15 we are committed to building a Navy Office of  
16 Special Trial Counsel that is independent,  
17 specialized, and expert.

18 The Navy's Office of Special Trial  
19 Counsel will utilize a centralized oversight and  
20 decentralized execution of the mission. The Navy  
21 will field an OSTC consisting in part of a lean  
22 headquarters function here in D.C. and two main

1 regional offices, one in Norfolk and the other in  
2 San Diego, comprised of approximately 90  
3 personnel, officer, enlisted, and civilian staff.

4 They will support the fleet in ten  
5 different geographic locations. The OSTC will be  
6 led by a flag officer who will report directly to  
7 the Secretary and be responsible for the effective  
8 operations and administration of the OSTC.

9 As Mr. Coffey mentioned, after  
10 selection by a Promotion Selection Board, which  
11 convened in May of 2022, the President has  
12 nominated Captain Jonathan Stephens for  
13 advancement to Rear Admiral Lower Half. If  
14 Confirmed by the Senate, Captain Stephens will  
15 serve as a Lead Special Trial Counsel for the  
16 Navy's OSTC.

17 He's been serving as the Secretary's  
18 interim Lead for the OSTC since June of 2022,  
19 working to ensure full operating capability by  
20 December. He brings an extensive knowledge of  
21 every facet of our military justice system.

22 Having served with the OJAG

1 Headquarters, Criminal Law Division, working  
2 policy issues, and also having served as a senior  
3 defense counsel, a senior trial counsel, a  
4 military judge, Commanding Officer of Defense  
5 Service Office West, and most recently Chief Judge  
6 of the Navy-Marine Corps Trial Judiciary, Captain  
7 Stephens has been a part of the Navy's Military  
8 Justice Litigation Career Track since 2008 and is  
9 a military justice expert within the track.

10 He has a tireless work ethic and an  
11 innovative mindset. And if confirmed, he will be  
12 a sterling leader for the Navy's OSTC.

13 In addition to being independent of the  
14 chain of command, as the General Counsel  
15 highlighted, the Navy's OSTC will be specialized  
16 and laser focused on those statutory duties of  
17 investigating and prosecuting covered offenses.  
18 Only the Lead Special Trial Counsel may approve  
19 his or her counsel to perform duties outside of  
20 the Office of Special Trial Counsel, including  
21 detailed courts-martial involving non-covered  
22 offenses.

1           In September of this year, pursuant to  
2 Article 24 Alpha, subparagraph Bravo of the UCMJ,  
3 I established criteria for certification and  
4 assignment of Navy Special Trial Counsel.

5 Specifically, they must have completed all  
6 necessary educational and licensing requirements,  
7 have been previously certified by me to be  
8 detailed as a trial counsel for a general court-  
9 martial under Article 27 Bravo of the UCMJ, have  
10 been previously sworn to perform duties of a trial  
11 counsel in accordance with Article 42 Alpha UCMJ,  
12 and have successfully completed a course  
13 specifically focused on the litigation of special  
14 victim crimes or one focused on the litigation of  
15 covered offenses.

16           Additionally, all Special Trial Counsel  
17 must have successfully completed the Department of  
18 the Navy's Military Justice Orientation Course and  
19 the Special Trial Counsel Certification Course.  
20 Further, a Special Trial Counsel must have been  
21 previously selected as a Specialist 1 in the  
22 Military Justice Litigation Career Track.

1           The Navy established the track in 2007  
2           to identify, select, develop, train, and retain  
3           Judge Advocates with a demonstrated aptitude for  
4           military justice litigation. Selection as a  
5           military justice litigation career track officer  
6           occurs via a competitive board process.

7           A Judge Advocate selected as a  
8           Specialist 1 must have a minimum of 24 months of  
9           experience in military justice litigation billets,  
10          which includes service as a trial or defense  
11          counsel, military commissions trial or defense  
12          counsel, appellate government or defense counsel,  
13          victim's legal counsel, or a military trial or  
14          appellate judge.

15          Additionally, applicants for  
16          designation as a Specialist 1 must have  
17          substantial participation in at least ten courts-  
18          martial or complex hearings. Finally, those  
19          selected for certification must have the proper  
20          temperament, including sound judgment under  
21          stressful circumstances, maturity, composure,  
22          levelheadedness, fairness, character, and

1 integrity.

2 Those in the rank of Commander or above  
3 who are selected for STC certification and an OSTC  
4 leadership billet must meet all of those criteria,  
5 as well as having completed an approved masters of  
6 law program or an analogous litigation externship.  
7 They must also have been previously selected as a  
8 Specialist 2 or an expert in the Military Justice  
9 Litigation Career Track and have previously  
10 completed a Special Trial Counsel tour or have  
11 served in a military justice leadership billet in  
12 a large fleet concentration area.

13 A Judge Advocate selected as a  
14 Specialist 2 must have a minimum of 84 months of  
15 experience in military justice litigation billets  
16 and must have substantial participation in at  
17 least 20 courts-martial or complex hearings. A  
18 Judge Advocate selected as an expert must have a  
19 minimum of 12 years experience in military justice  
20 litigation billets and substantial participation  
21 in at least 50 courts-martial or complex hearings.

22 We have identified a core cadre of our

1 first Special Trial Counsel that best meet these  
2 criteria and have provisionally slated them for  
3 assignment to our OSTC offices around the globe  
4 with a report date of summer 2023. The  
5 establishment of the OSTC also includes the  
6 expansion of Navy Defense Service Offices with  
7 additional Judge Advocates and enlisted and  
8 civilian support staff to ensure that all the  
9 accused charged with a covered offense are  
10 represented by well-trained, experienced, and  
11 skilled defense teams.

12 The Navy utilizes a career military  
13 justice training continuum that includes the  
14 Defending Sexual Assault Cases course, training at  
15 the National Criminal Defense College, and through  
16 the National Association of Criminal Defense  
17 Lawyers, among others, to ensure that Navy defense  
18 counsel will have similar qualification in terms  
19 of experience and expertise as Special Trial  
20 Counsel.

21 General Bligh will now discuss the  
22 Marines' efforts since our last meeting in June.

1 MAJGEN BLIGH: Madam Chair Smith,  
2 distinguished members, thank you for the  
3 opportunity to appear before you today to discuss  
4 the Marine Corps's Office of Special Trial  
5 Counsel.

6 Central to these efforts is the  
7 establishment of a constitutionally sound system  
8 for the prosecution and defense of covered  
9 offenses. Like the Navy, the Marine Corps's  
10 Office of Special Trial Counsel will be  
11 independent, specialized, and possessing the  
12 expertise necessary to fully and successfully  
13 execute its mission.

14 The Marine Corps's Office of Special  
15 Trial Counsel will also utilize centralized  
16 oversight and decentralized execution of the  
17 mission. It will consist of a lean headquarters  
18 element and four regional offices, the east at  
19 Camp Lejeune, North Carolina; the west at Camp  
20 Pendleton, California; the Pacific at Camp Foster,  
21 Okinawa, Japan; and then the National Capital  
22 Region at the Marine Corps Base Quantico.



1                   These regional offices will be led by  
2 senior experienced litigators with oversight and  
3 supervision of Special Trial Counsel at nine  
4 installations. As Mr. Coffey has already  
5 indicated, the President has nominated, and in the  
6 last week the Senate confirmed, Colonel Scott  
7 Woodard to serve as the first Lead Special Trial  
8 Counsel of the Marine Corps.

9                   Colonel Woodard is an exceptional  
10 choice, having extensive military justice  
11 experience as a trial counsel, defense counsel,  
12 military justice instructor, trial judge, Chief  
13 Judge of the Navy-Marine Corps Court of Criminal  
14 Appeals, and most recently as my principal advisor  
15 on all military justice matters.

16                   Colonel Woodard's criminal justice  
17 experience, however, is not limited to just  
18 military justice. He also served as a Commandant  
19 of the Marine Corps Fellow at the Department of  
20 Justice, where he participated in the  
21 investigation and prosecution of domestic and  
22 international terrorism subjects as a member of

1 DOJ's National Security Division Counterterrorism  
2 Section.

3 In September, pursuant to Article 24(a)  
4 UCMJ, I established the criteria to certify Marine  
5 Corps Judge Advocates to serve as Special Trial  
6 Counsel. The certification criteria include,  
7 similar to the Navy's, completion of all  
8 educational and licensing requirements necessary  
9 for assignment as a Judge Advocate, certification  
10 by the Judge Advocate under Article 27(b) of the  
11 UCMJ, and be sworn under Article 42(a) of the  
12 UCMJ, and successful completion of a course  
13 focused on the litigation of special victim crimes  
14 or a course specifically focused on the litigation  
15 of covered offenses.

16 Judge Advocates must also successfully  
17 complete a Special Trial Counsel certification  
18 course. Further, the Judge Advocate in the ranks  
19 of Captain and Major must possess at least 24  
20 months of experience in military justice  
21 litigation, which includes service in billets such  
22 as trial or defense counsel, military commissions

1 trial or defense counsel, appellate government or  
2 appellate defense counsel, victims legal counsel,  
3 and military trial or appellate judge.

4 Additionally, these Judge Advocates  
5 must have participated in a minimum of ten courts-  
6 martial, tribunals, or complex hearings involving  
7 covered offenses, including at least one court-  
8 martial or tribunal involving a covered offense  
9 that was tried to verdict.

10 Our Lieutenant Colonel and Colonel  
11 leaders within the Office of Special Trial Counsel  
12 require additional experience, including a  
13 master's of criminal law or an analogous  
14 fellowship or service as a military judge.  
15 Additionally, if not previously certified as a  
16 Special Trial Counsel, Lieutenant Colonel leaders  
17 require a minimum of 72 months of military justice  
18 litigation experience, participation in at least  
19 25 courts-martial, tribunals, or complex hearings  
20 involving covered offenses, including at least  
21 three courts-martial or tribunals that were tried  
22 to verdict.

1           A Colonel not previously certified as  
2 a Special Trial Counsel is required to have at  
3 least 96 months of military justice litigation  
4 experience, participation in at least 50 courts-  
5 martial, tribunals, or complex hearings involving  
6 covered offenses and including at least five  
7 courts-martial or tribunals that were tried to  
8 verdict.

9           Finally, those selected for  
10 certification must have the proper temperament,  
11 including sound judgment under stressful  
12 circumstances, maturity, composure,  
13 levelheadedness, fairness, character, and  
14 integrity.

15           After establishing the certification  
16 criteria, I convened a board to identify Marine  
17 Corps Judge Advocates potentially qualified for  
18 certification as Special Trial Counsel based upon  
19 the established certification criteria. This  
20 screening board reviewed the records of all Judge  
21 Advocates in the ranks of Captain, Major, and  
22 Lieutenant Colonel, and identified those Judge

1 Advocates as potentially qualified for  
2 certification based on their education and  
3 experience.

4 After review and input by the  
5 leadership of the Office of Special Trial Counsel  
6 on the results of that screening board, I further  
7 refined the list of those I assessed as qualified  
8 to serve as Special Trial Counsel. This  
9 eligibility determination will remain in effect  
10 for four years, and during that period, any of  
11 these officers may be assigned to the Office of  
12 Special Trial Counsel and will be formally  
13 certified in writing upon their successful  
14 completion of the Special Trial Counsel  
15 Certification Course.

16 Our efforts to establish the Office of  
17 Special Trial Counsel also include reinforcing the  
18 Defense Services Organization with additional  
19 field grade Judge Advocates, administrative  
20 officers, civilian litigation attorney advisors,  
21 and civilian support staff to ensure that counsel  
22 representing accused charged with a covered

1 offense are well trained, experienced, highly  
2 skilled, and competent.

3 The additional field grade Judge  
4 Advocates will be designated as Special Defense  
5 Counsel and will have similar qualifications in  
6 terms of experience and expertise as Special Trial  
7 Counsel.

8 In conclusion, we can unequivocally  
9 state the Marine Corps remains fully on track to  
10 establish an independent, specialized, and expert  
11 Office of Special Trial Counsel by December of  
12 2023. Thank you.

13 MR. COFFEY: Thank you, General Bligh.

14 Madam Chair, this concludes the opening  
15 remarks of the Department of the Navy. We would  
16 be happy to answer any questions later on. Thank  
17 you.

18 MR. BESHAR: Great. Good afternoon.  
19 Madam chair, distinguished members of the  
20 Committee, Ms. Goldberg -- my former law school  
21 classmate, with whom I just reconnected, if I may  
22 say this, Ms. Goldberg, for the first time in 30

1 years -- I'm very grateful for the opportunity to  
2 appear on behalf of Secretary Kendall to talk  
3 about the OSTC, and I'm delighted to be joined by  
4 my esteemed colleague, Major General Vernon.

5 Secretary Kendall has established a  
6 clear tone and set of expectations regarding our  
7 responsibility to combat the scourge of sexual  
8 assault and sexual harassment. In September, the  
9 Secretary stated unequivocally that eradicating  
10 sexual assault and harassment and creating a  
11 command climate in which no one feels disrespected  
12 or unsafe is a Commander's and a leader's core  
13 responsibility.

14 This commitment has been reinforced by  
15 Undersecretary Jones, who recently testified  
16 before Congress that sexual assault and sexual  
17 harassment undermine our Force lethality,  
18 operational readiness, and mission success and  
19 that this is a war-fighting issue, a readiness  
20 issue, and a leadership issue.

21 Major General Vernon will provide an  
22 overview of the Department's plans regarding the

1 OSTC. I'd like to focus my remarks on three  
2 specific topics: first, oversight of the LSTC by  
3 Secretary Kendall; second, the implications of  
4 including sexual harassment as a covered offense;  
5 and third, the Secretary's expectation that  
6 leaders empowered with actionable data will take  
7 the steps necessary to foster an appropriate  
8 climate within their operations.

9 So, first, oversight. The recently  
10 confirmed Lead Special Trial Counsel will report  
11 directly to Secretary Kendall, as Mr. Coffey said,  
12 without intervening authority. While the precise  
13 contours of the Secretary's oversight role are  
14 still to be defined, likely elements will include  
15 assessing the adequacy of OSTC resources, ensuring  
16 the independence of the OSTC, and analyzing key  
17 data trends to guide the Department's efforts.

18 Important work is underway to identify  
19 appropriate metrics. These may include, one, the  
20 experience of victims and the percentage who  
21 choose not to participate in OST cases; two,  
22 overall timelines, including the duration of



1 investigations and prosecutions; three, due  
2 process protections, such as the percentage of  
3 cases reversed on appeal; and fourth, demographic  
4 trends based on race and ethnicity.

5 Second, sexual harassment as a covered  
6 offense -- the IRC has emphasized the importance  
7 of addressing the continuum of harm that too often  
8 begins with sexual harassment. In that regard,  
9 the potential inclusion of sexual harassment as a  
10 covered offense, as others have said, will have  
11 important impacts on the OSTC.

12 As a threshold matter, a final  
13 determination has to be made as to who will take  
14 the lead in investigating these offenses and the  
15 particular expertise, including relating to cyber  
16 harassment, that will be needed. In addition,  
17 current estimates vary widely from one-third  
18 increase in cases to multitudes of that as the  
19 likely volume and potential impact on resourcing  
20 of sexual harassment cases that will reach the  
21 OSTC.

22 An objective of the Department as a

1 whole will be to develop effective strategies to  
2 address what is widely perceived as significant  
3 under-reporting of sexual harassment.

4 Third, commanders' responsibility.

5 With covered offenses being moved from the chain  
6 of command to the OSTC, Secretary Kendall has made  
7 clear that the formation of an independent  
8 reporting and prosecution chain does not relieve  
9 Department of the Air Force leaders of their  
10 foundational command responsibility to foster a  
11 culture where every airman and guardian feels  
12 safe.

13 By way of example, a priority for all  
14 of us is to be vigilant about overt and more  
15 subtle forms of retaliation against alleged  
16 victims who step forward to report unacceptable  
17 behavior. To empower Commanders and other leaders  
18 to make informed decision, the Department of the  
19 Air Force is working to develop detailed metrics  
20 and trending data that can be used to develop  
21 important insights at both the command and  
22 individual base levels.

1           While the OSTC will take the lead in  
2 particular prosecutions, the rest of the  
3 Department must work assiduously on prevention,  
4 climate and culture, and victim care and support.  
5 Our overarching goal in implementing these  
6 reforms, as General Risch said earlier, is to  
7 restore trust in the system and belief amongst all  
8 stakeholders that due process has been followed.

9           I commend the Committee for holding  
10 another important hearing on these issues.

11           Major General Vernon?

12           MAJ GEN VERNON: Madam Chairwoman Smith  
13 and distinguished members of this Committee,  
14 Lieutenant General Plummer very much wanted to  
15 appear before you today, and we wanted to be there  
16 in person but for reasons that I believe you've  
17 been made aware of were unable to do so. But we  
18 very much appreciate the opportunity and are  
19 grateful for another opportunity to be here before  
20 you on behalf of Secretary Kendall to update you  
21 on our ongoing efforts to successfully stand up  
22 and implement the Office of Special Trial Counsel.

1           Lieutenant General Plummer and I can  
2 assure you that we and the Air Force and Space  
3 Force team are firmly committed to reinforcing  
4 trust in the military justice system. Lieutenant  
5 General Plummer remains steadfast in his prior  
6 commitment to this Committee that the successful  
7 implementation of the OSTC is his top priority.

8           We remain dedicated to our collective  
9 efforts to weed out sexual assault and other  
10 serious offenses in the military. Since the  
11 Independent Review Commission released its report  
12 on sexual assault in the military and the  
13 subsequent passage of the Fiscal Year 2022 NDAA,  
14 we've devoted our most experienced and senior  
15 military justice practitioners to ensure the  
16 seamless standup of the OSTC.

17           The last time we met with this  
18 Committee, we explained in detail our phased  
19 implementation effort. What I'd like to do now is  
20 detail our efforts since June as we look ahead  
21 full statutory operational capability in December  
22 of 2023.

1           We're pleased to advise that our Lead  
2 Special Trial Counsel was confirmed by the Senate  
3 last week and coordination is underway for  
4 Brigadier General Select Christopher Brown to be  
5 promoted to the Grade of 7 and transferred to the  
6 National Capital Region.

7           A military police officer before  
8 becoming a Judge Advocate, Brigadier General  
9 Select Brown has served as a prosecutor, defense  
10 counsel, and a court appellate military judge. He  
11 led the Military Justice Division of the Air Force  
12 Judge Advocate General School before later  
13 becoming the school's Commandant. He led our  
14 Military Justice Policy Division at the Air Staff  
15 level and has served as a Staff Judge Advocate  
16 both at the wing and major command level.

17           In sum, his extensive experience trying  
18 cases and advising convening authorities at the  
19 tactical level before later developing the next  
20 generation of litigators at the schoolhouse and  
21 implementing military justice policy at the  
22 enterprise and strategic level make him the

1 absolute perfect choice to be our inaugural Lead  
2 Special Trial Counsel. We look forward to  
3 partnering with Brigadier General Select Brown in  
4 the ongoing standup of the OSTC.

5 The Department of the Air Force OSTC  
6 reached initial operational capability on 15 June  
7 2022, a month ahead of the DoD directive standup  
8 date of 15 July. At that time, Lieutenant General  
9 Plummer certified the first cadre of 19 Special  
10 Trial Counsel to serve as lead counsel on cases  
11 involving covered offenses.

12 Secretary Kendall also issued his  
13 policies governing the Department of the Air Force  
14 Special Trial Counsel to codify his intent  
15 regarding the execution of this critical mission.

16 The LSTC is structured in a district  
17 model similar to the Department of Justice to  
18 build key relationships with local offices, align  
19 with DAF law enforcement entities, and keep  
20 Commanders accountable for climate and culture.

21 To ensure qualified and experienced  
22 Judge Advocates are assigned to OSTC roles, the

1 Department has developed a robust staffing process  
2 analyzing multiple data points, including prior  
3 military justice experience and duties, litigation  
4 training, prior criminal justice experience, the  
5 number and types of courts-martial participated  
6 in, military grade and assignment history,  
7 temperament and interpersonal qualities, civilian  
8 and military education, and personal interest in  
9 criminal litigation.

10 Candidates are vetted by our  
11 Professional Development Directorate with the  
12 leadership of our provisional OSTC based on a  
13 holistic review of the candidates' experience,  
14 expertise, and acumen for litigation. Once the  
15 most qualified candidates are identified by the  
16 OSTC, Lieutenant General Plummer personally  
17 assesses their qualifications and assigns them to  
18 duty within the OSTC.

19 As we discussed last time, the Judge  
20 Advocates selected for OSTC duty are required to  
21 complete the foundational Special Trial Counsel  
22 Qualification Course. We held our inaugural

1 course in May of 2022, and the next is scheduled  
2 for May of '23.

3 The course comprises a range of  
4 instructors, including Air Force senior  
5 litigators, senior service subject-matter experts,  
6 Department of Air Force subject-matter experts,  
7 and law enforcement criminal investigative  
8 agencies. We continue to refine the course  
9 content to ensure we provide the most relevant  
10 training on topics like complex litigation  
11 strategy, in-depth briefings from forensic  
12 experts, complex charging analysis based on trends  
13 in appellate law, and roundtable discussions for  
14 peer-to-peer development.

15 To further the critical partnership  
16 between law enforcement investigators and OSTC  
17 prosecutors, agents from the Air Force Office of  
18 Special Investigations will take part in the STC  
19 Qualification Course, just as they did last May,  
20 partnering with attorneys in practical exercises  
21 and analyzing case scenarios.

22 In addition to our collaborative



1 training effort, we've established three liaison  
2 officer positions to be filled by OSI Special  
3 Agents, who will be assigned to the Air Force  
4 Judge Advocate General School and the OSTC.  
5 Meanwhile, our Judge Advocates assigned to the  
6 Federal Law Enforcement Training Center, where OSI  
7 trains its agents, is actively engaged in the OSTC  
8 training effort.

9 OSTC leadership will continuously  
10 monitor Special Trial Counsel performance to  
11 ensure the requisite proficiency is maintained.  
12 Should these proficiency standards not be  
13 maintained, we have established procedures for  
14 removal by the Lead Special Trial Counsel.

15 We instituted fixed three-year  
16 assignments for Special Trial Counsel, consistent  
17 with DoD policy, to ensure they develop and  
18 maintain optimal effectiveness. To meet full  
19 operational capability of OSTC by the effective  
20 date of 27 December 2023, Lieutenant General  
21 Plummer will assign an initial cadre of 32 Judge  
22 Advocates to support this effort.

1                   Additionally, we have a proposed  
2                   resourcing plan to increase the staffing of OSTC  
3                   through fiscal year 2026 to meet anticipated  
4                   increases in reports of covered offenses,  
5                   investigations, and courts-martial.

6                   Finally, in the next phase of OSTC  
7                   implementation, we'll continue to refine our  
8                   education and training plans and standard  
9                   operating procedures for OSTC's integration with  
10                  law enforcement investigators.

11                  As your subcommittees meet tomorrow,  
12                  they will have the opportunity to talk in greater  
13                  depth about our ongoing efforts to stand up and  
14                  resource the OSTC with our current acting Lead  
15                  Special Trial Counsel and our current Director of  
16                  Professional Development. Our team looks forward  
17                  to highlighting all our initiatives to make OSTC  
18                  a success.

19                  Lieutenant General Plummer and I are  
20                  resolute in our commitment to the success of OSTC.  
21                  This is a no-fail mission for us and is critical  
22                  to reinforcing trust in the military justice

1 system.

2 Thank you again for the opportunity to  
3 appear before you, and we look forward to your  
4 questions. Thank you.

5 CHAIR SMITH: Thank you.

6 All right. Well, I'll start with a  
7 question. What procedures will you have in place  
8 to ensure that there is no undue influence on  
9 Special Trial Counsels by Commandants, convening  
10 authorities, or SJAs?

11 MR. COFFEY: Well, we start at the very  
12 top. I could start with the Secretary's  
13 instructions that forbids that. As it gets  
14 fleshed out, perhaps Admiral Crandall or General  
15 Bligh can elaborate on whether there will be more  
16 granular instructions. But the word has certainly  
17 gone out from the Secretary that these folks are  
18 independent and are not to be interfered with by  
19 the command, convening authorities, or anyone  
20 else, for that matter. I'm looking for a precise  
21 passage in the policy, but he's made that quite  
22 clear.

1           VADM CRANDALL: So I think a part of  
2 that is also going to be training to ensure that  
3 people understand that the Secretary has set a  
4 very important standard there that needs to be  
5 followed. So there's going to be various training  
6 audiences that we're going to have to train to.

7           So you think the fleet writ large needs  
8 to understand how these changes impact the  
9 military justice system under which they fall  
10 under now. We're going to have to train those  
11 non-lawyers who are legal officers and clerks at  
12 commands, as well as all those commanding officers  
13 and the triads, the executive officers and the  
14 senior enlisted leaders, to understand this new  
15 system and to understand the independence of the  
16 OSTC and the fact that there is no ability to  
17 pressure any determination made with any kind of  
18 undue influence.

19           And then the Staff Judge Advocates, who  
20 serve those convening authorities who will be  
21 responsible for convening courts-martial that are  
22 determined to move forward by the Office of

1 Special Trial Counsel -- they'll have to be  
2 trained, and also make sure their convening  
3 authorities, their supervisors, understand those  
4 new relationships.

5 So I think there's a training piece  
6 that comes into this as well, ma'am.

7 LTG RISCH: I concur, ma'am. As far as  
8 the Army is concerned, that's started already.  
9 Number one, to echo the comments of Mr. Coffey  
10 that it started at the top, the Secretary and I  
11 had a conversation about unlawful command  
12 influence and went through the slides and  
13 briefings on that.

14 And every time she has spoken, she has  
15 stressed the independence of this organization.  
16 It will be built into policies. It's already gone  
17 into training, so Commanders training that we have  
18 at the schoolhouse, when this new structure is  
19 discussed, that's one of the first things that's  
20 there.

21 Commanders have asked, and that's one  
22 of the things we discussed with OSD was the

1 ability to communicate a victim's wishes,  
2 especially if that victim is not actually  
3 represented by a special victim counsel. And we  
4 do have some of those cases, and that's where the  
5 command would play a role.

6 I've tried to educate Commanders to let  
7 them know that this is not something that it's no  
8 longer their responsibility. They still have a  
9 responsibility for victim care, for the accused  
10 care, and then when the case comes back down tried  
11 by a Special Trial Counsel in the Office of  
12 Special Trial Counsel, but in a courtroom that  
13 belongs to the installation and with SJ support,  
14 as well, too.

15 So there's got to be that coordination  
16 and communication by Commanders. It's been made  
17 very clear that while they can provide input  
18 that's nonbinding input -- and that is an  
19 independent structure.

20 MR. COFFEY: If I may, Madam Chair, I  
21 found the cite for the record in the SECNAV's  
22 September 7, 2022, memo regarding policies

1 governing the Navy-Marine Corps OSTC. I'll just  
2 cite for your staff for the record it's paragraph  
3 3B, Independence and Readiness, subparagraphs 1,  
4 2, and 3, which would be -- that they will execute  
5 their duties independently from the chain of  
6 command, that they'll conduct their activities  
7 free from unlawful or unauthorized influence, and  
8 that they'll be rated by Special Trial Counsel,  
9 not by others. So that's for the record.

10 MAJ GEN VERNON: Madam Chair, if I may,  
11 for the Air Force --

12 CHAIR SMITH: Sure.

13 MAJ GEN VERNON: Thank you. From the  
14 Air Force perspective, obviously just as in the  
15 other services, we intend to do extensive training  
16 on this issue. Secretary Kendall has been very  
17 clear in his direction, as well, about the  
18 independence of this office.

19 And so, in addition to the training as  
20 well as the other things that have been discussed  
21 here today, I will mention that the independence  
22 of attorneys is not a new concept in any of the

1 services. We have our Trial Defense Services as  
2 well as our victims counsel.

3 And so our counsel are very comfortable  
4 in the space of being able to indicate if they  
5 feel that their independence is being intruded  
6 upon at all. So we do feel that our folks are  
7 comfortable doing so if that should happen. So  
8 it's really that combination, as has been  
9 mentioned, of the training as well as the support  
10 from the highest levels of the Air Force. Thank  
11 you.

12 CHAIR SMITH: Thank you.

13 Ms. Bashford?

14 MEMBER BASHFORD: I am very interested  
15 in the cases that OSTC is not going to take. You  
16 said that the cases you will take -- that decision  
17 is final. I presume that's the same for the cases  
18 that are triaged out.

19 Who's making the decision to send a  
20 case back? What's the standard that's going to be  
21 applied across the services? When in the process  
22 will that take place, that decision be made? Is



1 it early on? Is it the end of a two-months-long  
2 investigation? And what happens to those charges  
3 if the decision is made not to take it?

4 My understanding is only OSTC could do  
5 an Article 120 court-martial. So what happens to  
6 the things that are triaged out?

7 LTG RISCH: From the Army, I'll tell  
8 you, all great questions, and all that we're  
9 working on right now. I talked about how we've  
10 already gone through our business roles, but we  
11 wanted to wait till the Lead Special Trial  
12 Counsel, who is responsible for running it, came  
13 on board. He is now on board. He's not promoted  
14 yet, but he's in the position, and he's looking  
15 those things.

16 And so that'll be part of our policy.  
17 What I've reminded everybody is there are  
18 standards and so forth, but there's a process by  
19 which those decisions will be made, who's going to  
20 review at what level when those decisions are  
21 made. So we've made no final decisions. As soon  
22 we do, we'll be transparent with that, as we are.

1           VADM CRANDALL: I would offer that on  
2 the Navy side it's similar. The team is working  
3 on the standard operating procedures as to how  
4 those things will function as they stand up. So  
5 we're not there yet to be able to share all the  
6 details with you, but that's coming here.

7           We owe our SOPs by the 1st of July. So  
8 the training plan is next on the hook, by 31  
9 December. And then we'll have to dig in even  
10 deeper and work on those SOPs and answer some of  
11 those very questions you have.

12           But when it comes to Article 120, if  
13 the decision's been made -- by the statute, it  
14 says if the decision's been made by the OSTC that  
15 it is not going to a general or a special court-  
16 martial. It cannot be taken by a traditional  
17 convening authority to a court. They don't have  
18 that ability to do that -- would have to deal with  
19 it in a different way, potentially.

20           There may be other reasons to  
21 administratively separate somebody, but if the  
22 OSTC's made that determination, a 120 would not go

1 to a court.

2 CHAIR SMITH: Ms. Goldberg?

3 MEMBER GOLDBERG: Thank you all for  
4 your testimony. I have a couple of questions  
5 because you're at this unique point of having  
6 thought a lot through, and thank you for sharing  
7 all of that, and also in the building stage. And  
8 as we know, sort of thoughtful building can lead  
9 to the better institutional design in the end.

10 So wondering, picking up on a theme  
11 from this morning's conversation -- I don't know  
12 if any of you were here, but how are you ensuring  
13 that the people who are populating these offices  
14 are going to be demographically diverse? That's  
15 question one.

16 Question two is what structure do you  
17 have now for conferring with victims legal  
18 counsel, or SVCs, whichever your branch uses, so  
19 that they are having some input or sort of an  
20 ongoing feedback loop with respect to the building  
21 that you're doing? And the third is what  
22 structure do you have now for conferring across

1 the services? Because you're all thinking through  
2 a similar set of challenges and questions.

3 And I understand that the services each  
4 have unique environments and unique challenges and  
5 opportunities. But this seems to be an  
6 opportunity where having more alignment than in  
7 some other areas where there are preexisting  
8 reasons for having differentiation might be  
9 useful. So wondering concretely what you're doing  
10 on that.

11 MS. RICCI: I just want to jump in  
12 first and say the first part of your question  
13 about diversity really delights me. I know that  
14 the Army is very much concerned about ensuring  
15 diversity within our Force and within our  
16 prosecution force and that the Judge Advocate  
17 General, who I will allow to speak to his  
18 programs, has been very fully engaged.

19 And since my time on board, I have seen  
20 the very sincere and concerted effort to continue  
21 to move diversity forward. And the Army is in a  
22 good place at this moment in comparison to the

1 rest of the legal community, but we have more work  
2 to do. And I'll let General Risch speak to those  
3 programs.

4 LTG RISCH: Yes, ma'am. So as far as  
5 diversity I'll address it from two ways: Number  
6 one, it's a top-down, but it's also a bottom-up.  
7 What I mean by top-down is as we've heard over and  
8 over again, if I see no one in the upper echelons  
9 of your leadership here in the Office of Special  
10 Trial Counsel, 0-6 and one-star positions, how do  
11 I know that I can achieve that? And so two of the  
12 three 0-6 referral authorities that will make  
13 those decisions are women and happen to be African  
14 American women. They were not chosen for that  
15 reason. I can show you their military justice  
16 bona fides and it was a great selection. So  
17 that's from the top.

18 And then from the bottom that's why I  
19 mentioned at length the efforts that we've made in  
20 diversity, equity, and inclusion. So we stood up  
21 a council. We stood up field boards to find out  
22 what we didn't know. So the leadership. There

1 was a mechanism from the bottom up for our forces  
2 within the regiment, not just in military justice,  
3 but in the regiment as a whole to identify best  
4 practices, things that we can do to get better.

5 In addition we stood up an office and  
6 we hired a civilian director. She's been on board  
7 for about three months. Her focus is not only  
8 training and education, but to actually go out  
9 into the field and to kind of get the feel as  
10 well.

11 We also have a deputy O-6 in that  
12 office who actually sits in our assignment  
13 process. Doesn't have the final say on  
14 assignments, but is there to remind us what we're  
15 missing, to talk about the gaps that are there.  
16 A Hispanic officer, but one that's well-regarded  
17 by everyone in the regiment as well and just has  
18 his finger on the pulse of things. And it's been  
19 very effective to tell us what we're missing in  
20 the assignment process as well, too.

21 So and then as I said in my statement,  
22 we've got lots of recruiting and retention, novel

1 concepts that are out there. We've asked for more  
2 individuals. In the Army JAG Corps we do all of  
3 our own recruiting, so it's not done by recruiting  
4 command, just because we were able to convince the  
5 powers that be that just to send recruiters out to  
6 recruit lawyers and paralegals doesn't necessarily  
7 work that well. So we do all our own. But we  
8 were doing it on the cheap. We asked the  
9 leadership for more and we actually got more  
10 resources.

11 So additional resources plus novel  
12 intensified efforts to get after it to target  
13 historically Black colleges and universities. We  
14 identified more than you need to know probably,  
15 but on the list of top 50 law schools with the  
16 most diverse populations, 27 of those schools are  
17 in four states. So we're targeting those states  
18 with greater efforts to get after, because this is  
19 a problem that we not only have to solve within  
20 the OSTC, but within our regiment as a whole. And  
21 we're going to do it from the bottom up.

22 MR. COFFEY: If I may address your

1 question about what the services are doing  
2 together. We're doing a lot together. We're  
3 talking quite a bit. Mr. Beshar, Ms. Ricci and I  
4 several months ago after we were all confirmed,  
5 set up a regular drum beat of every two weeks.  
6 Doesn't always work out because of schedules, but  
7 we routinely exchange ideas, have very candid  
8 discussions about the challenges.

9 This is -- for me personally this is my  
10 number one issue as general counsel of the Navy is  
11 to get this right. As I said last time, I was  
12 commanding officer of a reserve squadron the '90s.  
13 I can't believe this is still an issue. We got to  
14 fix it. It's important for everything else we do.  
15 And so we talk about that routinely. We exchange  
16 drafts of policies. And if Carrie has a better  
17 idea, I'm happy to steal it and pass it off as  
18 mine. And I think it's worked out very, very  
19 well.

20 I agree that each of the services has  
21 their unique perspective. And we all respect  
22 that, but I think it's been a really positive



1 collaborative relationship on this extremely  
2 important issue.

3 MR. BESHAR: I'd just follow up briefly  
4 on Mr. Coffey's comments. This is an intractable  
5 challenge that we're talking about that has been  
6 -- that the Department has been grappling with for  
7 years, if not decades. And so I think the  
8 immensity of the task we are all keenly aware of,  
9 and not just across the services. But probably as  
10 the newcomer at this table I've been extremely  
11 heartened by the interactions with Ms. Krass and  
12 the experts within OSD, particularly Dwight  
13 Sullivan, who you know well, and Rich Gross, who  
14 have been immense resources to me.

15 And General Vernon, would you like to  
16 address the first two questions for Ms. Goldberg?

17 MAJGEN VERNON: Yes, sir. Thank you.  
18 With regard to diversity, diversity is a huge  
19 priority for the Department of the Air Force in  
20 all aspects and as well as particularly for this  
21 discussion with the JAG Corps and the OSTC. And  
22 it does start with recruiting as well as the

1 professional development throughout an  
2 individual's career. And so we do want to  
3 maximize that diversity because it is important  
4 that those who are prosecuting cases represent the  
5 community throughout the Air Force.

6 And so we do a lot of different things  
7 to maximize our recruiting and our retention, but  
8 we are -- of the 32 projected judge advocates that  
9 will be in the initial cadre in the OSTC next  
10 summer 50 percent of those will be female and 25  
11 percent of those will be diverse. For our 0-5 and  
12 above level, those who are more senior STCs, 23  
13 percent of those are diverse and 44 percent are  
14 female. So we are very optimistic about our  
15 ability to continue to grow. We still have work  
16 to do in that arena, as we all do, but we are very  
17 excited about that initial cadre of special trial  
18 counsel.

19 With regard to victims' counsel we do  
20 currently have great relationships between our  
21 victims' counsel as part of the trial process. In  
22 these types of cases obviously now we're currently

1 following the rules that STC provides in the law,  
2 but that will grow as we -- as the team that looks  
3 at those cases will grow as we roll out the OSTC.  
4 An important person in that team is the victim's  
5 counsel and ensuring that the victim's voice is  
6 heard at all stages of the trial.

7 And so that is something that our folks  
8 are trained to when they go through their initial  
9 victims' counsel training. That is something that  
10 we train our staff judge advocates on as well as  
11 all of our prosecutors and throughout the process,  
12 that that is an important voice that we need to  
13 make sure is part of the process.

14 And then I will just add on the issue  
15 of the collaboration I know that our acting lead  
16 special trial counsel, Colonel Bettis -- I know  
17 she meets regularly with her counterparts from the  
18 other services, and that has been extremely  
19 helpful as we learn and share lessons as we work  
20 through what our procedures will be with the  
21 Office of Special Trial Counsel. Thank you.

22 CHAIR SMITH: Thank you. We'll go to

1 Mr. Kramer and then Dr. Spohn.

2 MEMBER KRAMER: Thank you all very  
3 much. I have a question. I think I heard the  
4 Navy and the Marine Corps talk about defense  
5 counsel, both with respect to training and  
6 experience. I was unclear how parallel the  
7 situation was and whether you think there should  
8 be -- whether the Office of Special Trial Counsel  
9 runs the risk of being so experienced and so adept  
10 at their job that it runs the risk of being an  
11 imbalance with defense counsel.

12 And I'm curious first of all about the  
13 other two -- the Army and the Air Force, whether  
14 they have focused on defense counsel as well as  
15 the Navy and the Marine Corps. And second of all,  
16 how -- I know the legislation doesn't provide for  
17 it, but how parallel a situation you think it  
18 should be with defense counsel. And part of that  
19 is -- and I know the answer to this I think, that  
20 it's just as hard to ensure diversity of defense  
21 counsel as well because especially if a number of  
22 the accused are people of Color or -- and so

1 that's enough questions, I guess. Thank you.

2           LTG RISCH: I'm certainly ready to  
3 address your question. We were concerned about  
4 that obviously, that it looked like the finger  
5 might be on the scale on the government side. And  
6 so when we went and asked the leadership,  
7 particularly -- specifically the Secretary and the  
8 Chief, we asked for increased growth on the TDS  
9 side as well, too. So we're more than happy to  
10 share our structural slides with you, if you don't  
11 have them. And I think you'll see that the growth  
12 on both sides of the bar has been equivalent, as  
13 will the training and education and the selection,  
14 the assignment of folks as well.

15           What we found is the growth has been so  
16 significant that unless you're going to take every  
17 one from a current office and move them over to  
18 OSTC, both TDS and government side, you're left  
19 with the other five core legal disciplines not  
20 having that expertise. So we're reaching out to  
21 our mobilized reservists, some who have 5, 10, 15  
22 or more years of education and training, specific

1 training in either prosecution or defense, asking  
2 them to mobilize for a year or two to cover until  
3 we can grow those additional positions.

4 MS. RICCI: And I'll just add the other  
5 part of this is also ensuring that they have the  
6 appropriate administrative support and not just  
7 grow attorneys but not have the support there. So  
8 that is also part of the package.

9 LTG RISCH: You may also be tracking  
10 that Congress has -- so we're looking into the  
11 potential for a budget, TDS managing their own  
12 budget, and then also doing a manpower analysis to  
13 determine the needs of -- additional needs of TDS.  
14 Quite honestly I think we've addressed that  
15 already, but we'll be interested to see what that  
16 shows.

17 MAJGEN BLIGH: Sir, I'll just -- on the  
18 Marine Corps side we are going to add some  
19 additional MOS designators for folks who have  
20 reached certain experiential levels, which will  
21 help us when we do our slating every year, ensure  
22 we have even -- equal on either side of the aisle,

1 sir. That's our process to keep things balanced.

2 VADM CRANDALL: And on the Navy side,  
3 just a little bit about our slating process for  
4 the 0-4 and above. For all of these positions we  
5 had a large group in the room of about 12 people.  
6 I was there, too. But the senior defense counsel  
7 of the Navy was in the room, the senior prosecutor  
8 in the current form in our RLSO structure was in  
9 the room. We had our interim lead OSTC in the  
10 room. We had the Chief Judge of the Navy in the  
11 room. So as we were detailing these kind of  
12 limited number of skilled litigators we were  
13 getting a good balance across all of the portions  
14 of the litigation enterprise that need to be  
15 represented.

16 And I will just jump back in on the  
17 diversity piece a little bit because I would echo  
18 what Major General Vernon said. I mean the  
19 recruitment piece is really critical. So we build  
20 a broad bench of folks who represent all across  
21 America as we come in so that as we get to the  
22 senior stages we have those folks to draw upon.

1 So it's really very complex. It includes  
2 important mentoring and retention along the way.

3 And one way we're trying to get at it  
4 in the Navy is we have something called our  
5 Standing Advisory Committee on Inclusion and  
6 Diversity. That stood up about two years ago,  
7 January of '21. So that's an advisory group that  
8 advises me as a judge advocate general. They've  
9 done a couple of things over the last years: One  
10 is they suggested we add a sixth governing  
11 principle to our JAG Corps principles. Stand for  
12 diversity, equity, and inclusion. So we did that.

13 Another recommendation was that we  
14 should remove the LSAT score for our accessions  
15 boards when we're looking to bring people into the  
16 Navy JAG Corps because it really measures your  
17 performance your first year of law school and  
18 we're looking at people who are already in their  
19 second year. And the Army had done it. So we  
20 tested it and what we found was the board spent  
21 more time talking about people and less time  
22 focusing on numbers. So that's I think important



1 for us.

2 But also now they recommended that our  
3 military justice career litigation track set up a  
4 DEI advisory committee within the track to  
5 encourage people to apply for the track, to  
6 provide mentors so people who might say I don't  
7 see a senior track person who represents some of  
8 my background. And we can link people up and help  
9 break down barriers of people think they won't be  
10 welcome or won't fit in or whatever it is, because  
11 we need to do better at that. So that's been on  
12 board about a year now and I think that's an  
13 important change for us to ensure we not only have  
14 good diversity across our entire JAG Corps, but  
15 within our litigation track as well.

16 MR. BESHAR: It's always hard being  
17 remote, General Vernon.

18 MAJGEN VERNON: Yes, sir. Thank you.  
19 With regard to the question on the defense  
20 counsel, when this discussion first started, just  
21 like our sister services we raised the concern  
22 internally of making sure that holistically the

1 military justice system is fair and due processed.  
2 And so as we take at that we also, just as the  
3 other services, are going to increase the number  
4 of our defense counsel to meet the need. We also  
5 -- our Career Litigation Development Program takes  
6 into account building not only those futures OSTC  
7 prosecutors, but our defense community as well.  
8 Also as has been mentioned, ensuring they have  
9 their own funding as well as their own  
10 investigators.

11 And so we are very mindful of making  
12 sure that the defense community has all they need  
13 to include their own course that they will be  
14 holding to certify their defense counsel in order  
15 to be able to handle -- cover defenses. And so as  
16 we go forward we will continue to identify those  
17 areas and ensure that we do have that critical  
18 parity within the military justice system. Thank  
19 you.

20 MEMBER SPOHN: Thank you very much for  
21 your presentations. This is obviously a very  
22 significant change in policy and practice and it's

1 clear from your presentations that you've thought  
2 about how to implement the change consistently and  
3 with fidelity to the legislation.

4 But putting on my academic researcher  
5 hat I'm wondering if you've thought at all about  
6 how to evaluate the impact of the change. That  
7 is, are you going to be promulgating standards,  
8 performance measures for the OSTC or for the LSTC  
9 or for the individual STCs? I mean have you  
10 thought about how you will evaluate the impact of  
11 that -- of this very significant change on the  
12 outcomes of sexual assault cases and other  
13 factors?

14 MR. COFFEY: If I may, I think the test  
15 will be -- we will not know for several years, but  
16 the test will be whether the service members trust  
17 us anymore. Do they trust us again? Do they  
18 trust the process?

19 I don't know how we'll go about  
20 measuring that. Perhaps surveys. But will people  
21 feel that there's justice there? That they're  
22 heard? How quickly -- to your point, how quickly

1 do we get to a just result? So I think that's the  
2 measure. I think your question may be directed  
3 more to how you evaluate the STCs and et cetera.  
4 But I think again that's the means. The ends is  
5 restoring trust in the system so that there is  
6 accountability and prevention and that we finally  
7 eradicate as best as we can the scourge. So I  
8 think that's going to be the test and we're not  
9 going to know the -- we're not going to know  
10 whether we pass or not for several years.

11 MEMBER SPOHN: Yes.

12 MR. COFFEY: But we're going to work it  
13 hard.

14 MS. RICCI: Yes, I just want to add,  
15 while it's still pre-decisional, we have been  
16 discussing measures of effectiveness. And it's  
17 not an easy point and it requires careful thought.  
18 And we are looking at different metrics. And I  
19 think Honorable Beshar mentioned some possible  
20 metrics in his opening statement and it's  
21 something that we know we have to address. Now  
22 that we're getting everything in place and we feel

1 that we're on a good glide path to be fully  
2 operating capable we do want to look at measures  
3 of effectiveness and establish those and continue  
4 to refine those as we move forward. Thank you for  
5 that question.

6 LTG RISCH: To your question, ma'am,  
7 have we thought about it, my response is every  
8 single day.

9 (Laughter.)

10 LTG RISCH: Really. Because it is --  
11 we know we need to be successful in this and we're  
12 taking all the steps to be so. But I've been  
13 asked that question and I've asked myself that  
14 question, what does success look like and how do  
15 you measure it?

16 I can tell you the things we -- I don't  
17 think it is; and these are personal answers. I  
18 don't think it's more courts-martial. I don't  
19 think it's more convictions. I really -- and  
20 that's why I said in my opening statement I think  
21 it's trust in the system. If you go back to  
22 really what was the linchpin for the Army the

1 Vanessa Guillen situation, the Fort Hood  
2 independent review on which Ms. Ricci sat, came  
3 back and told us unequivocally soldiers have lost  
4 trust in us as leaders. Families have lost trust.  
5 We need to restore that trust. And this is a huge  
6 part of it.

7 And I think if there a metric by which  
8 you measure that it is the difference between the  
9 number of sex assaults you believe are happening  
10 and the numbers that are reported. And quite  
11 honestly in my world the closer you get to every  
12 victim reporting the offense means there's trust  
13 in the system, they believe they'll be well taken  
14 care of, someone will listen to them, they won't  
15 be retaliated against, all the things we talk  
16 about. Right now that's where I am.

17 But I also mentioned the data analysts  
18 because what I need is someone to help us think  
19 through what are those measures of effectiveness  
20 and how do we capture that information best?

21 VADM CRANDALL: I would just note on  
22 the Navy/Marine Corps side we talked about four

1 phases: the planning, the building, execution --  
2 the fourth phase is assessment. So we have to get  
3 that right. A lot more work to be done there to  
4 figure it out. I think that's difficult.

5 It really ties in though to what Big  
6 Navy is doing, which is this whole campaign of we  
7 have to get real and get better. We have to be  
8 better in the Navy about self-assessing, self-  
9 correcting, and always be learning. So we have a  
10 lot of support from Big Navy when it comes to  
11 taking assessments more seriously, not just making  
12 change and moving on to the next change. It  
13 doesn't institutionally over the long term help if  
14 you're not assessing and making those corrections  
15 that need to be made. So really appreciate your  
16 point.

17 MEMBER SPOHN: Thank you.

18 MR. BESHAR: I'd just follow up, Ms.  
19 Spohn, on the comments in my earlier statement.  
20 There are going to be expertise and resources that  
21 are poured into the OSTC. One of the main focuses  
22 of Secretary Kendall is what's happening outside

1 of the OSTC. How is it that you really reinforce  
2 to commanders and other leaders across the  
3 organization that they retain a vital  
4 responsibility in the realm of sexual assault and  
5 sexual harassment to be leading and reinforcing  
6 the importance of the issue, making it clear that  
7 there's fairness for everybody, both victims and  
8 accused, trying their level best to avoid  
9 instances of retaliation. And so that's the  
10 critical element of accountability outside of the  
11 OSTC that is a key focus of Secretary Kendall.

12 MEMBER SPOHN: Thank you.

13 COL BOVARNICK: Ma'am, if I could jump  
14 in? So for Dr. Spohn, your question about  
15 performance measures is actually a separate  
16 section of the FY '22 NDAA, Section 547, which  
17 requires the Secretary of Defense within a year to  
18 publish three plans. Section 547(c) specifically  
19 addresses performance measures that will be  
20 implemented by the Office of the Special Trial  
21 Counsel to measure that, but it's like --  
22 obviously it's going to be quite a ways after the



1 implementation in December.

2 But that provision and the plan is  
3 still in the draft phase. It's also due December  
4 27th of this year. It's going to be staffed with  
5 the military departments so that when the plan is  
6 implemented the military department will form  
7 working groups -- so for example, it could be  
8 individuals from the Office of the Special Trial  
9 Counsel -- to look at and develop specific  
10 performance measures. So in other words, it's a  
11 separate section of the NDAA that actually  
12 requires that to get after a lot of the technical  
13 points that you had asked about.

14 MEMBER GOLDBERG: May I just make a  
15 comment/maybe a question to those of you who  
16 didn't respond to this before, but it does seem to  
17 me to pick up on this discussion because I had  
18 written down the same question, right, what are  
19 the -- how do you measure if you've restored  
20 trust? And it seems to me that at least one  
21 resource that you currently have are the victims'  
22 legal counsels, or their equivalent, by equivalent

1 name.

2 And which is what was behind my asking  
3 you how much are you working with them now to  
4 understand how they would think of the metrics and  
5 what are the barriers to trust, some of which are  
6 obvious and any of us could guess at and some of  
7 which only they may have unique access to because  
8 they are the ones who are situated to most often  
9 be working with victims, including I think victims  
10 who don't go forward and in addition to people who  
11 are already in the system. I suppose there are  
12 many other ways to really be tracking this  
13 information to build in up front as you're  
14 thinking about the evaluation metrics.

15 And I assume you're doing that now, but  
16 would like to hear whether and the extent to which  
17 you are already doing that.

18 LTG RISCH: So, ma'am, I know you  
19 heard, the panel heard from Colonel Carol Brewer,  
20 who's the Chief of our SVC Program this morning.  
21 She and I meet regularly. She brings plans and  
22 programs to me. One of the things that we

1 identified -- so in answer to your question yes,  
2 at that level and all other levels we're engaging  
3 with our special victim counsel, what we call  
4 them.

5 But we also found out that -- we  
6 surveyed all of our victims afterwards and we  
7 weren't getting any responses back. And so we  
8 took some significant measures; and Carol can talk  
9 to you off line. The number of survey responses  
10 has increased now. It stands to reason. I don't  
11 think many victims really want to comment after  
12 the fact unless it's been bad, but I don't want to  
13 -- the service has been bad, people want to  
14 comment about that. I didn't want to read that  
15 into it. I think they just didn't want to comment  
16 any more on what's been a very horrible situation  
17 for them. And so we made it a lot easier for  
18 them. Focused questions and put some other things  
19 in place and we're getting some responses now  
20 back.

21 VADM CRANDALL: On the Navy side  
22 Captain Cimmino I believe spoke with the panel

1 earlier today and our Victims' Counsel Program has  
2 been also trying to survey clients. Not  
3 necessarily good response rates. So we are kind  
4 of endeavoring to do exactly what the Army is  
5 doing to increase that response rate from victims  
6 who've had victims' legal counsel.

7 I will say Captain Cimmino and his team  
8 have been very involved with inputting to the OSTC  
9 build-up process. And part of the OPT, or the  
10 Operational Planning Team and the working group  
11 that is coming up with ideas is to how we're going  
12 to do all this. So he's very closely intertwined  
13 with that as well, he and his team.

14 MAJGEN BLIGH: Ma'am, on the Marine  
15 Corps side currently your chief trial counsel and  
16 our chief victims' legal counsel Colonel Pedden,  
17 who you heard from earlier, they are separated by  
18 a very thin wall. So they interact on a regular  
19 basis. And as Brigadier General Select Woodard is  
20 continuing to develop the planning for the office  
21 he will be interacting with the VLC.

22 MR. BESHAR: Ms. Goldberg, the

1 proposition that you pose of being extremely in  
2 sync with the wishes of the victim is  
3 exceptionally important. The last time that we  
4 appeared before you we were asked about possible  
5 statistics. And I broached the concept of if we  
6 tracked the percentage of conversions from  
7 restricted to unrestricted reports wouldn't that  
8 be an indicia of progress? And I broached that  
9 with General Lovette, who ran AlZ for us and she  
10 said possibly, but at the same time if the wish of  
11 the victim is to keep the report restricted, then  
12 that really should be our guiding star in that  
13 context. And so there's nuance and complexity in  
14 almost any statistic.

15 MAJGEN VERNON: And if I could just add  
16 to that, to Honorable Beshar's point, in addition  
17 to that as we know -- and Colonel Park, as you  
18 heard from her as well, very tied in with really  
19 not just us here at this leadership level, but  
20 also with her counterparts in the defense and the  
21 prosecution side. And one thing we all know is  
22 that success to a victim looks very different

1 depending on the victim. Some of them don't want  
2 to go to trial, to Honorable Beshar's point. And  
3 so to gauge success on the number of reports, you  
4 know, as has been mentioned earlier by General  
5 Risch is -- completely agree, may not be the right  
6 statistic if really at the end of the day what we  
7 are trying to do is understand what victims and  
8 what success is going to look like for them and  
9 help them heal and come forward, and is -- also  
10 build that trust for the other individuals who  
11 will (audio interference).

12 CHAIR SMITH: I think she's frozen.

13 Okay. You have a question? Sure, go  
14 ahead.

15 MEMBER BASHFORD: Have you considered  
16 how you're going to deal with your creating a top  
17 tier elite level of prosecutors and then you have  
18 everybody else? If I was in the everybody else,  
19 I'd be pretty bummed out by that. Have you  
20 considered how you're going to -- you're taking  
21 away a lot of cases from them that they won't have  
22 jurisdiction over and they're not going to be part

1 of the elite -- how you keep up morale for the  
2 rest of the trial counsel?

3 LTG RISCH: Another great question,  
4 ma'am. That's the essence of leadership is just  
5 getting with them and letting them know that they  
6 may not be where they are -- need to be right now,  
7 but here's how you can get there in terms of  
8 training, education, trying your cases, whether  
9 they're non-covered cases or sitting second chair  
10 on some covered cases. That's where SJAs continue  
11 to have to play a role down at that level by  
12 supporting the special trial counsel who are  
13 prosecuting the case with everything they need,  
14 and that could be a second chair, another  
15 prosecutor who's going to learn from the special  
16 trial counsel. So I think it's just the training  
17 and education type thing, working with them.

18 VADM CRANDALL: I will say on the Navy  
19 side, I agree with General Risch, it's a  
20 leadership issue. And I'm not going to refer to  
21 them as the elite and the non-elite or the Team A  
22 and the Team B, right? The Navy needs prosecutors

1 prosecuting general crimes. Commanders need  
2 people who can prosecute larcenies and move those  
3 cases through quickly for good order and  
4 discipline. We need the very best doing defense  
5 work. And I intend to over time move people  
6 between various litigation billets so when they  
7 become judges they've had experience in all  
8 different types of litigations so they will serve  
9 well as military judges at the trial and later at  
10 the appellate level.

11 So I think we have an additional  
12 challenge as we're standing this up because it is  
13 new. And I will echo what General Risch said  
14 earlier: there's a lot of enthusiasm out there  
15 when I go out and visit the fleet for people who  
16 want to be involved in something new like this and  
17 see the merits in it and want to be part of it.  
18 But I need those people, some of those people  
19 staying in those general crime shops because  
20 there's a lot of good order and discipline that  
21 still needs to be maintained across the fleet. So  
22 that needs to be our message. Thank you.



1 MAJGEN BLIGH: And, ma'am, we've been  
2 on this since the FY '22 NDAA gave us the term  
3 special. We knew this was going to be a potential  
4 issue. And so the general crime side, that's a  
5 really great training ground to get your sets and  
6 reps in litigation, also second chair, the special  
7 trial counsel. So it's leadership, it's  
8 motivating folks to continue to grow.

9 LTG RISCH: I will add we've had five  
10 individuals actually withdraw resignations because  
11 they now have an opportunity prosecute cases at an  
12 04, 05 and potentially 06 level. So that's the  
13 type of enthusiasm that I'm talking about, a real  
14 tangible result.

15 CHAIR SMITH: All right. Do we have  
16 any other --

17 MEMBER WALTON: I guess (audio  
18 interference) question. We've been talking about  
19 evaluating what are the quality of services? And  
20 the quality of prosecution is going to be  
21 evaluated and what metrics you use in making that  
22 assessment? What about from the defense

1       standpoint? I mean are there metrics that you can  
2       use in assessing whether better quality  
3       representation is being provided to the accused,  
4       which is also very important. I mean, I don't --  
5       that's a -- hard metrics I think to do, but it's  
6       important. And I think at the same from the  
7       standpoint of the judiciary. Are evaluations  
8       being made of whether the judges are doing -- I  
9       mean we don't like to be judged obviously --

10                       (Laughter.)

11               MEMBER WALTON: -- but I do think it's  
12       important that we have some appreciation as to  
13       whether we're performing our tasks at a high level  
14       also.

15               LTG RISCH: So in terms of selecting  
16       sort of our proficiency codes apply to all jobs in  
17       military justice. So when you write -- and there  
18       are assignment folks along with our general  
19       officers when we put somebody in those measures of  
20       effectiveness, those prior performance in whatever  
21       job you had. And not just military justice, but  
22       leadership jobs, all those intangibles that we

1 talked about that you need to do jobs that ever  
2 increasing levels get factored in.

3 And then we do have -- we have talent  
4 scouts out there. Our judges will serves as  
5 talent scouts of -- and will report to other  
6 individuals. We've got bench builders that feed  
7 that information back to our assignment process  
8 and our general officers. So there's a constant  
9 mechanism of feeding effectiveness or lack of  
10 effectiveness from everyone back into the system.

11 VADM CRANDALL: Sir, on the Navy side  
12 we went through the comprehensive review of the  
13 Navy's uniformed legal community several years and  
14 one of the things that came out of that was we  
15 realized an increasing need for more assessments  
16 across our enterprise.

17 So we hired a GS-15 chief counsel for  
18 assessments and oversight originally to help us  
19 work through the 51 recommendations that came out  
20 of that comprehensive review to be able to figure  
21 out how to implement them and then to assess how  
22 that was done, but also to increase our

1 assessments across the enterprise so that we  
2 weren't just visiting the 13 legal commands, but  
3 we figured out how do we assess divisions at  
4 headquarters and the missions they have in support  
5 of DOJ, for example, and how do we better assess  
6 judges? And actually just within the last several  
7 months the Chief Judge of the Navy has begun  
8 formally assessing the trial judiciary now and has  
9 done Norfolk and is headed to the southeast.

10 So it's a growth industry for us. And  
11 SJAs are also part of that. So I think it's a  
12 really important question because we do have to  
13 get after that across the enterprise, not just for  
14 example in the OSTC.

15 MAJGEN BLIGH: Yes, sir, in the Marine  
16 Corps, on your defense-specific question, we rely  
17 on the defense leadership to assess the quality.  
18 As you well know, sir, the client drives a  
19 particular case. There's privileged communication,  
20 so outside of that it's tough to assess  
21 effectiveness. But within the defensible our  
22 chief defense counsel and her regional defense

1 counsels do the assessing right now.

2 MAJGEN VERNON: And on the Air Force  
3 side, in addition to what's already been discussed  
4 by the other services, we also have an extensive  
5 vetting process for both our defense counsel and  
6 our judges. They are nominated and they are  
7 evaluated in the beginning and then also  
8 throughout their careers and while they are  
9 currently sitting in their positions. The very  
10 structure of our defense community as well as our  
11 judges allows for that continual feedback in order  
12 to identify if we have any issues and if there  
13 needs to be additional training. Or if somebody's  
14 just not up to snuff, then there's a procedures  
15 for that as well. Thank you.

16 CHAIR SMITH: Ms. Tokash?

17 MEMBER TOKASH: What recommendations  
18 could we make as a panel that would be helpful to  
19 you and your work forces in terms of standing up  
20 these offices? For example, we heard from the  
21 Navy with respect to some concerns with  
22 resourcing. I believe Mr. Beshar also mentioned

1 that with respect to taking -- potentially taking  
2 on sexual harassment. In terms of potential  
3 recommendations what could we do that could be  
4 most helpful to you in terms of recommendations to  
5 the Secretary? Thank you.

6 MR. COFFEY: I'll start. I would ask  
7 you to take a look at what's going to come out in  
8 the '23 NDAA, and to the extent it expands things  
9 that we need to do, whether additional covered  
10 offenses or shifting from the convening authority  
11 to OSTC, additional tasks like giving immunity and  
12 things like that. Have us back to give you  
13 specifics about what we think we need in terms of  
14 your recommendations to the Secretary in terms of  
15 additional resources.

16 It looks to me like sexual harassment  
17 is coming -- and if I may on that point, as it  
18 stands today if sexual harassment is a related  
19 offense to a covered offense, it's already being  
20 investigated. But there are some pure sexual  
21 harassment cases. Who's going to investigate  
22 those? And in the DON we've made the decision,

1 after considerable debate and analysis, that it's  
2 going to be NCIS since they will already be doing  
3 the covered offenses and those collateral sexual  
4 harassment cases, and of course the professional  
5 cadre that they are, et cetera. But it's going to  
6 cost resources. And we've done some estimates.

7 So I don't have specific dollar numbers  
8 for you now. And we have a process for budgeting  
9 that doesn't run from me. But a general statement  
10 that if we want to get after this, we got to get  
11 it right and to get it right it's going to cost  
12 resources. And so please urge the Secretary and  
13 all concerned that -- to listen to that demand  
14 signal. Thank you.

15 MS. RICCI: I'll just add also General  
16 Risch mentioned attorney wellness, and that's  
17 something that I had not thought about as we were  
18 working through the OSTC. And I think that is an  
19 important point. And so to the extent if it's  
20 amenable to comment about ensuring that the  
21 services also consider that. And I know that the  
22 Army is asking for -- to have an appointment of a

1 wellness coordinator and that is when you're  
2 working in this type of -- with these types of  
3 cases we should not forget that.

4 MAJGEN BLIGH: It would be very helpful  
5 if we could pressurize the staffing of the  
6 executive orders to adjust, you know, just the  
7 RCMS --

8 (Laughter.)

9 MAJGEN BLIGH: -- so that we're  
10 planning it against certain certainty.

11 MR. BESHAR: Ms. Tokash, I sometimes  
12 feel like you're Columbo at these hearings. You  
13 wait until the end and then you always ask a good  
14 provocative question that tries to get underneath  
15 the surface a little bit.

16 This is a long-term effort. And people  
17 don't want to hear that because they want swift  
18 results, but the reality is that the focus has to  
19 be sustained over a multi-year period, and that's  
20 hard to do just in reality because so many other  
21 priorities arise and kind of intrude. So I think  
22 all of us in this room are trying to really



1 maintain visibility, maintain focus, maintain  
2 accountability so that this is an enduring effort  
3 that really produces tangible results as promptly  
4 as possible.

5 COL BOVARNICK: Judge Smith, I just  
6 kind of wanted to know for the record -- it was --  
7 the Committee had in the letter that you drafted  
8 inviting the members mentioned an interest in  
9 potentially attending courses. And so we'll  
10 coordinate with the staffs of the respective  
11 departments. Obviously General Risch mentioned  
12 they had a list of a number of cases. And we have  
13 that from the Navy and the Air Force as well.

14 So as I mentioned this morning, I'll  
15 circulate that with the members and if there's  
16 interest in courses, we'll coordinate with those  
17 course administrators to get members out to those  
18 courses, like the few that were already attended.  
19 That's all I had, ma'am.

20 CHAIR SMITH: Well, I don't think  
21 anyone has any additional questions, so thank you  
22 very much for spending part of your afternoon with

1 us.

2 COL BOVARNICK: We'll break for 15  
3 minutes. Can say 1530.

4 (Whereupon, the above-entitled matter  
5 went off the record at 3:17 p.m. and resumed at  
6 3:34 p.m.)

7 COL BOVARNICK: Okay, so we're going to  
8 have our staff presentation from Mr. Mason on the  
9 racial disparities. I think it's at tab 6 of the  
10 hand outs for the members. And then right after  
11 that at 1600 we'll stop, and we have our three  
12 public comments. We will cover that at 1600. So,  
13 over to you.

14 MR. MASON: Thank you sir, Madam Chair,  
15 members. We are going to do a little bit of data  
16 talk, and if you go to the second slide, the  
17 reason that we're here is to discuss the RFI that  
18 the committee requested back in June. And that  
19 specifically was dealing -- in response to  
20 testimony that you received, dealing with the  
21 diversity of the practitioners within the JAG  
22 Corps.

1                   Specifically paralegals, trial counsel,  
2                   everybody that are a player in the game. And we  
3                   requested the sex, race, ethnicity, and pay grade  
4                   by member, as well as sex, race, ethnicity by pay  
5                   grade for the total force, as well as for the JAG  
6                   Corps specifically. So, that is the context by  
7                   what we're talking to now, and we'll get back to  
8                   that RFI at the end of the presentation.

9                   So, the next slide shows you kind of  
10                  the history of where we're going to go in a rather  
11                  abbreviated time. Starting with the OMB standards  
12                  for race, and ethnicity, all the way through to  
13                  the report that you as a committee did in 2022 on  
14                  race, and ethnicity. First, I acknowledge some of  
15                  you were here for the first report, so this is  
16                  going to be old hat for you.

17                  For everybody else, we're going to get  
18                  up to speed on what the background is. And to  
19                  keep in mind, we're talking the big picture. So,  
20                  we're talking about a personnel system, data  
21                  system. We're talking about an investigative  
22                  system, we're talking about the military justice

1 system. It's not specific to sexual assault, and  
2 I know that's our focus, but these issues are much  
3 larger, and they impact what ability you have as  
4 a committee to make determinations.

5 So, the first one that we're looking at  
6 is OMB 15, this is the Office of Management and  
7 Budget, Statistical Policy Directive Number 15.  
8 Shorthand OMB 15, you'll see it in many  
9 publications that way. And this is the  
10 information that we use for census gathering. So,  
11 it's a standard for the federal government. And  
12 by saying standard, that's kind of a misnomer.

13 Because I like to look at it as choose  
14 your own adventure. You can go one route, and you  
15 can answer it this way, and you have a whole  
16 different set of answers, but you're going to get  
17 to the same point hopefully. And again, that's  
18 important, you'll see that at the end of the  
19 presentation, where that comes into play.

20 Specifically in 1997 we have the  
21 original executive order, and this policy that was  
22 established. In 2000 there were some revisions to

1 it, and it's what we use for the census, and again  
2 in 2010, 2020. In the most recent year they have  
3 started through the White House, a process of  
4 revising these standards again.

5 So, they are not set in stone, they are  
6 constantly evolving, and it's based on what the  
7 general practice of society is at that point. One  
8 thing, there's five minimum categories, so you're  
9 talking American Indian/Alaskan Native, Asian,  
10 Black or African American, Native Hawaiian or  
11 Other Pacific Islander, and then White.

12 Those are your five minimum categories.  
13 You can classify more than five categories, but  
14 when you aggregate down, when you report out the  
15 data, there's supposed to be at least those five.  
16 So, you have to be able to pull -- if you break as  
17 you're data taking, American Indian, and Alaskan  
18 Native separately, when you aggregate it out, they  
19 have to be one category.

20 With respect to ethnicity, there are  
21 two possible options. Hispanic, or Latino, not  
22 Hispanic or Latino. That's where we're supposed

1 to be at. Now, what does ethnicity mean? And  
2 it's one of those questions a lot of people have,  
3 we're talking about individuals with a Cuban,  
4 Mexican, Puerto Rican, South, or Central American,  
5 or other Spanish cultural origin regardless of  
6 race.

7 So, one of the things that we're  
8 looking at, race should be a category, and  
9 ethnicity should be a category, because that's how  
10 it's defined. But you will see, you can combine  
11 them into one if that's how you'd like to report  
12 it. So, the next slide that comes into play for  
13 how we're dealing with the data is the Article  
14 140a of the Uniform Code of Military Justice.

15 And we've talked about that as a  
16 committee before, this is a statutory requirement  
17 to create a case management, data collection, and  
18 accessibility. So, the ability for individuals to  
19 access courts-martial records, to dockets, to see  
20 what's happening within the system. But at the  
21 same time, the Secretary of Defense has to  
22 prescribe uniform standards, and criteria for the

1 collection, and analysis of this data.

2 And the key to it is that we are  
3 looking for standard definitions, and standard  
4 collection criteria, so that everybody is using  
5 that same set going forward. Additionally that  
6 information is to be used by the Article 146  
7 panel, which is the Military Justice Review Panel.  
8 That data is supposed to be available for them as  
9 well.

10 So, we are interested in what's being  
11 collected on the sexual aspect of it, the MJRP  
12 would be looking at the uniform code in total.  
13 So, where this comes into play for us, in 2018,  
14 the General Counsel issued a memorandum that  
15 basically said adopt the OMB standards. So, with  
16 that we now have American Indian/Alaskan Native,  
17 Asian, Black or African American, Native Hawaiian  
18 or Other Pacific Islander, White, and then a  
19 category for other.

20 That the services are all supposed to  
21 be using when they do their data collection. And  
22 then as well, they have the same Hispanic or

1 Latino, and then Not Hispanic, or Latino. In  
2 total for this Article 140 system, there are 155  
3 data points that the general counsel, working with  
4 the Joint Service Committee, they established what  
5 they were going to collect.

6           However, of those 155, roughly 10, or  
7 11 deal with demographics, and mostly on the  
8 accused standpoint with a limited focus on the  
9 victim. So, they're gathering a lot of  
10 information throughout the process of the military  
11 justice, but again, it is military justice  
12 focused. We're looking at preferral of charges  
13 through appellate review.

14           So, it's not the investigative side for  
15 the most part, and it's not the personnel system,  
16 it's a separate system that's being created. And  
17 that is part of where the problem will present  
18 itself. Additionally, the services have a  
19 requirement under Article 146a in its annual  
20 reports that the services have to provide on the  
21 military justice system to Congress.

22           And the statutory language is not



1 explicit on what they should be gathering, or how  
2 they need to report it. It has evolved over time,  
3 and what you now see is for the accused, the  
4 services are collecting gender, race, and  
5 ethnicity. For the victim, they're collecting  
6 gender, race, and ethnicity. But if you remember  
7 on the last slide, that's not part of their 155  
8 categories for the victim.

9 So, now we have a break by what the  
10 General Counsel has established as the minimum  
11 standards, and we know that they're collecting  
12 more than that, but it's not in that 155. Now,  
13 again the 155 standards are not the end all be  
14 all, it is a starting point, and it's a common  
15 language for all of their systems. The other  
16 component, and we heard a lot about this today, is  
17 the distinction between sex, and gender.

18 And part of the problem with our  
19 gathering is that we use the term interchangeably.  
20 Sex, in Article 140a, that data system, they use  
21 the term sex. But in the 146a report that they're  
22 giving to Congress, they use the term gender. So,

1 we think we're gathering the same information, but  
2 there is a difference in definition.

3 So, we've got a disconnect right at  
4 that point of what exactly is being collected.  
5 Now, in your materials for today, there is an  
6 example of 146, the appendix to one of the 146a  
7 reports. And you'll see in that it's the Air  
8 Force that I excerpted, but they are using the  
9 right categories for race, using the right  
10 categories for ethnicity, and they're using the  
11 right, in theory, gender, or sex.

12 This, over the past three years, if you  
13 looked at the last three years of the reports, you  
14 would see a definite change in how it's being  
15 reported. So, the services are definitely  
16 improving, their data collection is improving, and  
17 they're able to report it using the same standard,  
18 which is a positive. However, this takes us to  
19 this part in the conversation of what have we  
20 determined in looking over the past few years  
21 through studies?

22 And we're going to highlight two

1 reports that were done by the GAO, and then the  
2 DAC-IPAD's report on race, and diversity, because  
3 it's sandwiched between the two GAO reports. So,  
4 the first one, the GAO in 2019, in their report,  
5 one, they acknowledge the application of the 140a  
6 standards. And those were through the General  
7 Counsel in 2018.

8 So, the GAO said yes, these standards  
9 are out there, make sure you're using them. That  
10 way we're going to eliminate some of the problems  
11 that we have. They said at that point, that the  
12 146a annual reports lacked demographic data for  
13 the service members. Well, you just saw the  
14 example that I showed you, they fixed that.

15 So, since 2019, when the GAO said you  
16 need to include this, the services have gone  
17 further, because they now have it on the accused,  
18 and they have it as well on the victim. So, we  
19 are making progress. Their recommendations were  
20 that the race, and ethnicity data, investigation,  
21 and personnel databases should mirror the 140a  
22 standards.

1           So, now we're moving outside of the  
2 military justice, and saying the overall personnel  
3 system should be the same, and the investigative  
4 system, they should all be using the same  
5 definitions. They recommended that the reports  
6 include race, ethnicity, and gender, and that that  
7 is happening, and that you incorporate non-  
8 judicial punishment information in the database.

9           That was the long goal. It's something  
10 that they weren't doing at that point, and we are  
11 getting there now, but it was a big  
12 recommendation, and it required a lot of  
13 investment to get there. So, one of the questions  
14 that you asked, and I'm only highlighting it now,  
15 because it's something that has been asked, but  
16 it's not really the focus of what this discussion  
17 is.

18           But there was a question on are Black  
19 service members being treated differently? Are  
20 White service members treated differently? Are  
21 women treated differently? The GAO, based on  
22 their observations, and you have to take this not

1 with a grain of salt, but you have to in the back  
2 of your mind remember, they're saying that the  
3 data they're collecting is not comprehensive.

4 So, they were taking data in, and then  
5 having to use essentially assumptions to get to  
6 the point where they could then make their  
7 determinations. However, based on what they  
8 observed, they said Black, and Hispanic male  
9 service members were more likely than White, or  
10 female service members to be subject of  
11 investigations, and to be tried.

12 So, they're more likely, but then when  
13 you get to the outcome, and the punishment, or  
14 conviction, race, and gender were not  
15 statistically significant. So, what the GAO said  
16 is there may be discrepancies within the system at  
17 various stages, but the ultimate outcome, there  
18 doesn't show to be a correlation that as race, or  
19 gender, it's more likely, or not that you're going  
20 to be punished, or convicted.

21 So, their data was not comprehensive,  
22 but what they got in, they were able to make this

1 determination. So, that takes us then to 2020,  
2 when the DAC-IPAD was tasked by Congress through  
3 the NDAA to do a study on the disparities in the  
4 investigation, prosecution, and conviction. We as  
5 a committee, staff, we presented it to the  
6 committee, and the committee endorsed it.

7           However, as you probably remember, it  
8 is not a comprehensive assessment on racial  
9 disparities. And the reason for that is we ran  
10 into the same issue as the GAO. We asked for what  
11 is the racial composition of individuals, and the  
12 ethnicity? And one example, at the time, the Air  
13 Force gave us 20 different categories for race.

14           And then we had to make a determination  
15 how to break that 20 down into 5 so we had a  
16 standard. With ethnicity, there's two accepted  
17 categories, they had 17. So, if you go back to  
18 our report, you'll see all of those eye charts,  
19 where we tried to connect it, and get to a  
20 standard. We were comfortable that we came to a  
21 standard, and we could do some preliminary  
22 comparisons.

1           But it takes us back to the same  
2           problem as that when the services aren't using the  
3           same reporting, we're unable to make an apples to  
4           apples comparison. Now, the committee did have  
5           five findings, and recommendations as a result of  
6           that report. One of them, and just for  
7           background, you'll see it starts at recommendation  
8           33.

9           1 through 32 are previous  
10          recommendations of the committee, and they were in  
11          previous reports. So, starting at 33 is the one  
12          related to the data, and disparity.

13          Recommendation 33 was to designate the military  
14          personnel system as the primary data system. And  
15          then building on that was to record race, and  
16          ethnicity data utilizing the same standard in the  
17          military criminal investigative system, the  
18          military justice system, and the personnel.

19          Now, I've highlighted those as red, and  
20          yellow, because in theory they have adopted that,  
21          that they're using a common standard. But in  
22          practice, we know that there's still a disconnect.

1 So, I guess orange would probably be the right  
2 color, it's somewhere between red, and yellow.  
3 The next one that the committee had recommended  
4 was that we collect the race, ethnicity, sex,  
5 gender, age, and grade of both the victim, and the  
6 accused.

7 And the 140a standard that we just  
8 talked about, they are doing the race, ethnicity,  
9 sex, age, and grade, so we're halfway there. The  
10 victim, it's just sex at this point in the 140a  
11 standards, and then status, whether it's military  
12 personnel, or not. We know that they're  
13 collecting more than that, but we're still not  
14 making the distinction between sex, and gender in  
15 what we're recording.

16 And then the last recommendation that  
17 I wanted to highlight was to collect the race, and  
18 ethnicity of the participants in the process. This  
19 ties in again to our RFI that we did in the  
20 presentations that you've heard today, there  
21 really isn't a good way to gather that information  
22 yet. There isn't a central database that you can



1 go to, and see the trial counsel was Black, non-  
2 Hispanic.

3 That type of information isn't just in  
4 one database, and you would have to pull from  
5 different systems, and hope you're getting the  
6 right information. So, we had those  
7 recommendations, which then takes us to the GAO  
8 doing a report right after that. And in the GAO's  
9 report in 2021, it was an update of their  
10 findings.

11 Their first major one is DOD, and the  
12 services have improved their ability to collect,  
13 and report consistent demographic, and NJP data.  
14 So, in their analysis, everybody was moving in the  
15 right direction, so it gets the green, because  
16 they've made progress from where they've started.  
17 And the Coast Guard was the furthest behind on NJP  
18 data, and they've caught up.

19 They're not there 100 percent yet, but  
20 they're getting closer. However, they had two  
21 other components, and one is DOD has not  
22 identified when the disparities exist, it should

1 be further reviewed, and they don't know the  
2 causes for the disparities. So, we're getting  
3 this data in, we know what the what is, but we  
4 don't know why, or how.

5 And GAO is saying that's something you  
6 need to work on, which takes us to the next slide,  
7 which is the developments in race, and ethnicity.  
8 And the very first one is DOD is doing it, they  
9 have started an internal review team on racial  
10 disparities in the investigative, and military  
11 justice systems. They're looking for why, how is  
12 something happening?

13 And the results, the findings are  
14 pending at this point, but we should be seeing  
15 something that will come out, and explain how can  
16 we change policies? What are the programs, and  
17 processes that need to be changed in order to  
18 address disparities that are identified? Key to  
19 that is having the right data to begin with.

20 So, at least you can make the  
21 assumption if we have correct data, we're going to  
22 be able to start looking at why the disparities

1 exist. The second one that was in the FY '22  
2 NDAA, and it directly impacts what this committee  
3 does going forward, is a change in policy that the  
4 SAPRO annual report, Sexual Assault Prevention and  
5 Response Office. Their annual report include race,  
6 and ethnicity in their documentation, in their  
7 data set. And then additionally, there needs to  
8 be an annual report on racial, and ethnic  
9 demographics in the overall military justice  
10 system. So, specific to sexual assault, they're  
11 saying yes, you need to include that, as well as  
12 the overall system.

13 So, this committee will have access to  
14 better data based on that. And if you look at the  
15 language, it's fairly extensive, and it has  
16 different categories referenced against each  
17 other. So, it is going to be a comprehensive  
18 report. So, that brings us back to where we  
19 started. We heard testimony on the -- in June, we  
20 heard testimony on the promotions, and the  
21 demographics within the JAG Corps.

22 And we sent out an RFI, and we asked

1       them again, sex, race, ethnicity, pay grade of  
2       members, and then by pay grade for the total  
3       force, as well as the Jag Corps. We intentionally  
4       did not provide them categories. So, we didn't  
5       say here are your five categories, make it fit.

6               The testimony that you received is that  
7       they're all aware of the diversity, and that  
8       they're aspiring to improve their diversity, and  
9       make sure that they're representative. And before  
10       I slip to the next slide, you're going to see that  
11       the Army is grayed out. And the Army is grayed  
12       out, and the slide after, one for race, and  
13       ethnicity, I'll explain that in a second.

14              They did respond, we did get a  
15       response. So, don't go into it thinking they're  
16       ignoring, they did, it's just it's different. So,  
17       looking at the next slide for race, you can see  
18       where the services are essentially matching up.  
19       When you look across American Indian/Alaskan  
20       Native, you can see that the Navy, Marine Corps,  
21       Air Force, Coast Guard, are all using that same  
22       category.

1                   And the only difference that you see on  
2 this is that the Marine Corps doesn't include more  
3 than one, or other as a category. So, they're  
4 breaking them out, and it's either decline to  
5 respond, or they're fitting them into one of these  
6 other five categories. The other declined, or  
7 more than one race is something that with your  
8 committee report, and what the Article 140a  
9 standards, you get into that with the other.

10                   So, for the most part, four of the five  
11 services right on board using the same language.  
12 Looking at the next slide, you'll see a break, and  
13 this is ethnicity. It looks a little discouraging  
14 when you first look at it, but it's a statistical  
15 issue, or a reporting issue. The Hispanic, Not  
16 Hispanic or Latino, all of the services we're  
17 doing that of the four we're looking at right now,  
18 except for the Marine Corps.

19                   And they're breaking out further, and  
20 they're putting the race categories back in for  
21 ethnicity, which OMB says you can do that, so  
22 they're kind of doing it on their ethnicity. What

1 the rules is with respect to that is whether they  
2 respond as Hispanic is a category. Anything else  
3 is non-Hispanic, and when you total it up, it  
4 still equals 100 percent.

5 So, once you have that 100 percent,  
6 however else you categorize it, you can do it, but  
7 when you aggregate, you're still back to those two  
8 categories. So, even though the Marine Corps has  
9 a bunch of other categories listed, it's still an  
10 acceptable way to record it. It's just when they  
11 aggregate it, we'd prefer to see Hispanic or  
12 Latino, and then Not Hispanic or Latino as just  
13 two categories, rather than us having to figure  
14 it.

15 Now, here's where the Army comes into  
16 play. One of the things that we first said is the  
17 OMB allows you to do a choose your own adventure.  
18 And one of them is you can do Hispanic, and then  
19 racial categories. So, the Army, they responded  
20 with one set of data. We asked the two questions,  
21 race, and ethnicity.

22 They responded with one set of data

1 saying Hispanic, and then American Indian/Alaska  
2 Native, and going down the categories. So,  
3 they've lumped the two into one. It's perfectly  
4 acceptable to do that, and we're not going to say  
5 they're wrong to do it. The problem is none of  
6 the other services are reporting it that way, so  
7 we can't do the apples to apples comparison.

8 We only have to look at what the Army  
9 is doing, and then look at -- we can put the other  
10 services against each other because they're using  
11 the same standard. The reason we didn't ask for  
12 specific categories is we wanted to see what  
13 they're doing. And the interesting point is you  
14 saw on the military justice, the 146a reports,  
15 they're using a different set of reporting  
16 statistics there, or categories.

17 But then when they're looking at the  
18 personnel system, and diversity within their  
19 force, they're reporting it differently. So, it's  
20 not a problem, it's just now even within a  
21 service, you're looking at it differently. And  
22 the GAO, as well as the DAC-IPAD have said use one

1 set as a standard.

2 Have your personnel system, have your  
3 investigative system, your military justice all  
4 use the same categories. And that way you don't  
5 have the possible error through interpretation, or  
6 input. And so what we learned from this is  
7 they're doing it their way, and they're able to  
8 give their answers, but it's still different than  
9 what everybody else is doing.

10 So, the potential options are we can go  
11 back, and ask the question again, and give  
12 everybody the same categories, and get an apples  
13 to apples comparison. Or we can do the analysis  
14 of all this data for each individual service, and  
15 not try to compare services against each other.  
16 I would just note in the last presentation, the  
17 Air Force was talking about their OSTC Office, and  
18 their representation.

19 And they were using the numbers of 75  
20 percent diversity, 25 percent diverse. If you  
21 compare that to the service, and their JAG Corps,  
22 they're right on. So, their JAG Corps, and the



1 OSTC Office is identical statistically. And then  
2 they said that 50 percent of their OSTC attorneys  
3 are 50 percent male, 50 percent female, that is  
4 the exact representation of their JAG Corps.

5 So they are, their JAG Corps is 50 50,  
6 the OSTC Office is 50 50. When you compare it to  
7 the overall Air Force though, it's 75 percent  
8 male, 25 percent female. So, within the JAG  
9 Corps, female representation would be over  
10 represented, but within the OTSC it's exactly the  
11 same.

12 So, we have all of this data, and the  
13 guidance that I would be asking from the committee  
14 is would you like to see the data Service-  
15 specific, or would you like us to go back, and get  
16 the Army, and everybody on the same page, and try  
17 to do an overall comparison? We have it, but we  
18 haven't done the analysis yet. We wanted to get  
19 the guidance from you of which way you would like  
20 to go.

21 And that really is the presentation,  
22 it's just to tell you that we have data. We asked

1 for it based on what you were looking for, you can  
2 see there's still a problem in how it's reported,  
3 so it's going to take more work on our end. But  
4 I think it helps inform you that as much as the  
5 GAO, and the DAC-IPAD have said, and other people  
6 have said in the past you need to standardize,  
7 it's still not happening 100 percent.

8 We are better than where we were  
9 though. Any questions?

10 MEMBER LONG: I was going to make a  
11 recommendation, but I feel like Dr. Spohn should  
12 probably -- you probably have an idea as an  
13 academic, otherwise -- well, I mean I guess I  
14 would turn -- I have two questions. The first  
15 would be is there a way that would come up with  
16 more accurate data? And if the -- so, that's  
17 accuracy.

18 And the second, is there a way that  
19 would encourage the services to do what they're  
20 supposed to do? If they don't want to enable  
21 more, if everyone wants to get together, and they  
22 just need a push to do the right thing. That

1 seems like the right answer.

2 MR. MASON: The potential exists to get  
3 better data, and that's by asking the question  
4 again, and being very prescriptive of the response  
5 that we're looking for. We know it's in their  
6 system to some degree, so if we ask it in a  
7 defined way, and say all services please answer it  
8 exactly the same, we will get that. The problem  
9 is the systems are not the same.

10 And that is something that the 140a  
11 requires the system, it's something the services  
12 struggle with. The DAC-IPAD had its own database  
13 for years, it was put together with shoestring,  
14 and gum. And we even -- like when we reported the  
15 sex of an accused, or a victim, we did that by  
16 reading, and trying to figure out what their name  
17 is.

18 And then looking at the specification  
19 or offense, and trying to figure out the sex  
20 through that. We don't have an actual document in  
21 the record of trial that says this is the sex. So,  
22 our system is flawed in that sense. We knew our

1 methodology, and we did it, but we didn't have the  
2 background. So, the bigger question is we need to  
3 keep pushing -- this committee could keep pushing  
4 to DOD to say you need a system.

5 You need one system that pulls  
6 everything together in one. Yes ma'am.

7 MEMBER SPOHN: So Chuck, I'm a little  
8 confused. So, the Army has Hispanic, African  
9 American, non-Hispanic African American?

10 MR. MASON: No ma'am. They have one  
11 category Hispanic, then they have American  
12 Indian/Alaskan Native, then they have a category  
13 Black --

14 MEMBER SPOHN: Under Hispanic?

15 MR. MASON: No ma'am. It's either  
16 Hispanic, and then it's all of the other race  
17 categories. So, they're exclusive answers. You  
18 can answer that you're Hispanic, or you can answer  
19 that you are American Indian. You can answer that  
20 you're Hispanic, or you're Black. You are given  
21 those set, and that's how they categorize it.

22 MEMBER SPOHN: Got it, as --

1           MR. MASON: Pardon me? All as one. In  
2 the way they reported it here, they do not  
3 separate. It's race, and ethnicity wrapped into  
4 one. But we know that in the other reports that  
5 they do, they break it into separate categories.  
6 So, for this one when we asked the question, for  
7 your diversity in the JAG Corps, they combined it  
8 all into one group.

9           MEMBER SPOHN: But you're saying they  
10 have it in the other --

11          MR. MASON: They absolutely have it,  
12 because it's their personnel system.

13          MEMBER SPOHN: So, it seems then that  
14 we should go back, and say we want you to break it  
15 down the way everybody else has broken it down,  
16 and then look at those numbers, no?

17          MEMBER GARVIN: No, I'm not  
18 disagreeing, I have kind of a -- if we ask that  
19 question, I wonder if we could ask a follow up  
20 question, which is -- or a tag along question,  
21 which is just to document the effort that it  
22 required to do that through some metrics, even if

1 it's personnel hours, or something.

2 Because I think what we're getting at  
3 is we keep -- all the services are having to  
4 continue to band aid their systems in order to get  
5 data responsive to these questions. But we're not  
6 looking at the burden that we put on the services  
7 as they have to collect the data, to have it speak  
8 to each other.

9 And if we knew information about the  
10 burden that's put on them to get their systems to  
11 talk more effectively together, then the ask of  
12 put your -- create a singular system, could be  
13 more create in the ask of what resources are  
14 necessary.

15 MR. MASON: We can absolutely do that,  
16 and we did in a previous RFI, request for  
17 information, we did ask them please give us this  
18 answer, and then tell us how you did it step by  
19 step. And we haven't done that since you've been  
20 reconstituted, and the systems have definitely  
21 changed since then. So, with your approval, we  
22 can go, and do a new request.

1                   And we can give them specific  
2 categories that we're looking for, and then ask  
3 them exactly what systems they've accessed, and  
4 how they queried it to get to the result that  
5 they're giving us. And then we would be able to  
6 further discuss okay, this system is connected  
7 this way, but not here, and figure out how they  
8 work together. We can absolutely do that.

9                   CHAIR SMITH: I see head nodding that  
10 people are in agreement with that. Go ahead.

11                   MEMBER GOLDBERG: I guess I would  
12 underscore just two things that others have said,  
13 and maybe add one layer. One, that it seems, at  
14 least to me, that we -- to be able to do our job,  
15 we need to be able to make a good service to  
16 service comparison. It seems like it would not  
17 only be useful to DAC-IPAD, but also for the  
18 services in their own work.

19                   And in particular, thinking back to the  
20 last panel, as in this moment of building a new  
21 system, to be able to collect data accurately, to  
22 be able to assess, sort of not just trust as

1 building, rebuilding trust as a whole, but whether  
2 there are particular groups that are either  
3 gaining, or losing in the building trust would be  
4 very important for the tracking.

5 It's a good moment to be revisiting  
6 this question I think. And then the second to the  
7 burden point, which seems incredibly important,  
8 right? This is -- it's sort of the what is the  
9 information, and what would you need to be able to  
10 produce this information more easily, and  
11 accurately?

12 And then the kind of background  
13 question I have is the census has long enabled  
14 people -- fairly long enabled people to select  
15 multiple categories, and it seems that in 2022, on  
16 the verge of 2023 to not have a category that  
17 allows for multi-racial, or multi-ethnic identity  
18 misses a large segment of the population.

19 And not only that, but I think to the  
20 extent people have to self-report, that can have  
21 a negative effect on the individuals who are being  
22 asked, sort of looking at a form that doesn't



1 actually enable them to provide an accurate  
2 answer.

3 CHAIR SMITH: This comment is probably  
4 completely muddying the waters, but I'm going to  
5 make it anyway. On the heels of all the things we  
6 discussed today, and I don't know if it would be  
7 asked as part of this, or not, but while they're  
8 looking at data, it seems to me that the committee  
9 might be interested in knowing what the juror  
10 makeup is.

11 Because we heard one thing today, and  
12 then we heard other things from some of the  
13 committee members, and so the proof is in the  
14 numbers with respect to women on juries, and also  
15 minority representation on juries compared between  
16 officers -- courts-martial for officers, versus  
17 enlisted, so that would be one.

18 And then also looking at the lawyer  
19 data. What's the makeup of the JAG Corps, I guess  
20 it is, right? And that might be, this might be  
21 the wrong moment to be saying it, but I want to  
22 put it out there, because I think everybody would

1 be interested. And rather than hearing little  
2 vignettes here, and there, getting some concrete  
3 information. For sexual assault cases, yes.

4 MR. MASON: And ma'am, I was taking  
5 notes earlier, and those issues came up. I had a  
6 side bar with some of the Service reps, and  
7 setting expectations, the first one, the panel  
8 compositions is going to be difficult to  
9 accommodate. And the reason for that is once you  
10 have a convening order, and you have the  
11 individuals listed, and they get into a court-  
12 martial, you don't keep -- a personnel record  
13 doesn't go with it.

14 So, you could go in the record of  
15 trial, and see who the individuals were listed,  
16 and then you would have to go back into a  
17 personnel system, and try to find them, make sure  
18 you have the right person, and then get that data.  
19 It's actually a manual search, and I talked with  
20 Dr. Wells briefly.

21 You might be able to do a statistical  
22 sample, but it's still -- we don't even know what

1 the numbers are we'd be dealing with. So, the  
2 first one could be problematic, but I think what  
3 we'd need to do, with your permission again, is go  
4 to the services, and have them explain to us what  
5 they would have to do to get that. With respect  
6 to the participants, the lawyers in it, that's an  
7 easier pull.

8 Because they're in the Jag Corps, and  
9 if they were assigned to a case, their information  
10 is there, and you can pull directly from their own  
11 records, and that would be easier to do. It's  
12 still manual, but it's not the one step removed  
13 from the systems. And the overall demographics of  
14 the JAG Corps, we absolutely have that, and will  
15 be easy -- that will be available for us to  
16 present to you.

17 CHAIR SMITH: So, down the line one  
18 potential recommendation that we might consider as  
19 a body would be that they start keeping data on  
20 who the jurors are, what the makeup is of the  
21 panels. Because certainly, that would be  
22 important for making sure there is fair

1 representation.

2 MEMBER LONG: I mean not to minimize  
3 it, but it almost seems easier than in the regular  
4 world, because they have a finite amount of  
5 trials, and they do collect that initial  
6 information with the personnel records. So, I  
7 mean even going back doesn't seem like a heavy  
8 lift. I'm not trying to burden anyone, but going  
9 forward for sure, I feel like you could definitely  
10 do that.

11 MR. MASON: Most definitely. And not  
12 to speak out of turn, but the other thing that's  
13 happening parallel to all of this with Section 547  
14 in the NDAA, which was developing a larger system  
15 that the services could utilize. And that's  
16 something that is separate from what the DAC-IPAD  
17 is doing, separate from the MJRP.

18 But under those requirements of  
19 developing a new system, you may see some of that,  
20 if it's implemented, that you would be able to  
21 pull more information into it, and track what's  
22 happening through the military justice system.

1 That is pre-decisional, it's not made it to the  
2 point where it's published, but it is a  
3 requirement under the NDAA. Yes ma'am.

4 MEMBER BASHFORD: The data, and  
5 personnel databases on race, and ethnicity, it's  
6 self-generated?

7 MR. MASON: It would be self-reported,  
8 yes ma'am, when they join the Service.

9 MEMBER BASHFORD: But you also mention  
10 investigations databases. Now, is that self-  
11 reported, or is that a detective sitting down, and  
12 saying okay, you're female, you're black, your  
13 name is Gonzalez, you're Hispanic, or are they  
14 actually asking people?

15 MR. MASON: If I remember correctly  
16 ma'am, during the case review study, there was a  
17 lot of the it was the interpretation, or the  
18 opinion of the investigator, what they put onto  
19 the form. Tying it into a personnel system would  
20 be another step, and it would be a good question  
21 for the investigative -- the MCIOs, of do they  
22 correlate those?

1           Or are they still allowing it based on  
2 what is the observation, or the opinion of the  
3 investigator. That would be another request that  
4 we could send out, and ask them how do they  
5 reconcile that information?

6           COL BOVARNICK: Ma'am, we'll summarize  
7 this tomorrow as well, when do the kind of  
8 deliberation sessions, we'll be able to nail down  
9 the exact request for information that the  
10 committee has, and discuss it in more detail  
11 tomorrow.

12           MR. MASON: That's all I have, thank  
13 you very much.

14           COL BOVARNICK: So, ma'am, I think we  
15 can go right into the public comment session next.  
16 And so, before we invite our first public speaker  
17 up, we have two here in person, and we have one  
18 who will start with virtual. I just want to note  
19 for the record that we obtained written public  
20 comment, which is included in the member's packets  
21 at tab 11.

22           So, 11A is written public comment for

1 Mr. Clarence Anderson III, who appeared before the  
2 committee at the September meeting. He provided  
3 additional materials regarding his petition for a  
4 new trial, and petition for reconsideration with  
5 CAF. So, those documents have been provided to  
6 the committee.

7 And then tab 11B is written public  
8 comment from Lieutenant Commander Dominguez, who  
9 appeared before the committee at the June meeting,  
10 and there are three separate documents in that  
11 tab, it includes comments I just mentioned from  
12 Lieutenant Commander Dominguez, comments from his  
13 attorney, Ms. Tammy Mitchell, and comments from  
14 his wife, Ms. Sarah Gonzalez.

15 So, that's just written materials that  
16 were submitted, and I already provided to the  
17 committee. And so, we'll start with our first  
18 public commenter. We have virtual -- Mr. Antiwan  
19 Henning, who will provide his oral comments to the  
20 committee about -- I'm sorry, Mr. Christopher  
21 Hines is virtual, my apologies. So, he has five  
22 minutes, Mr. Hines, are you up there?

1 MR. HINES: Yes, I'm here.

2 COL BOVARNICK: Okay, go ahead sir,  
3 your time starts.

4 MR. HINES: All right. Ladies, and  
5 gentlemen, thank you for allowing me the  
6 opportunity to speak. I'm Christopher Hines, I  
7 was wrongfully convicted of sexual assault in  
8 2013. I was incarcerated for over six years, and  
9 it continues to wreak havoc over my life. While  
10 attending a house party, I met a female soldier,  
11 we'll call her Jane.

12 Jane and I hit it off that evening, we  
13 talked for hours, and at some point in the  
14 evening, we went into one of the bedrooms with  
15 another female soldier, who we'll call Angel.  
16 Jane, Angel, and I started engaging in sexual  
17 activities, and at some point Angel decided she  
18 wanted to stop. She got up, and left. Jane and  
19 I continued to have sex.

20 During this period though, Angel and  
21 another male friend, who we'll call Ralph, entered  
22 the room. They both witnessed us having sex, we



1 completed having sex, and life went on. It wasn't  
2 until several days later, her fiancée found out  
3 about what happened, and she accused me of sexual  
4 assault. Jane admitted during her testimony that  
5 she could have yelled, screamed, pushed me off,  
6 but she didn't.

7 She never said no, or indicated that  
8 she wasn't interested in continuing. Angel left  
9 with zero issues, I tell you this for background  
10 though, the reason I'm speaking today is the  
11 flawed -- all of the changes in the military that  
12 has been in these type of cases, taking review out  
13 of the commander's hand.

14 Unanimous panel decisions to that of  
15 two thirds, these, and the other would help  
16 alleviate situations like mine. However, the  
17 military has yet to address the injustice that was  
18 done in the past. I came from a family with  
19 modest means, I was an E4 when this happened. I  
20 could not afford expensive lawyers, hire  
21 detectives, or find an expert that would have  
22 assisted in clearing my name.

1 I didn't even think I needed them  
2 honestly, I knew that I was innocent. What I'm  
3 asking today is to create a regional criminal  
4 integrity unit to review old cases, cases such as  
5 mine, where the evidence does not meet its burden  
6 of proof. There's a lot of us who we deserve  
7 justice. We'd love to rejoin the military, and  
8 finish what I started.

9 I want my life back, I want my bright  
10 future back. I had a promising military career,  
11 I was great at my job, and that was taken from me.  
12 Not only was my career taken, I've lost years of  
13 my life sitting in a prison cell. My future was  
14 robbed, because now I have a dishonorable  
15 discharge, a felon, and I am on the registry.

16 This is not what the military is about.  
17 So, I'm asking -- actually no, I'm begging to fix  
18 this problem as well. Thank you.

19 CHAIR SMITH: Thank you sir. Any  
20 questions for Mr. Hines?

21 COL BOVARNICK: Apparently not. So, we  
22 have two folks who are present with us, so I

1 believe -- yeah, so Mr. Antiwan Henning is here in  
2 person, sir?

3 MR. HENNING: Thank you ladies and  
4 gentlemen, for allowing me this opportunity to  
5 speak. I will be referring to my notes in my  
6 phone, so if I do not have direct eye contact, you  
7 will know why. My name is Army Major Retired  
8 Antiwan Henning, and that's important. I was  
9 wrongfully convicted in 2016 of a sexual assault.

10 Not only did I not commit the sexual  
11 assault, the events never happened, they were  
12 completely fabricated. This fabrication almost  
13 cost me 13 years of my life. In 2018, after being  
14 incarcerated for over 19 months, my case was  
15 overturned. I was returned to active duty, and  
16 allowed to continue on with my profession.

17 The installation commander decided that  
18 I needed to have a second court-martial, because  
19 it was within his right. It was within his right  
20 based on the way that my case was overturned. In  
21 2019, I had a retrial, and it took the panel less  
22 than 40 minutes to return a not guilty verdict.

1 And I think they took more time completing the  
2 paper work than they did discussing my case.

3 In 2021, I retired from the Army. As  
4 you can imagine, I could have continued my career  
5 at this point, but as you can imagine, my mental  
6 health was not where it needed to be to continue  
7 on with service. I provided that information not  
8 for sympathy, but as background. I am not seeking  
9 any relief for myself, my situation has been  
10 resolved in a favorable manner, so I am whole at  
11 this moment.

12 I am here to request your consideration  
13 for two items that will, in my opinion, assist  
14 wrongfully convicted service members. Before I  
15 ask those two items, I would like to applaud this  
16 panel, and the DOD for making the changes that  
17 they have made taking certain significant cases  
18 out of commander's hands, which I think was a  
19 problem, as well as going to a unanimous panel  
20 verdict.

21 I think those, and some of the other  
22 recommendations will go a long way in ensuring

1 that the current service members, and future  
2 service members do not suffer the fate that I, and  
3 others have had. So, the first area I'd like to  
4 discuss is panel selection. I've heard a lot here  
5 regarding panel selection, and in my personal  
6 case, that was an issue.

7 The prosecutors worked hard to ensure  
8 that there was as few people of color on my panel  
9 as possible. Fortunately I had my second trial.  
10 My first trial was a judge alone trial. My second  
11 trial was a trial by panel, and they worked hard  
12 to try to ensure that there were no people of  
13 color on my panel. Why is that though? Why did  
14 they work so hard?

15 I don't have an answer why, but I will  
16 tell you I am currently a DE&I executive for a  
17 large insurance carrier, so I'm going to put on my  
18 DE&I hat, and kind of give my thoughts. The  
19 prosecutors felt that people of color may be more  
20 sympathetic, and potentially biased in my favor.  
21 We don't know if that's true.

22 We all believe that our military

1 officers are able to separate their biases, and  
2 continue on with their military duty. But the  
3 prosecutors didn't see it that way. So, with  
4 that, I ask you wearing my DE&I hat, I ask  
5 everyone here, how comfortable would you be if you  
6 were sitting in a trial for your life, and the  
7 entire panel was black?

8 How would you feel, would there be a  
9 sense of hesitation, or trepidation? And for some  
10 of us, that's the case, that's how I felt. That's  
11 how we feel, that's how people of color, that's  
12 how women feel when you're sitting in a court-  
13 martial, and the prosecutor is adamant about  
14 ensuring that there is few people of color sitting  
15 on that panel as possible.

16 The military works hard to ensure  
17 diversity in its ranks. Why does that not apply  
18 to the panel selection process? Why do we not  
19 work as hard to ensure we have diversity on a  
20 panel as we do in our military ranks? So, that's  
21 my first request, and I heard a lot of  
22 conversation about panel selection, and things of

1 that nature.

2 So, I applaud those efforts, it seems  
3 like you guys, that this body is moving towards  
4 that direction. The second request is similar to  
5 what Chris asked for. Criminal integrity units.  
6 Criminal integrity units are designed to  
7 investigate cases where the evidence is not  
8 consistent with the verdict, or there may be some  
9 discrepancies.

10 We have done a lot of work to help  
11 service members going forward, all of the efforts  
12 that I mentioned ahead of time, previously. Now  
13 it's time to help those that are wrongfully  
14 convicted, that have been wrongfully convicted,  
15 that are still languishing in prison, or they are  
16 out of prison, similar to what Chris is going  
17 through, where their lives have been up ended for  
18 something that they did not do.

19 And they do not have the means to hire  
20 an attorney, to hire an investigator, to right the  
21 wrong that has been done to them. We do not have  
22 a body -- a wrongful conviction unit to help

1 individuals within the military. So, those  
2 members such as Chris, once you have exhausted  
3 your two appeals, that's all you have. There is  
4 no longer a mechanism, or an avenue of redress.

5 And there are thousands, the University  
6 of Michigan does a study every year, and they  
7 estimate that between six and ten percent of  
8 individuals that are incarcerated are wrongfully  
9 convicted. How do we help those six to ten  
10 percent of military members who have been  
11 wrongfully convicted that are either again,  
12 languishing in prison for double digit years?

13 In the facility that I was in, it was  
14 full, and everyone there, to be there, you had to  
15 be sentenced to over ten years. So, everyone  
16 there had a minimum of ten years up into life in  
17 prison. Now, I know everyone there was not  
18 innocent. I know that for a fact, I listened to  
19 their stories, they allowed me to read their case,  
20 because they wanted my assistance, but there are  
21 several.

22 Even if there's only one, that's one



1 too many. Individuals like Chris deserve a second  
2 opportunity at life. He was a young man when he  
3 went into prison, and he came out, and his life --  
4 he can't even start, it's challenging for him to  
5 start over. So, with that I thank you for the  
6 opportunity, are there any questions?

7 MEMBER TOKASH: I have a question, this  
8 is Ms. Tokash.

9 MR. HENNING: Yes ma'am.

10 MEMBER TOKASH: Thank you for your  
11 testimony, thank you for being here. Could you  
12 tell us, at your second trial, you said it was a  
13 members trial, two things. First, you said the  
14 prosecutors were trying hard to make sure that it  
15 was not a racially diverse panel?

16 MR. HENNING: Correct.

17 MEMBER TOKASH: What were they doing,  
18 was that in terms of challenges that they were  
19 making to members?

20 MR. HENNING: Yes.

21 MEMBER TOKASH: And then my second  
22 question is what was the end result of your panel

1 makeup?

2 MR. HENNING: The end result, they used  
3 all of their challenges, so we were able to sit --  
4 I had an all-male panel, it was an all-male panel  
5 of six, four white members, four white officers,  
6 and two black officers. So, that was the final  
7 makeup. And it only worked that way, because they  
8 exhausted all of their challenges, and there were  
9 still additional people of color on the list.

10 MEMBER TOKASH: Did the prosecutor  
11 challenge any minority members, and if so, did  
12 your defense counsel issue back some challenges,  
13 and were those successful?

14 MR. HENNING: Yes, that's how we  
15 ultimately sat the two that were on the panel,  
16 absolutely.

17 MEMBER TOKASH: Thank you.

18 CHAIR SMITH: Any other question for  
19 Mr. Henning? No? Yes.

20 MEMBER GOLDBERG: Just one question,  
21 and thank you very much for your testimony. Have  
22 you thought about a criminal integrity unit, how

1 to structure that, so it doesn't become kind of an  
2 appeals unit for everybody? Because I think  
3 that's always going to be the question, right?  
4 Because why wouldn't somebody who feels wrongfully  
5 convicted, even if they weren't, seek --

6 MR. HENNING: Right, absolutely, yes,  
7 I have thought a lot about this. I did not  
8 mention this, while incarcerated, I created a  
9 nonprofit specifically for this reason, to help  
10 wrongfully convicted members. So, I know the  
11 challenge with receiving a lot of requests at one  
12 time, where everyone believes that they're  
13 innocent.

14 So, the makeup of the criminal  
15 integrity unit would be one prosecutor, one  
16 defender, one defense attorney, one prosecutor,  
17 one defense attorney, as well as an investigator,  
18 and then a paralegal. And someone to kind of comb  
19 through their record of trial for inconsistencies.

20 But the impetus falls onto the  
21 individual who is requesting relief to provide --  
22 and there is a questionnaire, and details that you

1 provide to the CIU. And the CIU will cross  
2 reference that information based on your record of  
3 trial. But so that's kind of how you cull through  
4 everyone that has been -- that feels they have  
5 been wrongfully convicted.

6           However, a great place to be would be  
7 like with organizations such as Save our Heroes,  
8 who has done a lot of that work as well. And some  
9 other organizations that I can provide you a list  
10 of that has done that work already to provide a  
11 great start, if that's something that we were  
12 interested in pursuing.

13           MEMBER GOLDBERG: How many military  
14 members have you been contacted by in your  
15 nonprofit, how many -- when did you start it first  
16 of all?

17           MR. HENNING: So, I started it in 2017  
18 while I was incarcerated, and it continues today.  
19 I've probably received over 300 requests for  
20 assistance.

21           MEMBER GOLDBERG: And have you had any  
22 success? Well we've had -- well, some of the

1 limitations for our success is financial, it's  
2 hard to receive donations, and lawyers are  
3 expensive. So, we've had success with two cases,  
4 one was overturned, and one was not. Fortunately  
5 those cases were still within their appeal window.

6 So, it was -- their appeal went up to  
7 CAF, so we were able to help them craft language,  
8 and do research to assist them. If I had the  
9 financial means, we could have done more for more  
10 people. Of the 300, or so requests that I  
11 received, I would say there were 20 that I believe  
12 were wrongfully convicted. That if I had  
13 additional funds, I would look to assist.

14 MEMBER GOLDBERG: And do you keep any  
15 data on the breakdown, male versus female, White,  
16 Black, Hispanic?

17 MR. HENNING: Yes, I do have data.  
18 Remarkably enough, it's 100 percent male, it's 100  
19 percent male. And then there are 30 percent  
20 African American, 30 percent Black, 15 percent  
21 Hispanic, less than 10 percent -- correction, yes,  
22 35 percent, 15 percent, Asian population was

1 negligible, it was less than 1 percent. And then  
2 the remainder were White males.

3 And the one case that was overturned  
4 was a White male who was at West Point when his  
5 case -- and he returned back to active duty.

6 MEMBER TOKASH: This is Ms. Tokash  
7 again, you mentioned unanimous verdicts. How  
8 could unanimous verdicts, in your opinion, help  
9 ameliorate the problem of wrongful convictions?

10 MR. HENNING: Well, with two thirds,  
11 that's a low bar. A unanimous verdict allows --  
12 to me, it's an equitable process, it's what works  
13 in the civilian courts, and that is there for a  
14 reason, and we're talking about significant  
15 crimes, we're not talking about misdemeanor  
16 crimes. Every time you're up for a court-martial,  
17 that's a felony conviction. So, I think a felony  
18 conviction deserves a unanimous verdict.

19 That's only part of it though, that's  
20 only part of the solution. I listened to a  
21 portion of the events here today, and the  
22 prosecutors, they were aligning a dream team, a

1 special forces type of team for prosecutors, but  
2 the defense does not have the same resources. So,  
3 it's an unbalanced system, especially if you can't  
4 afford to hire outside attorneys.

5 I hired an outside attorney for my  
6 retrial, and he was able to bring to bear  
7 investigators. Not only investigators, we had  
8 specialists testify on my behalf. I did not have  
9 that in my first trial, that was not because of  
10 the lack of finances, only simply because I knew  
11 the events did not happen at all, and I trusted  
12 the system, and believed that I would not be found  
13 guilty, because I did not do anything.

14 So, while I did hire another attorney,  
15 we put forward very little defense. We thought  
16 that the story, the accusation would speak for  
17 itself, and it didn't. And the other part of that  
18 is, and I don't know where to place this, but I  
19 had a judge alone trial, that after I was found  
20 guilty by the judge, the prosecutor requested  
21 seven years imprisonment.

22 We requested dismissal, the judge

1 decided to give me 13 years. And I'm not sure why  
2 he decided to add additional time. Based on the  
3 accusation, because I was not even accused of  
4 having sex with someone, like actual intercourse.  
5 I'm not sure, there was nothing violent -- I'm not  
6 sure where he pulled the 13 years from. But  
7 there's a lot of inconsistencies that are outlined  
8 in my case.

9           Given more time, I could share that  
10 with you. That I think there are a lot of other  
11 individuals experiencing at this moment, however  
12 they don't have the financial means to seek the  
13 relief that they need.

14           MEMBER TOKASH: This is Ms. Tokash  
15 again, I wanted to make sure I heard you  
16 correctly. Am I correct in saying that your first  
17 judge alone trial, you had a military defense  
18 counsel at no cost to you?

19           MR. HENNING: I had a military defense  
20 counsel, as well as a civilian defense counsel, I  
21 had both.

22           MEMBER TOKASH: You did, okay, thank



1 you.

2 MR. HENNING: Yes, I had both. Just  
3 fervor, the level of fervor was different the  
4 second time, because we went into it thinking  
5 there was no way they were going to find me  
6 guilty.

7 CHAIR SMITH: Any other questions?

8 MEMBER CASSARA: Very briefly, Madam  
9 Chair, this is Mr. Cassara again. Thank you for  
10 your presentation, very helpful for those of us  
11 that are on the defense side of the bar. You are,  
12 to some degree, preaching to the choir, but I do  
13 appreciate the comments. And Madam Chair, this  
14 problem may be outside the scope of what we are  
15 currently doing.

16 But one of the biggest concerns that I  
17 have as a defense counsel is the lack of  
18 meaningful habeas relief to military members. I  
19 realize habeas relief is -- I've got a shadow in  
20 my face, I'm sorry for that. I realize habeas  
21 relief is difficult in the best of circumstances  
22 for state, and federal prisoners. It is nearly

1 non-existent for military prisoners.

2           There are several reasons for that, but  
3 I think it might be a helpful out branch of what  
4 we do to look into the lack of habeas relief for  
5 military prisoners, and military accused.

6           CHAIR SMITH: Thank you for that, we  
7 can add it to our long list of things that we're  
8 looking at.

9           MEMBER CASSARA: Yes ma'am, yeah, I  
10 hate to bring on more work.

11           CHAIR SMITH: I have one question for  
12 you actually. You spoke about kind of this dream  
13 team for the prosecutors, and the defense being  
14 left without the resources, is that something in  
15 your trial that was evident to you, or in your  
16 working with these other men who were coming to  
17 you because they felt they had been wrongly  
18 convicted?

19           Is this lack of equity between the two  
20 sides, is that something that's evident all the  
21 time, or?

22           MR. HENNING: It's not evident all the

1 time, but a majority of the time the prosecution  
2 has unlimited financial resources, they have an  
3 investigative body, whether it's NCIS, or CID,  
4 they have the military police at their disposal,  
5 and they get to direct the direction of the  
6 investigation, and they're not investigating to  
7 ensure that the defendant is receiving a fair  
8 trial.

9           They're investigating to prove that  
10 individual's guilt, and any information that they  
11 receive that would direct them towards that is  
12 something that they do. For instance in my trial,  
13 they were able -- the prosecution was able to  
14 reach out to several women that I have dated in  
15 the past to ask if this behavior was something  
16 that they have experienced from me.

17           And of course they all said no, but the  
18 defense doesn't have the resources to go out, and  
19 investigate, and request additional information,  
20 or to send an investigator out to get information  
21 as part of their defense. So, the prosecutor has  
22 all of the cards, and they have -- that's where

1 the, let's say the best attorneys.

2 I won't call them the best -- I'm  
3 hesitant to say the best, but they are. And the  
4 defense attorneys are generally new, junior to the  
5 prosecutor, with less experience. And you would  
6 think that would be the other way around. That  
7 you want a vigorous defense of individuals  
8 regardless of their level of guilt, a vigorous  
9 defense, versus the prosecutor holding all of the  
10 cards.

11 It's an unbalanced justice system.  
12 It's an unbalanced justice system in the design,  
13 to include the way the judges are evaluated, to  
14 the evaluations. I was an Army officer, and my  
15 goal was to achieve the next rank, and I knew what  
16 my bosses, my senior leaders wanted me to do in  
17 order to have that top block in my evaluation, to  
18 be part of the best, among the best.

19 And the lawyers, the prosecutors, the  
20 defense attorneys, as well as the judges are no  
21 different. They all want to succeed in their  
22 careers, and if you are the reason that a general

1 does not receive his -- that commanding general  
2 does not receive his second, or third star, or  
3 their second, or third star, that's not going to  
4 bode well for you if you continuously not perform  
5 to the level of expectations.

6 CHAIR SMITH: All right, well thank you  
7 so much.

8 COL BOVARNICK: I think we have one more  
9 person for five minutes pending the panel  
10 questions. Thank you.

11 MS. PULVER: Good afternoon, my name is  
12 Nicole Pulver. When I was 14 years old, it was  
13 the dawn of the internet, does anybody remember  
14 AOL chat rooms? ASL? My age, sex, location was  
15 16, not 14, female, in Colorado. I met an  
16 undisclosed age male in Colorado in a chat room,  
17 and snuck out of my house to meet him in person.  
18 Undisclosed age male in Colorado was well into his  
19 20s, or even 30s.

20 My first interaction with the opposite  
21 sex was this man. I was molested, and it made me  
22 feel so dirty, I did not want to have any

1 relations. It took me three years before I'd want  
2 to date again. I began dating my now husband --  
3 sorry. He was so patient with me, and supportive  
4 of me, even though I had never told him why.

5 I have so many other traumas in my  
6 life, starting with that my mother gave me up when  
7 I was very young, she was addicted to drugs. I was  
8 fortunate enough that my grandparents raised me.  
9 However, I had four younger half siblings, much  
10 younger, ten plus years, that were not as lucky,  
11 and they were raised in the foster system.

12 The youngest had three failed adoptions  
13 due to her extreme behaviors before my husband,  
14 and I petitioned to adopt her when she was eight.  
15 My sister came to us with a diagnosis of reactive  
16 attachment disorder, or RAD. Just a few symptoms  
17 of RAD are superficially charming, triangulation  
18 of adults, mental, or physical abuse of their  
19 siblings, and, or care givers, and false  
20 allegations of abuse.

21 My two biological sons, and I lived in  
22 absolute chaos for the eight years after adoption.

1 I had been choked, slapped, and made to feel crazy  
2 by my daughter. My oldest son, he was pushed,  
3 choked, and had a gun held to his head by her.  
4 And my youngest had his fingers slammed in doors,  
5 or run over by a vacuum, and one time she pushed  
6 him off the bed.

7 And we had to take him in the ambulance  
8 down to have plastic surgery to stitch his lip  
9 shut. Because of all of these behaviors, and her  
10 attempt to claim that I physically abused her, I  
11 had cameras inside my home to protect my children,  
12 for since about a year after we adopted her. In  
13 2020, amidst COVID lockdowns, after we had just  
14 PCSed to Hawaii, my half-brother passed away due  
15 to drug overdose.

16 This spurred even more erratic  
17 behaviors in our daughter that culminated in her  
18 making an allegation of sexual abuse against my  
19 husband to get out of being grounded, and to move  
20 back to Colorado with our sisters. She claimed  
21 her abuse happened one time in an RV, to which she  
22 could not remember how old she was.

1           And the government was able to look up  
2           that we were in an RV at a new duty station for a  
3           short period of time prior to a deployment, and  
4           said so you were ten, to which she agreed. I have  
5           documentation however, of another RV incident when  
6           she was about six. The report is from a social  
7           worker, that the foster mom reported while camping  
8           in an RV.

9           The mom, and other children were  
10          outside, while the father and my daughter were  
11          inside, when my daughter began screaming, throwing  
12          things, and scratched the father in the face. A  
13          later report states that the child continues to be  
14          distant from father, and has continued to be  
15          violent with him. Earlier, I stated I had cameras  
16          in my home, I also had them in the RV.

17          Everything I have told you today, I was  
18          not allowed to share during my husband's trial.  
19          While my daughter was allowed to have witnesses  
20          about her character, my husband was allowed none.  
21          Nearly every piece of evidence we had was blocked  
22          by the government. My husband was assumed guilty,



1 not innocent, as evidenced by the trial counsel  
2 calling him a pedophile during his trial before  
3 the verdict was even read.

4 During the trial my daughter changed  
5 her story, she tried to add new charges to my  
6 husband, and changed the time line of her  
7 allegations. Despite this, my husband was  
8 convicted on December 5th, 2021, and he is  
9 currently serving 18 months. He is hopeful for  
10 his appeal, but has said he felt silenced by the  
11 process, and that his trial was incredibly one  
12 sided.

13 My grandfather, who adopted me, and  
14 raised me, was a man that myself and my husband  
15 truly admired. He was a retired colonel in the  
16 Air Force, and he passed away this past March. He  
17 was too ill to travel during my husband's trial,  
18 but he told me that he was very upset by what was,  
19 and what was not happening at my husband's trial.

20 He wanted nothing more than to fly to  
21 Hawaii, and put on his uniform one last time to be  
22 by my husband's side. And one of the last things

1 he told me before he passed away was that he  
2 wanted me to keep fighting for what is right, and  
3 to uplift my husband as much as I can. Sorry. As  
4 a victim myself, I have felt that the one sided  
5 court-martial devalidated my experience.

6 And it hurts me to know that any person  
7 can make a statement, no matter how inconsistent,  
8 resulting in a conviction by court-martial. Due  
9 process should look at all of the evidence on both  
10 sides, and especially if there is motive to  
11 fabricate, or in my daughter's case, a diagnosis  
12 exists, and other circumstances that could result  
13 in her allegations.

14 I will close with this. I am broken,  
15 I had to choose between my daughter, who despite  
16 it all, I absolutely love, and I want her to have  
17 the best life that she can. Or I had to choose to  
18 stand with my husband, and what is right. I've  
19 heard today that this panel is making a lot of  
20 positive proposals moving forward, but how do we  
21 right the wrongs of the past?

22 I love the military, but this process

1 is broken, and I hope that this panel will be able  
2 to make a difference for both victims, and the  
3 accused. Thank you.

4 CHAIR SMITH: Thank you. Any questions?

5 MEMBER TOKASH: This is Ms. Tokash,  
6 what service is your husband in?

7 MS. PULVER: He's in the Army.

8 MEMBER TOKASH: In the Army, okay, and  
9 where was the court-martial held?

10 MS. PULVER: In Hawaii.

11 MEMBER TOKASH: Was it a trial by judge  
12 alone, or was it a members trial?

13 MS. PULVER: He changed it to trial by  
14 judge alone at the last minute, because the  
15 prosecution kept trying to introduce a whole bunch  
16 of hearsay, and the defense counsel advised that  
17 even though hearsay would not be allowed, the  
18 panel would still hear it. So, literally the last  
19 minute, they changed it.

20 MEMBER TOKASH: And was that the case,  
21 or I guess the theory for -- you mentioned that  
22 during closing argument, the prosecutor said that

1 your husband was a pedophile before there were  
2 findings of guilt, or innocence. Was there any  
3 objection, and how did the judge rule on that?

4 MS. PULVER: I was not allowed to be in  
5 the room, so I can't recall exactly what period of  
6 time that was. But his appellate attorney raised  
7 that to us.

8 MEMBER TOKASH: Why were you excluded  
9 from the court-martial?

10 MS. PULVER: The government called me  
11 in as a witness.

12 MEMBER TOKASH: But you were also  
13 excluded from argument?

14 MS. PULVER: Correct. So, any witness  
15 during the court-martial proceedings was not  
16 allowed to be in the room at all for the entire  
17 trial, only during their time they were on the  
18 stand.

19 MEMBER TOKASH: Was a reason given as  
20 to why you were not allowed in the court-martial  
21 after the close of all the presentment of the  
22 evidence?

1 MS. PULVER: No. I was allowed in  
2 there for sentencing, that was it.

3 MEMBER TOKASH: Thank you.

4 CHAIR SMITH: Any other questions? No?  
5 Thank you.

6 MS. PULVER: Thank you.

7 COL BOVARNICK: So, before Mr. Sullivan  
8 closes out, we'll reconvene at 8:55 in the  
9 morning, and it'll be for the subcommittee  
10 updates.

11 MEMBER TOKASH: I have a question  
12 Colonel Bovarnick.

13 COL BOVARNICK: Yes ma'am.

14 MEMBER TOKASH: Is there an agenda for  
15 tomorrow? What tab is it under?

16 COL BOVARNICK: Tab one. I think it  
17 should be page three, or so. There may have been  
18 a mistake with printing.

19 MEMBER TOKASH: I'll get one, thank you.

20 COL BOVARNICK: So, I guess I can just  
21 go real quickly, yeah, we'll make sure everyone  
22 has an agenda. But 8:55 just welcome, and then we

1 have the case review subcommittee update, special  
2 projects update, then we'll take a little break.  
3 We'll take our morning break, then the policy  
4 subcommittee update, and we'll go into the --  
5 you'll have deliberations on victim impact  
6 statement that Ms. Saunders mentioned today.

7 Then I'll cover the deliberations on  
8 the March 2023 report. We close out at noon  
9 tomorrow, and then of course there's the afternoon  
10 sessions, which aren't part of the public meeting.  
11 Anything else? We'll make sure everyone has the  
12 agendas.

13 MR. SULLIVAN: All right, this public  
14 meeting of the DAC-IPAD is closed.

15 (Whereupon, the above-entitled matter  
16 went off the record at 4:47 p.m.)  
17  
18  
19  
20  
21  
22

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Date: 12-06-22

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was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate complete record of the proceedings.

*Neal R Gross*

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Court Reporter

**NEAL R. GROSS**

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