

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

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PUBLIC MEETING

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WEDNESDAY  
 DECEMBER 7, 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 8:55 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  
 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\*

\*Participating virtually

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Public Meeting Adjourned

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

2 8:59 a.m.

3 MR. SULLIVAN: Good morning. I am  
4 Dwight Sullivan, the Designated Federal Officer  
5 of the Defense Advisory Committee on  
6 Investigation, Prosecution, and Defense of Sexual  
7 Assault in the Armed Forces. Welcome to day two  
8 of this public meeting. This public meeting is  
9 now open.

10 Judge Smith, you have the conn.

11 CHAIR SMITH: Good morning. I think  
12 we're starting with subcommittee reports. Is  
13 that correct?

14 COL BOVARNICK: Yes, ma'am. And then  
15 for the group, we're going to have an admin.  
16 session in the same room we met yesterday at  
17 9:30. So we'll do the first Case Review  
18 Subcommittee update and we'll break for an admin.  
19 session. And I know after that some members may  
20 have to check out of the hotel. But over to the  
21 Case Review Subcommittee.

22 MS. TAGERT: Hi, good morning. Can we

1 just put the slides on the screen, if that's  
2 possible?

3 So Audrey and I are going to just be  
4 doing a brief update of the Case Review  
5 Subcommittee. As you know, we were working on  
6 the appellate project which is under the umbrella  
7 of the Case Review Subcommittee and we've sent  
8 several members review cases. We sent about 34  
9 appellate cases ranging in different topics from  
10 factual insufficiency to Military Rules of  
11 Evidence.

12 Can someone do the next slide, please?

13 So we appreciate everyone reviewing  
14 cases. It's actually higher than what's on the  
15 screen. We've had a lot of you give us the cases  
16 within the last 24 to 48 hours, so I appreciate  
17 that.

18 The most interest that we've had in  
19 reviewing cases was in panel composition, the  
20 appellate case dealing with that as well as the  
21 prosecutorial misconduct. There were seven cases  
22 reviewed by members in those areas.

1           So I think based on a brief discussion  
2           that we had yesterday that was kicked off by Mr.  
3           Sullivan, we're just going to give you an  
4           overview of the United States versus Jeter case  
5           which is going to be taking place, the decision  
6           is going to be -- the decision will be happening  
7           potentially by the end of the year.

8           So I'm going to pass it over to  
9           Audrey.

10           MS. CRITCHLEY: Good morning. So as  
11           Mr. Sullivan talked yesterday about the case of  
12           United States versus Jeter. This is a case for  
13           those of you who expressed an interest in  
14           reviewing a members' panel composition, members'  
15           selection cases were sent to this decision. It's  
16           also in your read-ahead materials at Tab 10,  
17           along with the briefing in Jeter and the Court of  
18           Appeals for the Armed Forces.

19           So this was a decision by the Navy  
20           Marine Corps Court of Criminal Appeals in a case  
21           involving an African American Naval officer who  
22           was convicted of sexual assault and other

1 offenses by an all-white panel.

2 So just -- I'd like to just set sort  
3 of the legal backdrop here for you very briefly  
4 and then just tell you about some of the other  
5 issues that were raised in the case apart from  
6 what we heard about yesterday.

7 So the Sixth Amendment jury trial  
8 requirements don't apply in courts martial, so  
9 military members have no right to trial in front  
10 of a panel drawn from a representative cross  
11 section of the military community. But military  
12 defendants do have a right both to members who  
13 are fair and impartial and to the appearance of  
14 an impartial panel. And Article 25 of the UCMJ  
15 if you go to that slide please. This is the  
16 criteria that speaks to effectuate that end and  
17 so this is Congress' criteria for panel members  
18 to sit on a court martial.

19 So Article 25(e)(2) states that the  
20 convening authority shall detail members who are  
21 best qualified for the duty by reason of age,  
22 education, training, experiences, length of

1 service, and judicial temperament. And in the  
2 1964 case of U.S. v. Crawford that Mr. Sullivan  
3 talked about yesterday, the predecessor to the  
4 Court of Appeals for the Armed Forces held that  
5 the deliberate inclusion of a Black service  
6 member on a court martial panel for a Black  
7 accused did not violate equal protection  
8 reasoning that if that's discrimination, it's  
9 discrimination in favor of an accused. And since  
10 then, the courts have interpreted Crawford and  
11 cited it for the proposition that a convening  
12 authority may depart from the Article 25 criteria  
13 when seeking in good faith to make the panel more  
14 representative of the accused's race or gender.

15 So the Jeter case that's pending at  
16 CAAF now raised the question whether Crawford  
17 should be overturned. But that was not the  
18 issues that it was initially granted on. Those  
19 were specified by the court two weeks after oral  
20 argument.

21 So in October, the court heard oral  
22 argument on the granted issue which was whether



1 the convening authority violated the appellant's  
2 equal protection rights when over defense  
3 objection he convened an all-White panel using a  
4 racially non-neutral member selection process and  
5 provided no explanation for -- and this is the  
6 language of the granted issue, for the  
7 monochromatic result beyond the naked affirmation  
8 of good faith.

9 So the appellant argued three distinct  
10 theories. One argument was that the total  
11 absence of minorities from the venire selected by  
12 the convening authority established a prima facie  
13 case of purposeful discrimination under Batson.

14 Now the service courts held that  
15 Batson does not apply outside the context of  
16 preemptory challenges so that that argument was  
17 no good here. CAAF, the Court of Appeals for  
18 Armed Forces, has not ruled on that issue yet.  
19 So that issue is still on the table.

20 Another argument and this is the one  
21 that at oral argument that the defense said they  
22 thought that this was probably their best

1 argument was that the total absence of minorities  
2 from the panel combined with a racially non-  
3 neutral selection process established a prima  
4 facie violation of equal protection rights under  
5 Supreme Court precedent, *Avery v. Georgia*. And  
6 the non-neutral selection process in this case  
7 was a questionnaire that asked prospective  
8 members to identify their race.

9           And then the third argument was that  
10 the evidence established a pattern of racial  
11 discrimination because the same convening  
12 authority in the span of one year, detailed all-  
13 white panels in the courts martial of three other  
14 minority service members. Now CAAF in a previous  
15 case, *United States v. Bess*, which was one of  
16 those other cases with the same convening  
17 authority, held that one year is not a  
18 significant enough period of time to establish a  
19 pattern. So the defense didn't think that  
20 argument is going to go very far, but they put it  
21 out there.

22           And so the Government then argued that

1 the appellant neither presented evidence nor made  
2 a clear discovery request for evidence that would  
3 establish systemic or purposeful discrimination.

4 So a decision -- some of you have  
5 asked when they are likely to rule. It's hard to  
6 say, probably spring or summer, almost certainly  
7 before the start of the next term. But in the  
8 meantime, there are a couple of other proposals  
9 afoot concerning randomization of court martial  
10 panels that I just wanted to point out.

11 The Senate version of the Fiscal Year  
12 '23 National Defense Authorization Act contains a  
13 provision that would amend Article 25 by adding a  
14 paragraph calling for the convening authority to  
15 detail members under such regulations that the  
16 President may prescribe for the randomized  
17 selection of qualified personnel to the maximum  
18 extent practicable. And the Joint Service  
19 Committee has recommended the rules for courts  
20 martial be amended to require military judges to  
21 randomly select from among the members detailed  
22 by the convening authority.

1           So just a couple of questions to have  
2           in mind as we go forward and as the Case Review  
3           Subcommittee will be keeping in mind when we talk  
4           about where to go from here. Whether the Joint  
5           Service Committee proposal would have any impact  
6           in a case like Jeter where the venire itself is  
7           not diverse.

8           Another question to consider is  
9           whether randomization of the convening  
10          authority's detailing process would tend to  
11          increase or decrease representation of minorities  
12          on court martial panels. And the answer to that  
13          question turns on the makeup of the pool of  
14          Article 25 qualified personnel and also whether  
15          convening authorities under current practice  
16          reflect diversity. But what the appellate cases  
17          tell us is we don't know the answers to those  
18          questions. So we just put that out there as food  
19          for thought and the Case Review Subcommittee will  
20          be talking about these issues as we go forward.

21          Thank you.

22                 MS. TAGERT: So the next part of this

1 discussion and I don't mean to put Dr. Spohn on  
2 the spot, but she did read some panel selection  
3 appellate cases that we previously discussed, so  
4 if anyone who has read a case and has thoughts on  
5 either panel selection or any other topics that  
6 you selected to review, this would be the time to  
7 maybe discuss it in the full committee.  
8 Otherwise, we can just take those conversations  
9 back to the subcommittee.

10 MS. CRITCHLEY: One thing that I might  
11 point out, we looked at all the comments that  
12 came in and on the panel composition issue, one  
13 comment that was brought up and this is based on  
14 our review of just not U.S. v. Jeter, but also  
15 United States v. Bess which was the other case I  
16 mentioned involving the same convening authority.  
17 One observation from our members was that trial  
18 judges in both cases didn't want to acknowledge  
19 the possibility of racial bias and so that was an  
20 observation about what's going on at the trial  
21 level.

22 Also, that it's unclear from the

1 appellate decisions whether Batson applies to the  
2 panel selection process and that's exactly the  
3 issue that's before the court. Whether it will  
4 reach that, who knows?

5 And also, the observation that the  
6 Article 25 criteria do not tend to ensure the  
7 member selection process is and has the  
8 appearance of fairness because the convening  
9 authority hand picks the members. So these were  
10 some of the comments that we received from you  
11 all which we appreciate.

12 MEMBER BASHFORD: I must say I don't  
13 really understand when they're saying should the  
14 court overrule Crawford why -- there's like an  
15 assumption that in order to get a minority or a  
16 diverse panel, you have to depart from the  
17 Article 25 criteria. I don't understand why  
18 that's even an issue. I'm quite sure you can  
19 find diverse people who fit the Article 25 -- why  
20 would it be a departure from it to include more  
21 diversity?

22 MS. CRITCHLEY: That's a good question

1 and also there's not much discussion in the cases  
2 about -- we had discussion on the panels  
3 yesterday about maybe Article 25 could be amended  
4 if there's an issue, but that doesn't come up in  
5 the cases. I mean that's not the place. It's  
6 not what the courts are going to do.

7 MEMBER SCHWENK: This is Jim Schwenk.  
8 One of the arguments might be that Article 25  
9 sets out the criteria that a convening authority  
10 may consider or should consider or shall  
11 consider, I'm not sure what the language is, in  
12 detailing members and race is not one of the  
13 factors that's on that list. And therefore, a  
14 convening authority is exceeding the scope of  
15 Article 25 if a convening authority considers  
16 race.

17 MEMBER LONG: I'm glad that Martha  
18 asked that question because I had a similar -- I  
19 just don't know the jurisprudence enough, but why  
20 -- why doesn't it just come in under -- or has  
21 anyone argued that that just comes in under  
22 experience? Not that it shouldn't be clearer,

1 but that the interpretation of a panelist's  
2 experience, that's where that would fit in, so  
3 there's no need to overrule it, just to clarify.  
4 And I didn't know if -- because I didn't read any  
5 of these cases and I didn't get a chance to  
6 review before we got here, so I didn't know if  
7 you all knew the answer to that question.

8 MS. CRITCHLEY: I haven't seen that  
9 argument. I don't know if anyone else has seen  
10 that, but they seem to be sticking to the lines  
11 of argument under the Avery v. Alexander or Avery  
12 v. Georgia and Alexander v. Louisiana which are  
13 talking about whether there's total -- just  
14 whether there's a total absence, looking at the  
15 panel as a whole as opposed to -- I guess that  
16 would come in at the individual selection stage.  
17 But these cases are not about the voir dire in  
18 individual selection. I guess that would be why  
19 that wouldn't come up there.

20 MEMBER SPOHN: So I did read this case  
21 and there was a lot of discussion in the case  
22 about the Castaneda case from Texas which was a



1 case in which the Supreme Court overruled the so-  
2 called key-man system which is a system whereby  
3 some designated person in the community gets to  
4 determine who gets on the venire for the grand  
5 jury. There's a lot of discussion in the Jeter  
6 case about whether Castaneda did or did not apply  
7 in the situation. But it seems to me that it's  
8 very similar. I mean what is going on in the  
9 military is very similar to the key- man system  
10 where someone is selecting people based on their  
11 character, their temperament, their experience,  
12 and so on. So I thought that was an interesting  
13 piece of that case.

14 MS. CRITCHLEY: I think the question  
15 there is to what extent will the court's ruling  
16 in Bess preclude that argument where this same  
17 convening authority at the same period of time is  
18 that a year is not long enough. Of course, how  
19 long is a convening authority's time in that  
20 position? How do you get to long enough? What  
21 is long enough? So we don't have the answer to -  
22 - so a ruling on that might be narrow, even if we

1 get one.

2 MEMBER TOKASH: Do you have a copy of  
3 the FY23 NDAA proposed language with respect to  
4 this? Or if you could just tell us the section,  
5 we could look it up online.

6 MS. CRITCHLEY: It was -- I believe  
7 it's Section 542, but I can get it to you  
8 afterwards.

9 MEMBER TOKASH: Okay. A follow-on  
10 question to that is and I'm just thinking out  
11 loud, what impact would any recommendation that  
12 we make with respect to a potential amendment to  
13 Article 25, what's the intersection of the NDAA  
14 in that type of a recommendation?

15 MS. TAGERT: I'm not sure.

16 MEMBER TOKASH: I'm not sure either.

17 MS. TAGERT: NDAA also, I believe,  
18 came out with like both versions. They're coming  
19 out today, so there's lots of changes happening  
20 right now which we might not even be aware of  
21 because we're here and not reading it. So I don't  
22 know if I can answer that at this time.

1                   MEMBER SCHWENK: Yes, it seems to me  
2                   that any recommendation we make would be  
3                   considered by Congress for next year's NDAA, not  
4                   this year's. The train has left the station for  
5                   this year as far as a recommendation from us  
6                   goes. So it would be the '24 NDAA which, you  
7                   know, is supposed to be signed by 1 October, but  
8                   never is and may get signed by December. That's  
9                   what they're hoping for this year. But it will  
10                  be next year, I'm pretty sure.

11                  MEMBER TOKASH: Yes, I wasn't even  
12                  thinking of any recommendation that we make  
13                  having an impact on this year's NDAA. You said  
14                  that the FY23 NDAA proposing something with  
15                  respect to randomization, but if we need a  
16                  recommendation to add inclusion of racial  
17                  diversity to amend Article 25, I'm just trying to  
18                  think of what would be the impact of any  
19                  legislation that's passed in a couple of weeks  
20                  with respect to randomization and any potential  
21                  amendment to Article 25. But again, I'm just  
22                  thinking, like thinking out loud.

1 MS. TAGERT: Yes, so from the staff's  
2 perspective, I think this would be a very long-  
3 term project for the DAC-IPAD which potentially  
4 no recommendations would be made with 365 days.  
5 I think it would take a lot of study, but I could  
6 be wrong on that, but that's just kind of my  
7 perspective. I don't know if there would be an  
8 impact on even next year's NDAA, but that's just  
9 me kind of talking off the cuff.

10 MEMBER SCHWENK: Yes, I also think if  
11 the Senate proposal ends up being in the line,  
12 they go to randomizing to the maximum extent  
13 practicable, then I think we have to sit back and  
14 see what that ends up being and then deciding how  
15 to assess with that result before we'd make any  
16 recommendations on panel selection because it  
17 would be a brand new system going into effect on  
18 panel selection so that I assume we go on to  
19 other issues and put this one on the back burner.  
20 The Joint Service Committee put in an executive  
21 order to implement the law together and it got  
22 signed and then it was implemented. So --

1 MEMBER GRIMM: This is Paul Grimm.

2 MEMBER SCHWENK: Go ahead, Judge  
3 Grimm.

4 MEMBER GRIMM: I agree with General  
5 Schwenk, but if it had a new statutory language  
6 in there, we've got to watch -- we've got to  
7 interpret that language and see how that plays  
8 out. But I also think that while we're doing  
9 that, we can try to gather data about the number  
10 of instances, the composition of members, the  
11 racial composition of the defendant, and try to  
12 gather that number to the extent that we can so  
13 if three years from now, for example, we have new  
14 statutory language and we still find that  
15 virtually non-existent number of cases or a very  
16 small number of cases are there is the new  
17 criteria resulting in the kind of diversity if  
18 the committee believes that that is the  
19 recommendation that should be, then you'd have  
20 the data available to be able to look at it, to  
21 be able to assess whether the new statute got any  
22 improvement or not.

1                   CHAIR SMITH: Let me just make sure I  
2 understand what Judge Grimm just said and that is  
3 to start -- add this to our list of items that we  
4 want to look at, perhaps giving it to a  
5 subcommittee, or figuring out which subcommittee,  
6 starting the data process now in terms of what it  
7 looks like for the panels now. If there is a  
8 change in the language being able to then compare  
9 okay, did this language change actually make a  
10 difference or are we still seeing the same lack  
11 of diversity on panels. I'm paraphrasing but is  
12 that what you're saying?

13                   MEMBER GRIMM: You actually did it  
14 better than I did, so I adopt your language.

15                   MEMBER BASHFORD: I'm not sure how we  
16 would collect the data because my understanding  
17 is nobody keeps track of that.

18                   MEMBER SCHWENK: Yes, I mean that's  
19 the first thing the staff could do for us is they  
20 could go ask is that data even available and if  
21 not, we could ask them to start collecting it.

22                   CHAIR SMITH: Right. And yesterday,

1 somebody mentioned that it might be possible to  
2 look back and retrieve some of the data with some  
3 work. Now I don't know how much work it would  
4 be. Obviously, we can't ask them to rebuild the  
5 whole thing, but you know, they would be able to  
6 tell us, is it possible to get that previous data  
7 or not. And if it isn't, at least we could say  
8 okay, well, we want this data collected from this  
9 point forward because -- not to repeat myself,  
10 but we again saw it yesterday another minority  
11 officer who came in and talked about the struggle  
12 to have a diverse panel decide his case and as he  
13 described it, of course, that's his perception,  
14 right, that there was an attempt to keep his  
15 panel from being diverse. We don't know if  
16 that's true or false, but it's certainly a  
17 concern potentially.

18           So I think it would be important and  
19 we've talked about this with Bill Wells and it  
20 would be important to not only collect data on  
21 the composition of the panel, but on how people  
22 got there, that is, were people excused for

1 cause? Were they excused peremptorily? And  
2 collect that kind of data as well which should  
3 not be difficult going forward because if we just  
4 create some sort of a form that they can fill out  
5 that indicates the race and sex of the potential  
6 panel members, and then which of them actually  
7 were chosen for the jury.

8 MS. TAGERT: And then, Dr. Spohn, just  
9 so I understand, the data would be covering  
10 convictions and acquittals, so all court  
11 martial? Okay.

12 CHAIR SMITH: Yes, Ms. Goldberg.

13 MEMBER GOLDBERG: So I know that this  
14 is already a large data collection task and I'm  
15 not necessarily suggesting this be added, but I  
16 just want to note that for the sake of  
17 completeness, in the discussion yesterday, we  
18 identified several potential points in the  
19 process where there could be some breakdown or  
20 exercise of discretion that might affect the  
21 racial and possible gender composition of the  
22 panels and one of that is prior to even the one



1 we're talking about is who -- what is the  
2 potentially on paper eligible pool look like as  
3 compared to the pool from which -- the narrowed  
4 pool from -- you know, that's sort of -- the full  
5 roster of who might be eligible and then there's  
6 that cut off into who winds up on the list that  
7 the selector of the panel members considers. And  
8 so when we think about each of -- I mean, you  
9 could -- I'm not a very visual person, but I  
10 could kind of map the point where there's  
11 potential leakage or change in -- from the larger  
12 composition to the actual panel. And I think at  
13 some point, even in doing the narrower search, we  
14 should just keep the big picture in mind and  
15 recognize there may be other points of challenge  
16 along the way.

17 CHAIR SMITH: Right, so that we're  
18 being clear, we're talking about what you just  
19 said was the -- who the convening -- the  
20 convening authority, the people the convening  
21 authority is given as options, right? Their  
22 race, gender, ethnicity. And presumably, we're

1 not just looking at officers, are we? We're  
2 looking at the whole -- we're talking about the  
3 entire process. Okay.

4 So that larger group and then the  
5 group that the convening authority picks to go  
6 through the voir dire process and then who  
7 ultimately makes it on to the panel. Is that  
8 what everyone, we're all saying the same thing on  
9 that? Okay.

10 MEMBER BASHFORD: Maybe this is a  
11 question for Dwight. But do we have the  
12 authority to order or request military keep this  
13 data? Don't we usually make the request to DoD,  
14 that DoD tells them to keep this data?

15 MR. SULLIVAN: Right, it would be a  
16 request from the committee and I was just talking  
17 to the Deputy Staff Director who had some  
18 thoughts about how such a project might be  
19 undertaken.

20 MEMBER WALTON: I think the collection  
21 of data with the objective of maybe bringing  
22 about change in the future based upon that is

1 important, but it seems to me that we know that  
2 the composition of juries in the civilian world  
3 does, in fact, make a difference and it seems to  
4 me that, you know, it's going to take a long time  
5 to come up with statistics to -- as far as the  
6 military is concerned, to justify a change. And  
7 I think that change needs to occur a lot sooner  
8 than that because I think we're experiencing it  
9 now and I think it's detrimental to morale to  
10 have people feeling that they're being railroaded  
11 through a system that doesn't accurately or  
12 appropriately reflect their racial makeup.

13 Like I say, I think there are studies  
14 out there that clearly show that there are  
15 different results that occur when you have a  
16 racially diverse jury panel that's judging  
17 somebody who is a racial minority.

18 CHAIR SMITH: Not just that, the fact  
19 that they consider education and age and all  
20 these other factors that in the civilian world  
21 are not considerations and yet, juries sit every  
22 single day ranging from high school diplomas to

1 three master's degrees and a law degree and they  
2 are able to assess the evidence of the law and  
3 come to a reasonable conclusion.

4 MEMBER WALTON: I found that  
5 perplexing that where the convening authority is  
6 excluding people who are members of the military  
7 based upon criteria that I don't believe really  
8 necessarily determines whether somebody can be  
9 fair and objective as a juror.

10 CHAIR SMITH: Correct.

11 MEMBER WALTON: We don't make those  
12 type of determinations as far as excluding people  
13 from the venire in the civilian world, so I don't  
14 understand why that's being done in the military  
15 world.

16 MEMBER TOKASH: And this is Ms.  
17 Tokash, that's why I was asking the question  
18 about the NDAA and our ability to recommend --  
19 make a recommendation now with respect to Article  
20 25 because the evidence that we've heard so far -  
21 - this is a problem now, right?

22 I mean from when we reconvened earlier

1 this year, we heard via public comment that this  
2 is a real issue and I don't think it serves Black  
3 and Brown service members well to wait and study  
4 this for years, if this is happening to Black and  
5 Brown service members now.

6 So I feel moved to action to do  
7 something sooner rather than later because we  
8 know, based now that we've heard, that this is a  
9 problem. So that's why I was asking about the  
10 impact of whatever is happening with the NDAA,  
11 but whatever we can do now to make a change so  
12 this isn't happening, so that there is more  
13 racial diversity so that as the gentleman  
14 presenter yesterday said, imagine if you were a  
15 White defendant and you come in and your jury was  
16 all Black. It's a real thing and we can't just  
17 take years, in my opinion, to flesh it out if we  
18 know it's a problem now. But those are my  
19 thoughts.

20 CHAIR SMITH: That has to be last  
21 word. The General Counsel is here, but it sounds  
22 like we have more to discuss about this issue.

1 We definitely want to explore it, see how we can  
2 get moving on it. Ms. Tokash makes excellent  
3 points. It's not just that it's happening now.  
4 It seems that it's been happening maybe forever,  
5 so it's something that needs to be moved on, but  
6 the General Counsel is here. Okay. Thank you.

7 (Whereupon, the above-entitled matter  
8 went off the record at 9:28 a.m. and resumed at  
9 10:30 a.m.)

10 COL BOVARNICK: Okay we're going to get  
11 started now. It's going to be the Special  
12 Project Subcommittee update.

13 And then that will go right into after  
14 that, the Policy Committee update.

15 MEMBER BASHFORD: I just wanted to  
16 finished up with the Case Review, and I'm  
17 proposing and making a motion to, so that we can  
18 get some progress going in between meetings, of  
19 moving the panel composition to Case Review, and  
20 have the staff do some RFIs and a data pull.

21 So that we're not just with anecdotes,  
22 that we can get some actual data and see where

1 that leads us.

2 And that's I think having data will,  
3 will be much more, make DoD much more receptive  
4 to any recommendations we might have.

5 So I'm making that motion. Is there  
6 a second?

7 MEMBER KRAMER: Second.

8 PARTICIPANT: Second.

9 MEMBER KRAMER: Okay, Ms. Bashford's  
10 motion.

11 MEMBER BASHFORD: Okay, in favor?

12 MEMBER KRAMER: Yes. Everyone's in  
13 favor?

14 (Chorus of yes.)

15 MEMBER KRAMER: Yes, okay, very good.

16 MEMBER BASHFORD: Okay, thank you.

17 MEMBER KRAMER: Thank you.

18 MS. PETERS: All right, good morning.

19 This is your update on the activities of the  
20 Special Projects Subcommittee.

21 Our chair is Ms. Meghan Tokash, Judge  
22 Grimm, Mr. Kramer, Dr. Markowitz. Dr. Spohn and

1 Judge Walton are the subcommittee members.

2 And I, along with Eleanor Vuono and  
3 Stayce Rozell, are the staff support to the  
4 subcommittee.

5 Of course the very first item on the  
6 subcommittee's agenda, is to study and evaluate  
7 the Offices of the Special Trial Counsel.

8 Particularly with respect to the  
9 policy development, workforce structure, and  
10 implementation of best practices within each of  
11 the military departments' respective offices.

12 And of course this topic was given to  
13 the DAC-IPAD by the general counsel, in a  
14 memorandum dated May of this year.

15 So we are moving out with that and  
16 want to note that of course, the DAC-IPAD has  
17 done quite a bit of work on this topic. And, the  
18 subcommittee wants to support and further develop  
19 that work.

20 The subcommittee will likely aim to  
21 make recommendations on OSTC, on the OSTC project  
22 to the full DAC-IPAD for a deliberation and vote.



1           And of course the subcommittee is  
2 meeting later today to flesh all of those ideas  
3 out, and put contours to the plan.

4           And I'll get into the subcommittee  
5 meeting agenda in just a moment.

6           I want to also note that other topics  
7 could potentially be brought into the  
8 subcommittee's purview.

9           At a previous meeting, it was  
10 discussed that the committee had interest in  
11 evaluating whether the services should adopt  
12 standing military magistrates, because they don't  
13 have standing courts martial.

14           Now I suggest that during your  
15 deliberations today, the full committee just  
16 consider whether this is an item that you are  
17 still interested in pursuing at some point, or if  
18 you would like to prioritize other projects.

19           And of course, our subcommittee can  
20 then also take on other projects in the future,  
21 along with the STC project.

22           Next slide.

1                   Now the, as you know, the Rules for  
2 Court Martial have, are going to be amended. And  
3 those proposed amendments have been published.

4                   And those amendments are geared  
5 towards implementing the authorities and duties  
6 of the Special Trial Counsel, as established in  
7 the FY22 NDAA.

8                   Now the Joint Service Committee on  
9 Military Justice published the proposed  
10 amendments, and opened up a public comment period  
11 of 60 days.

12                   Now these rules will be ultimately  
13 promulgated by Executive Order. But given that  
14 we're in the public comment period, and these  
15 rules deal with the implementation of the Special  
16 Trial Counsel, now is the time for the DAC-IPAD  
17 to weigh in with their comments on the proposed  
18 rules.

19                   If you're interested in having an  
20 impact on those. And of course, that is what the  
21 DAC-IPAD has already done.

22                   As you know and as you received ahead

1 of the meeting, that the Chair has submitted a  
2 series of questions to the Joint Service  
3 Committee, and some comments from the DAC-IPAD  
4 on, on the draft Rules for Court Martial relative  
5 to the Special Trial Counsel program.

6 And I think as Ms. Saunders and others  
7 will note, there are one or two other topic areas  
8 touched on by the proposed amendments, and the  
9 questions dealt into those other topics, as well.

10 But the primary focus of these  
11 amendments are on the Special Trial Counsel, and  
12 that's where the questions were centered.

13 Now the Joint Service Committee  
14 offered to answer the DAC-IPAD's questions. And  
15 these questions were submitted in the letter from  
16 the Chair dated November 17th. So that's right  
17 in the middle of the public comment period. And,  
18 as of yesterday, the beginning of the DAC-IPAD's  
19 meeting, the JSC's responses were actually posted  
20 to the JSC website.

21 So there on the website you'll see the  
22 DAC-IPAD's public comment, and the responses.

1           And what's notable about that is that  
2           the Joint Service Committee normally receives  
3           public comment during the 60-day period, and  
4           might post them all at the end of the comment  
5           period. That's what we would normally anticipate  
6           would happen, but without a response.

7           So the fact is that already, the DAC-  
8           IPAD's interest in areas being covered by the  
9           proposed Rules, has already led to a  
10          conversation, a public conversation, being  
11          developed around these, these rules.

12          Now we will provide to you because of  
13          the close time in which we received the JSC's  
14          response, we'll provide that to you in, in full  
15          depth I think, after the meeting for your  
16          awareness.

17          And a lot of the Joint Service  
18          Committee's responses to the questions are along  
19          the lines of we will consider the question; the  
20          nature of the question; and, the comment as we  
21          develop the final proposal for the Rules.

22          And there is little in the way of

1 explanation. So there's not a lengthy,  
2 substantive response. There's not a lot of  
3 deliberative material you know, discussed in  
4 their responses naturally because that's the  
5 nature of their process. They can't do that  
6 publicly.

7           However, we have already engaged in a  
8 public discussion with the Joint Service  
9 Committee, and it's available for the public to  
10 see what areas of concern the DAC-IPAD has.

11           Now I also want to note that in the  
12 process of the public comment period, the Joint  
13 Service Committee has a meeting that is public,  
14 and invites members of the public to make comment  
15 on the Rules, the proposed Rules during their  
16 public meeting.

17           And, three DAC-IPAD members attended  
18 that public meeting that was in November. I  
19 believe November 16th of that year.

20           So Ms. Goldberg, Dr. Markowitz, and  
21 Ms. Tokash, all attended the Joint Service  
22 Committee's public meeting.

1 I didn't know if you had comments or  
2 observations you want to share on the meeting.  
3 It was rather brief, but I leave it to you if you  
4 want to say anything about your participation in  
5 the meeting.

6 MEMBER GOLDBERG: This is the meeting  
7 at which there were no comments?

8 MS. PETERS: Yes.

9 MEMBER GOLDBERG: Publicly, yes.

10 It was very quick and I had hoped  
11 there were comments. And, we did have an  
12 interesting conversation about how the public  
13 comment session is advertised, and the extent to  
14 which people might actually be aware since most  
15 people don't read the Federal Register that  
16 regularly, and that extensively.

17 But it sounded like, and others you  
18 may remember in more detail, it sounded like  
19 there were a number of ways in which the meeting  
20 had been advertised to communities that would be  
21 particularly interested in these rules.

22 But it did make me want to, it did, it

1 did raise my interest in the question of how we  
2 could ensure that when there, when there are  
3 significant changes to Rules for Court Martial or  
4 other areas of potential public interest, that  
5 that DOJ can ensure that those are really, truly  
6 known to the public.

7 The opportunity to comment is truly  
8 known to the public.

9 MEMBER TOKASH: This is Meghan Tokash.  
10 I share Ms. Goldberg's sentiments. I mean the  
11 meeting essentially was asking if there was  
12 public comment, and then we sat in silence for  
13 about five solid minutes and the meeting was  
14 adjourned.

15 So, and I mean we didn't speak because  
16 we knew that Chair Smith had submitted our  
17 comments ahead of time.

18 But I, too, was surprised by the lack  
19 of like public participation. I thought it would  
20 have been a more robust discussion, or  
21 presentation from different viewpoints with  
22 respect to changes to a guide for practitioners

1 in the military justice system, concerning the  
2 historic changes to the military justice system.

3 So I'm glad that we went to see, or  
4 not see, what, what the JSC was all about. But I  
5 agree, I think there needs to be some more  
6 advertisement beyond the Federal Register with  
7 respect to you know, different, reaching  
8 different populations and different stakeholders  
9 who would be interested in voicing opinions on  
10 military justice.

11 Thanks.

12 MS. PETERS: And subject to any other  
13 questions or comments on that, I note that what  
14 we can do is monitor what they do post on their  
15 website at the end of the public comment period  
16 here in December.

17 And because that's when they will  
18 provide either there or in the Federal Register  
19 or both, like what other comments were made.

20 And we can make sure that the  
21 committee is aware of that, just to see the scope  
22 of the participation and, and the comments on the



1 Rules.

2 Because one thing that we didn't get  
3 to see in meeting in November is what comments,  
4 if any, had been made to date.

5 That wasn't a function of that  
6 meeting. It was just to broadcast public  
7 comments received thus far.

8 It was merely an opportunity for  
9 members of the public to walk in and, and make a  
10 statement.

11 All right, so I will move on to what  
12 we're going to do today as a subcommittee. We'll  
13 have a robust agenda today this afternoon, to  
14 move into the specifics of the Special Trial  
15 Counsel evaluation and assessment.

16 First, we've invited members of the  
17 inter-service working group on the Special Trial  
18 Counsel, to come and speak with us in more depth  
19 about the business rules and the standards by  
20 which they are going to make the decisions to  
21 prefer a case involving a covered offense, or to  
22 defer a case and hand it back to the command.

1           And, we also hope to develop further  
2 conversation along the lines of what issues and  
3 challenges they are facing in standing up their  
4 programs.

5           Separately, we'll have a panel of  
6 personnel managers within the JAG Corps for each  
7 service.

8           And, the idea there is to talk about  
9 how they are recruiting Special Trial Counsel,  
10 and going to groom members of that cadre in the  
11 future.

12           And what issues around attrition of  
13 JAG, JAG personnel they are facing, along with  
14 any attrition of the military justice expertise  
15 that they need to fill these new billets and, and  
16 the defense billets, as well.

17           But anyways, we want to talk about  
18 recruitment and retention, and how that will  
19 affect the makeup of the JAG Corps personnel, its  
20 diversity, et cetera.

21           So we hope to have a really good  
22 conversation later today.

1                   And finally, the subcommittee is  
2                   considering how, when it evaluates the Special  
3                   Trial Counsel and their jurisdiction, how the  
4                   pretrial procedures in Articles 32 and 34, will  
5                   apply in cases prosecuted by a Special Trial  
6                   Counsel.

7                   So that's something the DAC-IPAD had  
8                   previously done a lot of work on in studying how  
9                   those two Articles function to develop a case,  
10                  and identify cases selected for prosecution.

11                  And they want to see how that will  
12                  apply, and how the changes implementing the  
13                  Special Trial Counsel will, how it's going to  
14                  work under this new system.

15                  Because before they were really  
16                  setting the functions of Articles 32 and 34, and  
17                  now we have a new player in the system who will  
18                  have a role in, in each of those procedures.

19                  And if the subcommittee takes a look  
20                  at that, they may have comment for the full  
21                  committee on how those Articles will, what, what  
22                  they think any potential reforms will do in

1 Articles 32 and 34, to facilitate the prosecution  
2 of cases by a Special Trial Counsel.

3 So lastly, I'm going to just talk  
4 about the annual report.

5 MEMBER TOKASH: Ms. Peters, could I ask  
6 a very quick question?

7 MS. PETERS: Go ahead.

8 MEMBER TOKASH: Thank you. This is Ms.  
9 Tokash.

10 Could you explain just very briefly,  
11 about the intersection of this topic on 32 and 34  
12 for the subcommittee, as it pertains to the work  
13 that was done previously by the full DAC-IPAD, on  
14 the subject?

15 MS. PETERS: Absolutely. To bring  
16 everyone up to speed, for more than two years the  
17 DAC-IPAD had evaluated the procedures in Articles  
18 32, which requires a preliminary hearing before a  
19 case can be tried by, for general court martial.

20 And the requirements of Article 34,  
21 which require probable cause determination to be  
22 made by the staff judge advocate, before a

1 convening authority can refer a case to trial.

2 Obviously now the Special Trial  
3 Counsel is not subject to the convening  
4 authority's decisions to have a 32, or to refer a  
5 case.

6 And so what the committee had  
7 previously looked at was, were Articles 32 and 34  
8 functioning in the convening authority and SJA  
9 system, to provide a meaningful assessment of the  
10 case.

11 Article 32 requires a preliminary  
12 hearing where a determination is made as to  
13 probable cause, but it's advisory.

14 And so the committee and the  
15 subcommittee, previously it was the Policy  
16 Subcommittee was considering whether the probable  
17 cause determination made it a preliminary hearing  
18 should be binding in the sense that a no probable  
19 cause determination as to a specified offense,  
20 would prevent referral of the offense.

21 Similarly how, similar to how a grand  
22 jury no bill, or a magistrate's determination of

1 no probable cause would result in dismissal of  
2 that charge in, in the civilian world.

3 Separately, the committee had been  
4 looking at who serves as the hearing officer in,  
5 in preliminary hearings.

6 And they considered elevating the  
7 preliminary hearing officer to the stature of a  
8 magistrate or a judge.

9 Right now it is a legal officer not  
10 attached to the prosecution. Really independent  
11 who offers an advisory opinion as to probable  
12 cause in the case merits.

13 Article 34 again requires the SJA to  
14 advise the convening authority on probable cause,  
15 and the appropriate disposition of the case.

16 The new statute for Article, the FY22  
17 NDAA amended 34 to say that this probable cause  
18 determination is now going to be made by a  
19 Special Trial Counsel.

20 And so the committee's concern  
21 previously was whether the probable cause  
22 threshold for referral, was too low.

1                   And, it was allowing cases to be sent  
2 to the fact finder that weren't supported by  
3 sufficient evidence to convict.

4                   And those same considerations could  
5 then be made, and thought of in terms of what is  
6 a Special Trial Counsel's prosecution standards  
7 for selecting a case and sending it to court  
8 martial.

9                   MEMBER BASHFORD: I wasn't on Ms.  
10 Cannon's subcommittee, but I know they did a lot  
11 of work on 32 and 34.

12                   They took all kinds of testimony from  
13 different panels. I don't remember that we ever  
14 saw a report and what happened to all of that  
15 work.

16                   It seems that it would be very helpful  
17 for the Special Projects to have, to have all of  
18 that. The testimony that they took, even though  
19 it's being shunted over to OSTC.

20                   COL BOVARNICK: Ma'am, if I could jump  
21 in here?

22                   So the IRC, you're all familiar with

1 the IRC report, and that they recommended the  
2 IRC. Of course, Ms. Tokash was part of that and  
3 General Schwenk.

4 Recommended that the DAC-IPAD kind of  
5 continue that study. However, the Secretary of  
6 Defense when he approved the IRC recommendations,  
7 those were a couple of the, a few recommendations  
8 that the Secretary of Defense didn't take  
9 verbatim, that the IRC recommended.

10 In fact, he specifically revised  
11 recommendation 1.7a that the Military Justice  
12 Review Panel, a separate panel, has been directed  
13 to study Article 32 preliminary hearings. And  
14 recommendation 1.72, 1.7b revised.

15 The Military Justice Review Panel has  
16 been directed to study Article 34, advice to  
17 convening authority.

18 So what that means is in all that work  
19 that the DAC-IPAD previously done, has been  
20 transferred to the Military Justice Review Panel.

21 I think part of that, too, and the  
22 recognition of the OSTC is it impacts more than



1 just the sexual offense cases that the DAC-IPADs  
2 are working on.

3 So all the work hasn't been lost.  
4 It's all been transferred to the Military Justice  
5 Review Panel, who's been also requested by the  
6 Secretary of Defense through the General Counsel,  
7 to continue to study this.

8 To work closely with the lead Special  
9 Trial Counsel to provide recommendations on  
10 Article 32 and 34.

11 As it applies to all of the covered  
12 offenses, some of which may not include things  
13 that the DAC-IPAD would look into.

14 MEMBER BASHFORD: But shouldn't we have  
15 access to that body of work that the DAC-IPAD  
16 subcommittee --

17 COL BOVARNICK: Absolutely.

18 MEMBER BASHFORD: Because I think it  
19 would be helpful to the --

20 (Simultaneous speaking.)

21 COL BOVARNICK: Oh, yes, ma'am, that's  
22 fine. Yes, I just wanted to make clear that the,

1 that the continued study recommended by the IRC  
2 was directed by the Secretary of Defense --

3 MEMBER BASHFORD: Okay.

4 COL BOVARNICK: -- to a different  
5 panel.

6 It doesn't mean that all of the work  
7 that's been done is absolutely accessible to, to  
8 this committee.

9 CHAIR SMITH: I wonder, Ms. Tokash,  
10 whether it would be helpful for your subcommittee  
11 to somehow receive information about what the  
12 Military Justice Review Panel has learned, done,  
13 et cetera, with, just as way of background for  
14 what you're doing.

15 MEMBER TOKASH: This is Ms. Tokash.  
16 That would be helpful. I think also seeing the  
17 work as Colonel Bovarnick just said.

18 And whether that be in a stripped down  
19 sort of fashion. Because I think of the  
20 recommendations that were made previously would  
21 be helpful.

22 I think it's also helpful for this

1 committee, to dive into this as it pertains to  
2 our specific mission, which is sex assault and  
3 related offenses.

4 Because quite frankly, we're a public,  
5 we're public. We're subject to FACA, and the  
6 Military Justice Review Group is not.

7 So I think that having public  
8 discourse about the subject is vitally important.

9 COL BOVARNICK: Yes, ma'am. And just  
10 by the way of update, the MJRP is just starting  
11 their work and so their recommendations are  
12 projected to be in the April timeframe to be able  
13 to provide to the LSTC, OSTC communities, as they  
14 go through this continued implementation phase.

15 And as we heard yesterday, the SOPs  
16 leading up to that December 2023 final date.

17 So that's in the works, but understood  
18 all here, and as far as the connection between  
19 the two committees and the work. We will take  
20 care of that.

21 MEMBER SCHWENK: This is Jim Schwenk.

22 One comment. I believe that the DAC-

1 IPAD did actually make a recommendation in the  
2 three year study that the DAC-IPAD did on sexual  
3 assault case data.

4 One of the fallouts from that had to  
5 do with Article 34. The part of Article 34 that  
6 establishes the standard of probable cause, for  
7 the staff judge advocate to find before a general  
8 court martial convening authority may refer a  
9 case to a general court martial.

10 And I think one of our recommendations  
11 said that should be changed to the federal  
12 standard, which basically was that you know, I  
13 don't remember the exact words but it was  
14 something to the effect of that there was  
15 evidence sufficient to support a conviction.

16 So, at least the DAC-IPAD I believe if  
17 we, if the subcommittee goes and looks up that  
18 old report, they'll at least see that the DAC-  
19 IPAD did speak before on that issue.

20 Thank you.

21 MS. PETERS: That is all I have by way  
22 of a subcommittee update. Like I said, we will

1 let you know how our, our meeting goes today.

2 And subject to your questions, that's  
3 all I have.

4 CHAIR SMITH: Thank you.

5 COL BOVARNICK: Next up will be the  
6 Policy Subcommittee. If we can just switch out  
7 the slides in place.

8 MEMBER SCHWENK: Yes, hi, this is Jim  
9 Schwenk again. I'm the Chair of the Policy  
10 Subcommittee.

11 And we're going to have the staff run  
12 you through what we've been doing, and where  
13 we're going, well, we don't know where we're  
14 going yet, but what we've been doing.

15 And we actually have recommendations  
16 for your consideration on RCM 1001, which  
17 addresses the victim impact statement in part.

18 Because we were given two tasks.  
19 Victim impact statement, and restorative, or  
20 alternative justice.

21 We decided to look at victim impact  
22 statement first. And we have two deliverables,

1 the DAC-IPAD has two deliverables, so we owe you  
2 all two.

3 One is responding to Congress' two  
4 questions on victim impact statements. And the  
5 second one, which basically were, are judges  
6 properly applying the rules on victim impact  
7 statements at courts.

8 And are they having an adverse effect  
9 on the judge's ability to either implement or to  
10 having an adverse effect on the judge's ability  
11 to understand the harm, the impact, on the  
12 victim.

13 And the second one was whether the  
14 judges are permitting individuals who have  
15 suffered harm, for which the accused has been  
16 convicted, to provide victim impact statements.  
17 And, not just those who are named victims.

18 So we have our draft reply to those  
19 two questions. We're not ready for your vote on  
20 it yet, but we're close.

21 But in the meantime of course, as the  
22 previous subcommittee briefed, the Joint Service

1 Committee, came up with proposed changes to the  
2 Manual for Courts-martial.

3 Some of those are in as I said, RCM  
4 1001. Some of those affect victim impact  
5 statements.

6 So we looked at those and we have six  
7 recommendations, that we think the DAC-IPAD  
8 should consider submitting to the Joint Service  
9 Committee for its consideration, before it goes  
10 forward with its Executive Order proposal.

11 That deliverable they briefed and we  
12 agree is 19 December is the due date. So today  
13 is our opportunity to discuss that during the  
14 deliberation period. But our staff will brief  
15 that.

16 Which leads me to the final point.  
17 Many thanks to our staff. If you look at the tab  
18 for our subcommittee, you'll see a ton of work  
19 that's been done by our staff. Terri Saunders,  
20 Terry Gallagher, and Marguerite McKinney.

21 And they've been absolutely  
22 instrumental in us being able to understand the

1 issues, and arrive at our recommendations to you.

2 So I want to doff my hat to them and  
3 thank them for their good work.

4 And with that, over to Terri.

5 MS. SAUNDERS: I know, whoever thought  
6 of putting two Terris on the same subcommittee  
7 was, but here we are.

8 MEMBER SCHWENK: Yes, we call them  
9 Terri with an i, and Terry with a y.

10 MS. SAUNDERS: Right, okay.

11 Thank you, General Schwenk, for your  
12 kind words, and for your intro.

13 So we're going to start by giving a  
14 short summary of the information that this  
15 subcommittee has gathered to date, on victim  
16 impact statements.

17 And then as General Schwenk mentioned,  
18 talk about the proposed response to Congress on  
19 the two questions that they posed.

20 And then talk, go right into the six  
21 recommendations that will actually be for vote  
22 today, for you to, to hopefully go into the you



1 know, as a public comment to the Joint Service  
2 Committee.

3 And then also to be rolled into the  
4 annual report in March.

5 Tab, as General Schwenk mentioned, the  
6 tab it's tab 9. It has the information on victim  
7 impact statements.

8 And tab 9d specifically has a, what we  
9 call a deliberation document that has kind of a  
10 quick and easy summary of the information.

11 And then beginning on page 5, you'll  
12 see the recommendations that are being proposed  
13 for vote here today.

14 So go to the next slide. There we go.

15 So as a reminder in the Fiscal Year  
16 2020 National Defense Authorization Act Joint  
17 Explanatory Statement, Congress posed two  
18 questions.

19 Which is, are military judges  
20 interpreting RCM 1001 too narrowly in limiting  
21 victim impact statements, so that the victim  
22 can't fully inform the court of the impact on him

1 or her.

2 And then also, are judges  
3 appropriately permitting others to testify about  
4 the impact of the crime on them.

5 Okay, if we can go to the next slide.

6 Oh yes, there we go.

7 So victim impact statements, the  
8 rights stem from Article 6b of the UCMJ, which is  
9 implemented through RCM 1001(c). And RCM -- if  
10 we can go to the next slide. Yes, there we go.

11 So RCM 1001(c) provides a couple of  
12 definitions that are important here. The first  
13 is crime victim, and then the second is victim  
14 impact, as you see there.

15 And for victim impact, the standard  
16 applied is that the impact must directly relate  
17 to, or arise from the offense for which the  
18 accused has been found guilty.

19 And that's a very important standard  
20 because you'll see in a lot of the appellate  
21 decisions that have come out during the last few  
22 years, that has, you know, the appellate courts

1 have honed in on that standard as being  
2 important.

3 And as I've noted in the materials but  
4 I'll tell you here today, it's been three years  
5 since Congress posed these questions, and there's  
6 been some pretty active appellate work, and a lot  
7 has happened in that time, which we'll discuss.

8 So the contents, if we can go to the  
9 next slide. There we go.

10 So the basic rundown of victim impact  
11 statements under the Rule, they may in the  
12 military system, they may be sworn, unsworn, or  
13 both, although for capital cases they must be  
14 sworn.

15 They can be oral, written, or both.  
16 And in a minute we'll discuss that, you know, we  
17 have a section here where we talk about case  
18 review that this subcommittee you know, performed  
19 on fiscal year 2021 cases.

20 And we see that the vast majority of  
21 victim impact statements are unsworn. And I  
22 think that was mentioned here yesterday, as well.

1                   They are not subject to cross-examine,  
2                   although the government or the defense may rebut  
3                   any factual statements in the victim impact  
4                   statement.

5                   The contents of the statement may only  
6                   include victim impact, or matters in mitigation.

7                   There is also a specific prohibition  
8                   currently in the Rule, that says that the victim  
9                   may not make any recommendations for a specific  
10                  sentence.

11                  And we'll talk about that in a minute  
12                  that there's the Joint Service Committee has  
13                  proposed a change on that, and that is, that  
14                  roles into one of the recommendations that we  
15                  have for you.

16                  The appellate courts have clarified  
17                  that unsworn impact statements are not evidence,  
18                  and are not subject to the Rules of Evidence.

19                  Although the courts have emphasized  
20                  that they must fall within the scope of victim  
21                  impact, meaning that they, it must directly  
22                  relate to, or arise from the crimes of

1 conviction.

2 So regarding the second question posed  
3 by Congress, which is whether other witnesses are  
4 being permitted to come and speak about the  
5 impact of the crime.

6 I think Mr. Guilds yesterday commented  
7 on this, and we've seen this in the, in some  
8 appellate decisions, and also in our case review.

9 It appears that in the three years  
10 since that question was posed, that the, that has  
11 been more established that it's not just the  
12 named victim on the charge sheet that can come  
13 and provide a victim impact statement.

14 But we're seeing, I know the Perrys,  
15 who spoke yesterday talked about they had to  
16 choose which parent would get to provide a  
17 statement. And, I think that has loosened up  
18 considerably.

19 I don't know that I saw a single case  
20 in the Fiscal Year 2020, 2021 case review that  
21 we'll talk about in a minute, in which a judge  
22 said no, you can't testify.

1                   They've expanded that pretty, pretty  
2 well. So that may be a settled issue.

3                   Here we go.

4                   As we've talked about the FY2022  
5 National Defense Authorization Act changes of  
6 which there are many.

7                   But one of them pertaining to victim  
8 impact statements is that, or that will impact  
9 impact statements, is the judge alone, there will  
10 be judge alone sentencing in all but capital  
11 cases, for any case in which the crimes were  
12 committed on or after December 27, 2023.

13                   So a year from now.

14                   Okay, there we go. Stakeholder input.  
15 You know, you heard from Survivors United, and  
16 the SVC/VLC community on this yesterday.

17                   And many of the things that Survivors  
18 United and the Perrys spoke to you, or and Mr.  
19 Guilds spoke to you about yesterday we have seen  
20 borne out in the case review that we have looked  
21 at, which we'll talk about in just a minute.

22                   Okay, and civilian jurisdiction

1 overview. We looked at the Rules for the federal  
2 and a lot of state, state rules related to victim  
3 impact. What is happening in different  
4 jurisdictions.

5 And while it's really helpful to be  
6 able to have those rules available and look at, I  
7 think what will be even more helpful since we, we  
8 can't tell how that is being applied on the  
9 ground.

10 So when we get, in a little bit when  
11 we start talking about the recommendations, I  
12 think it would be really helpful for all of you  
13 who have experience in you know, in courts, as  
14 judges, as prosecutors, as defense counsel, to,  
15 to help you know, provide some of your  
16 experiences in that regard. That would be very  
17 helpful.

18 But some of the, but some of what we  
19 are seeing in the Rules that you know, some  
20 states require that it be, some states require  
21 that the victim impact statement be sworn.

22 Most also do limit it to financial,

1 physical, psychological, or emotional harm. Or  
2 words to that effect for the, relating to the  
3 crime of conviction.

4 And some states will allow the victim  
5 to discuss, will explicitly allow the victim to  
6 discuss a sentence, or to recommend a sentence.  
7 But not all of them.

8 And some also allow audio or video  
9 recorded victim impact statements, in additional  
10 to you know, it being provided orally or in  
11 writing.

12 An important point, and an important  
13 difference in the military system when it comes  
14 to sentencing, is that you know, sentencing  
15 happens right after findings.

16 So the announcement of findings comes  
17 and they roll right into sentencing. And so  
18 every, everything that the judge is going to hear  
19 to, in which to base a sentence on, will happen  
20 during that sentencing hearing.

21 There's no pretrial report as you see  
22 in federal, and other state systems. So that is



1 a big difference in the military system.

2 So if we can go to the. Yes, here we  
3 go.

4 So now finally we're going to talk  
5 about the subcommittee's review of Fiscal Year  
6 2021 cases.

7 You know, during you know, while we  
8 were looking at this we decided let's, let's see  
9 what's really happening in the military with  
10 regard to victim impact statements.

11 So we looked at files for fiscal year  
12 2021. The staff did the initial you know, did  
13 the initial look at the cases to determine you  
14 know, for these offenses that are listed here,  
15 sexual related offenses, we used a broad  
16 category.

17 How many of them resulted in a guilty  
18 plea for one of those offenses, and how many of  
19 those involved a victim impact statement.

20 We looked at it with a broad brush.  
21 We didn't want to just look at adult sex  
22 offenses. We looked at child sex offenses. You

1 know, Article 120(c) offenses involving  
2 videotaping.

3 And then we also decided to look at  
4 cases in which a sexual offense was charged, but  
5 then ultimately either the member was acquitted  
6 of that offense, or it was dismissed as part of a  
7 pretrial agreement.

8 And the accused was ultimately  
9 convicted of an assault. A physical assault.  
10 And that was I know, mentioned here yesterday.  
11 Of which there were quite a few.

12 So we wanted to include those in our  
13 study, as well.

14 So we looked at the number of cases  
15 and we had 241 cases that had a guilty plea, and  
16 168 of those involved a victim impact statement.

17 And I know there was a comment  
18 yesterday, and I think Mr. Gold, Ms. Goldberg you  
19 had made this comment before too, that that seems  
20 like a lot of cases in which there were no victim  
21 impact statements. I this 68 total.

22 One point though is in 30 of those 68

1 cases, the victim did testify for the government  
2 in sentencing.

3 So did not provide a victim impact  
4 statement, which they also would have been  
5 permitted to do, but did testify.

6 So when we looked at those, and we  
7 divided those out between military judge alone  
8 cases and member sentencing cases, you see the  
9 vast majority, 151 versus 22 were military judge  
10 alone.

11 And, then looked at the cases in which  
12 the judge actually limited the victim impact  
13 statement.

14 For military judge alone sentencing  
15 cases there were 13, and for member sentencing  
16 cases there were 7. Smaller number, but higher  
17 percentage.

18 If we can go to the next slide. There  
19 we go.

20 So most of the cases in which the  
21 military judge did limit the statement, it was  
22 because they found, the military judge found that

1 the statement was beyond the scope of victim  
2 impact.

3 And, there were a few in which the  
4 victim recommended a sentence and that was not  
5 permitted, either.

6 For the majority of the cases that  
7 were not limited, in many of those cases just  
8 looking through the record of trial, the military  
9 judge didn't even ask if there was an objection.

10 Just when they got to that point in  
11 the case, invited the victim up to come and give  
12 her statement.

13 For those cases in which there were  
14 objections, in the majority of cases the military  
15 judge overruled them and just perhaps made a  
16 comment, I will only consider what is legally  
17 permissible under the rules.

18 But we do have the 13 cases that, in  
19 which a judge did limit some aspect of the, of  
20 the case. Or of the impact statement.

21 The members of this subcommittee  
22 looked at all 13 of those cases. They did a

1 review of them to see you know, to answer this  
2 actually admittedly fairly narrow question posed  
3 by Congress. Which is, is the military judge  
4 applying the rule too narrowly.

5 They found that in the majority of  
6 cases, the judge was applying the rule  
7 appropriately.

8 Although they did also find that you  
9 know, some military judges applied it more  
10 narrowly than others.

11 And, I think the ultimate conclusion  
12 that the subcommittee came up with, which we'll  
13 talk about in a minute, is it may be not so much  
14 that the military judge is applying the rule too  
15 narrowly, that the rule itself may be too narrow.

16 So would any of the members who were  
17 on our subcommittee want you know, want to speak  
18 to the cases you have reviewed? Or you know,  
19 what led you to come to some of those  
20 conclusions?

21 General Schwenk, do you want to, do  
22 you have any comments on that? Or anyone else?

1                   MEMBER GOLDBERG: So General Schwenk  
2 read many more cases than I did, so he may have  
3 more to, to add.

4                   I think what struck me in reading a  
5 couple of cases was that the victim's testimony  
6 must have a nexus, a direct nexus to the, the  
7 crime for which the, the defendant is convicted.

8                   But there are broader and narrower  
9 ways to think about what that nexus might be, as  
10 we discussed to some extent yesterday in terms of  
11 the potential breadth or narrowing, of a victim  
12 statement.

13                   And I was struck in one of the  
14 opinions I read, or one of the transcripts I  
15 read, that the judge consistently ruled for the  
16 most, what I thought was quite a narrow and in my  
17 view, an unduly narrow version of what the victim  
18 could say.

19                   And, there was sort of that experience  
20 that was described yesterday of repeated stopping  
21 a person, the victim, while they were trying to,  
22 to speak.

1           And, it seemed like quite a difficult  
2 situation. Which to me, suggested that it's  
3 worth more thinking about broadening the  
4 parameters toward the, toward what happens in the  
5 civilian context.

6           The other thing that struck me but I  
7 think this is being addressed, was that the  
8 victim's legal counsel sought to oppose the, the  
9 restriction of the victim statement in various  
10 ways multiple times.

11           And actually what happened was the  
12 defense counsel raised an issue, the judge ruled  
13 on the issue before hearing from the trial  
14 counsel. Then asked the trial counsel.

15           And, then the victim's counsel sought  
16 to speak and the court said no. And the  
17 government did not oppose the victim's counsel  
18 standing to speak on that issue.

19           So I, that was one case, but it was,  
20 it didn't give me you know, it wasn't a case that  
21 left me feeling oh, all is well in the, in the  
22 way that this operates on the ground.

1                   But again, caveat that that was one  
2 case. One transcript.

3                   CHAIR SMITH: Do you recall, was it a  
4 judge sentencing, or was it a panel sentencing?

5                   MEMBER GOLDBERG: Judge.

6                   MEMBER SCHWENK: Hey Terri, can you  
7 hear me?

8                   MS. SAUNDERS: We can hear you.

9                   MEMBER SCHWENK: Okay, I had a -- this  
10 is Jim Schwenk. I had a case where the named  
11 victim was writing the testimony. And she  
12 included a passage about the adverse effect of  
13 the crime, the conviction, a crime of conviction  
14 on her mother.

15                   And she didn't then say, and that had  
16 this effect on me. And the judge refused to  
17 allow it, because it was not effect of the crime  
18 of conviction on the person who was submitting  
19 the victim impact statement.

20                   But instead, on her mother which  
21 seemed to me to be awfully narrow. And you know,  
22 all she would have had to do is turn it around to



1 explain how it affected her and it would have  
2 come in. Which leads to one of our  
3 recommendations.

4 Otherwise, they're very narrow. The  
5 judge, I read nine of them. And overall, when  
6 they, when the judges got into it, they were  
7 pretty narrow on what they would allow as effect  
8 on the victim.

9 If there were multiple causes for a  
10 harm, they were reluctant to allow it to come in.

11 And so you know, you end up with a  
12 filtered down victim impact statement from what  
13 the real scope of the harm was that came from  
14 the, from the crime of conviction.

15 So anyway, there.

16 MEMBER GARVIN: This is Meg Garvin.  
17 So first thank you to staff because they did a  
18 tremendous amount of work here.

19 I only reviewed one case, but I echo  
20 what my colleagues have said and I also -- so the  
21 case I read involved I believe 13 victims that  
22 had victim impact statements, more victims. And

1 one of 13 ended up being restricted, but 5 were  
2 objected to, plus there was a general objection,  
3 but the process is what shocked me. And we heard  
4 about it yesterday, too.

5 So I've been a victims' lawyer for 20  
6 years as a civilian working in state and federal  
7 criminal courts directly representing victims.  
8 And I had a visceral reaction to what I was  
9 reading because when I started in this work 19  
10 years ago, so one year after I started, we worked  
11 on this redline reality of victim impact  
12 statements in several civilian courts, this show  
13 up in court and your statement gets  
14 collaboratively, I would say in quotes, redlined  
15 by others in the space as an editing process of a  
16 victim impact statement.

17 And I remember experiencing that 19  
18 years ago and us working in the civilian side to  
19 say that's really not what a victim impact  
20 statement is, it's not what Payne v. Tennessee  
21 intended about victim impact statements out of  
22 SCOTUS. It's a right of allocution akin to the

1 defendant's right of allocution that is generally  
2 in the civilian unsworn. There's a few random  
3 jurisdictions that continue to have it sworn as  
4 testimonial.

5 And it's essentially been done away  
6 with in the civilian world, this redlining  
7 reality of where other people edit the words of  
8 the victim and yet that's actually what was  
9 happening is in this space of redlining of -- and  
10 just that vocabulary may not be something that  
11 everything accesses, so I apologize, right? The  
12 editing where you cross words out, you say you  
13 can't read these words. That's what I mean by  
14 redlining, and so I apologize for using  
15 vocabulary that not everyone may have access to.

16 And so I was just shocked. I was  
17 shocked that it's not recognized as an allocution  
18 when it's unsworn, right? The Federal 9th  
19 Circuit of Appeals, the very first case that made  
20 it to the appellate courts after the Federal  
21 Crime Victims' Act was passed in 2004, which is  
22 what the NDAA's Article 6(b) rights are based on

1 -- the first court that talked about the victim's  
2 right to be heard recognized it's a right of  
3 allocution. And it seems that that's not the  
4 practice in the military. And I found that a bit  
5 challenging when one considers that then what's  
6 happening is a systemic additional harm on the  
7 victim from process as opposed to simply allowing  
8 allocution.

9 So again, I only read one and so maybe  
10 my visceral reaction is misplaced, but it sounds  
11 like some of my colleagues observed similar  
12 things from transcripts and from process, and the  
13 staff identified that it seems like it's  
14 happening.

15 MEMBER GOLDBERG: Just to follow on  
16 your point, Meg, and relate back to yesterday's  
17 conversation, the number of cases in which victim  
18 impact statement were limited is relatively  
19 small, but that is also, as we heard yesterday  
20 and as we've heard elsewhere, because a lot of  
21 this redlining process that you described, this  
22 editing process takes place before the statement

1 ever gets to court, right, where the victim's  
2 lawyer's negotiating with the defense counsel and  
3 where the victim's lawyer may even before talking  
4 to the defense counsel be revising what the  
5 victim would want to say because -- anticipating  
6 the kinds of objections that may be there  
7 particularly in front of a judge that takes a  
8 very narrow view of what the direct nexus  
9 requirement is in terms of what a victim can talk  
10 about.

11 And second point I wanted to make was  
12 to reiterate what Jim and Meg just said, which is  
13 thank you very, very much to the staff for your  
14 extraordinary work for this subcommittee and the  
15 work -- thank you in advance for the work going  
16 forward.

17 MS. SAUNDERS: Thank you. Yes, and as  
18 you mentioned, it's hard to really get the flavor  
19 of this from looking at the record of trial, but  
20 there definitely were indications in there that  
21 perhaps the victim's counsel or perhaps the trial  
22 counsel when there was no victim's counsel had

1 perhaps counseled that victim you can't say this  
2 or maybe you want to take that out, indications  
3 in the record of trial, although that would have  
4 been done prior to the court proceeding.

5           So but as you mentioned, overall in  
6 most cases the judge was not limiting the victim  
7 in her right to say -- to provide an impact  
8 statement, but that may be why. But we don't --  
9 obviously we can't -- we don't really have  
10 numbers on that because that's all -- those are  
11 all things that happened outside of the  
12 courtroom.

13           MEMBER WALTON: I would just say I've  
14 never read any of these, but I'm just surprised  
15 that those type of limitations are imposed  
16 because that's just not the norm, at least in my  
17 court, and I've never seen that in a federal  
18 court proceeding. And I think it does further  
19 traumatize the victim.

20           I think the victim should have an  
21 opportunity to fully express whatever he or she  
22 thinks is appropriate for the court to consider.

1 You may reject it and not consider it, but I just  
2 don't see why that type of limitation should be  
3 imposed. So I would hope that we would recommend  
4 that this rule be amended to not put those type  
5 of restrictions on the ability of a victim to  
6 articulate the impact this crime had on him or  
7 her.

8 MEMBER GRIMM: So Paul Grimm, if  
9 there's a moment for a comment?

10 CHAIR SMITH: Absolutely, judge.

11 MEMBER GRIMM: Thank you. I strongly  
12 agree with the comments that I've heard. In  
13 federal court these victim statements can be  
14 written. They can be in court. There are many  
15 times when -- and they don't just apply to sexual  
16 assault cases. They apply to -- we get a lot of  
17 Hobbs Act robberies where someone has a gun stuck  
18 in their face and they come in there and talk  
19 about what that is. Sometimes they're emotional.  
20 Other times they show remarkable insight by the  
21 victim, and even compassion sometimes.

22 Sometimes they ask for a specific

1 sentence; sometimes they just say the most  
2 serious sentence. You've got a judge who's  
3 imposing the sentence and the judge is sworn to  
4 impose a sentence in accordance with guidelines  
5 and criteria to do that. And there's very little  
6 doubt that if a victim statement is overly  
7 emotional or is -- asks for some sort of punitive  
8 sentence that would not be warranted under  
9 sentencing criteria -- but the judge has the  
10 ability to just disregard it and allow the victim  
11 the opportunity to have the catharsis that comes  
12 with the victim impact statement.

13           And I think any judge or any lawyer  
14 who's sat in a courtroom and seen it happens can  
15 see how emotional it can be for these folks and  
16 how important it is to having them feel like they  
17 have been heard. We hear that from criminal  
18 defense lawyers all the time. My client needs to  
19 feel like she or he has been heard, but the  
20 victim needs to feel like he or she has been  
21 heard. These are terribly challenging cases. So  
22 they go on and they carry the burden of them for



1 a long time.

2 And for a case in which the judge is  
3 the one imposing the sentence, not the members,  
4 because I understand members imposing a sentence  
5 might be unduly and improperly affected by overly  
6 emotional appeals, but if a judge is so unsure of  
7 their own ability to follow the law in imposing a  
8 sentence according with proper criteria and  
9 disregards something which they believe is not  
10 appropriate, then they -- I question their --  
11 whether being a judge is the most productive  
12 thing for them to do.

13 CHAIR SMITH: Can I just add to what  
14 both the judges said and state first of all  
15 Maryland is one of those states that does require  
16 in person for the victim to be placed under oath  
17 and subject to cross examination.

18 That said, in all my years as a  
19 prosecutor I never really saw a judge do that.  
20 What happens is the victim gets up and they say  
21 what they want to say, whatever it is, because  
22 the idea that through redlining and through a

1 judge saying no, you can't talk about that or you  
2 can't talk about this, nobody can tell the victim  
3 what the impact of the crime was on them.

4 They're the only person who can speak about how  
5 the crime impacted them, how it impacted their  
6 family, et cetera, et cetera.

7 So my general practice is come in, say  
8 what you want to say. I know what I'm going to  
9 consider, what I can consider, and as Judge Grimm  
10 said, ignoring the things that the court should  
11 ignore. And in practice what happens is that if  
12 the defense attorney disagrees with something  
13 that the victim said or if the victim talks about  
14 other incidences that weren't charged, the  
15 defense attorney just simply says well, Your  
16 Honor, my client wasn't found guilty of that or  
17 my client didn't admit to any of those things,  
18 that wasn't part of the proffer, whatever the  
19 case may be. But certainly the judge knows how  
20 to handle the emotion, the comments that are off  
21 base, et cetera.

22 And the last thing that I would say is

1 yesterday there was -- I don't remember who said  
2 it, but someone spoke about wanting to be able to  
3 look at the defendant and -- oh, I guess it was  
4 Mr. Perry -- turn around and address the  
5 defendant and tell him face to face how it  
6 impacted him. That I don't permit in my  
7 courtroom. The comments need to be addressed to  
8 the court. And I haven't really seen any other  
9 judges who allow that. And for me the reason  
10 being that things can get out of control quickly.  
11 And so one way to kind of maintain control of the  
12 courtroom is to not allow that kind of, if you  
13 will, emotional connection to take place. So I  
14 don't allow that to happen, but otherwise people  
15 are free to give their impact statements.

16 MEMBER WALTON: Can I ask a question?  
17 Is it envisioned that with the system moving to  
18 judge-only sentencing that there will be  
19 presentence investigation reports, or  
20 investigations done and reports submitted?

21 MS. SAUNDERS: I don't believe there is any  
22 -- I know there is a plan afoot to institute some

1 kind of guidelines, which is a completely  
2 different thing, but I think just based on the  
3 military system I don't believe there's any  
4 intention to change that.

5 Perhaps one reason is when you're  
6 talking about the military members as opposed to  
7 perhaps many defendants in civilian courts they  
8 don't have criminal records. I mean if they had  
9 a criminal record, they wouldn't be there, so  
10 there's no -- none of that information that needs  
11 to be compiled. But I don't -- I'm seeing Dwight  
12 shaking his head also, so I don't think there  
13 is --

14 (Simultaneous speaking.)

15 MEMBER WALTON: But I mean there's  
16 more than just --

17 MS. SAUNDERS: Yes. Right.

18 MEMBER WALTON: -- there's more than  
19 just criminal record that --

20 MS. SAUNDERS: No, I completely  
21 understand.

22 MEMBER WALTON: -- there's more than

1 just criminal record that's --

2 MS. SAUNDERS: Right.

3 MEMBER WALTON: -- a part of the --

4 MS. SAUNDERS: Right.

5 MEMBER WALTON: I mean I learn about  
6 their background, their family upbringing, their  
7 mental health situation. I learn about their  
8 entire background. And I find that many times to  
9 be very helpful.

10 MS. SAUNDERS: Oh, no, that's --

11 MEMBER GRIMM: This is Paul Grimm,  
12 when I can?

13 CHAIR SMITH: Yes, judge. Go ahead.

14 MEMBER GRIMM: Yes, I will say this:  
15 I think that when you have a presentence  
16 investigation report it is enormously helpful.  
17 It is true that in the federal system just  
18 because the guidelines that you have to apply  
19 have two evaluative matrices. One of them is the  
20 offense level, which focuses on the offense and  
21 its characteristics. The other, the prior  
22 offenses committed by the defendant on the notion

1 of how much deterrence might be relevant. And of  
2 course in the military that may not apply.

3 But we also have a period of time that  
4 allows the probation department to do an  
5 investigation, because they're very, very  
6 thorough. And it's my understanding that in the  
7 military the sentencing is immediately after  
8 conviction. So there would be no time to do it.

9 And I just wonder is it necessary to  
10 sentence immediately after conviction? What  
11 would -- does the statute require it? Do the  
12 Manual for Court Martial require it? Because  
13 that delay that allows the ability to be able to  
14 reflect on what the guidelines were to apply in a  
15 particular case -- you don't know until the fact  
16 finder convicts. And if they don't convict, then  
17 there's no sentencing at all.

18 And so you've got the lawyers in a  
19 tough place because before they even know whether  
20 there's been a conviction they've got to think  
21 about what they're going to say if there is a  
22 conviction or a conviction on what offense. If

1 it's multiple charges and they're found guilty of  
2 disobeying a lawful order and not everything  
3 else, then the presentation would be completely  
4 different than if they're found guilty on all of  
5 them.

6 It just seems to me that I wonder what  
7 the -- why it seems to be -- is it truly  
8 essential that the sentencing be immediately  
9 after the conviction? And if so -- I mean I  
10 understand if the members are going to sentence  
11 because they're right there and they may have to  
12 be -- they're reassigned some place or go off in  
13 another place. You've got the opportunity; you  
14 got to take it. But if it's the judge, why does  
15 the sentencing have to be immediately afterwards  
16 which effectively precludes any kind of an  
17 investigative report? Because I agree with Judge  
18 Walton that that's a vital part of what a judge  
19 does when being fair in a sentencing.

20 MS. SAUNDERS: So I guess the short  
21 answer is it does not look like the Department of  
22 Defense is currently looking at that. So that's

1 the short answer on that, I guess.

2 MEMBER SCHWENK: Yes, I think that --  
3 this is Jim Schwenk. I think that issue raised  
4 by the two judges is a good issue. When I first  
5 came in as a judge advocate I asked the question.  
6 I was on a -- when I was an infantry officer I  
7 sat on a murder case as a member and we went  
8 straight into sentencing. And I thought wow, you  
9 know, that was -- sort of surprised me. What did  
10 I know? I was 24 or something.

11 But when I became a judge advocate I  
12 asked one of the colonels why and he said war  
13 zones. This is a direct result of in a war you  
14 need finality. You need decisions made and move  
15 onto the next thing. And so that's why we don't  
16 have hung juries in the military because we can't  
17 take the time and the effort to do a second  
18 trial. That's why we -- you get one vote and you  
19 either make the number or you don't. It's an  
20 acquittal or a conviction. And it's also why we  
21 go straight into sentencing.

22 That's not to say -- so that was the



1 explanation I got then. I have no idea what the  
2 explanation would be today, but if you all want,  
3 that's certainly an issue that as a DAC-IPAD we  
4 can decide to take on. And I don't know if we  
5 have to request permission to look into issues,  
6 but whatever the process is we're supposed to  
7 follow. I would sign up to looking at that.

8 MS. SAUNDERS: Okay. Well, perhaps in  
9 your deliberation session that's something you  
10 all could discuss shortly.

11 If we could move ahead a couple of  
12 slides. Yes, maybe one more. Okay, here we go.  
13 So this brings us to the draft executive order.  
14 The draft changes to the rules for courts-martial  
15 that the Joint Service Committee has put out.  
16 And I think you have all been provided those.

17 The perspective changes, as relates to  
18 victim impact statement are, there are several.  
19 One, the issue of standing that was just  
20 discussed about not allowing that victim's  
21 counsel to be heard on the argument. I think  
22 that was the only case that we came across that

1 way.

2 But there is a prospective change that  
3 would allow the victim to be heard on any  
4 objection to the victim's unsworn statement. And  
5 of course, under the rules, if a victim has a  
6 right then the victim's counsel would also be  
7 able to argue that on his or her behalf.

8 There is also a prospective change.  
9 Currently there is a restriction within the rule  
10 that the victim may not recommend a specific  
11 sentence for the accused. That sentence has been  
12 deleted. We'll talk about that a little bit more  
13 when we get to the recommendations about whether  
14 that's the best way to do this.

15 Also, there is, they have added  
16 something that explicitly states that the victim,  
17 the victim's counsel, or both, may provide the  
18 unsworn statement. We'll talk about that shortly  
19 as well.

20 And then interestingly there is the  
21 discussion section to one of the subsections in  
22 the rule that currently has a sentence that says,

1 upon objection by either party or sua sponte, a  
2 military judge may stop or interrupt a victim's  
3 impact statement that includes matter outside the  
4 scope of the rule. That sentence has been  
5 removed from the discussion section.

6 So it appears that the Joint Service  
7 Committee is trying to put forth some changes  
8 that will hopefully expand the scope. Or  
9 hopefully expand the victim's ability to provide  
10 a statement. But we'll talk about that in just a  
11 second when we go into our recommendations.

12 So, if we could move to the next  
13 slide. So this gets into the proposed response  
14 to Congress on the two questions that were posed.  
15 No vote required on that today because you'll  
16 have the opportunity to review the full section  
17 of the report and to vote on that at your next  
18 meeting.

19 But the proposed response would be,  
20 you know, to the effect that the military judges,  
21 whether they're reviewing or whether they're  
22 interpreting the rule too narrowly, that they're

1 not limiting the victim's right in the vast  
2 majority of cases. And then provide some  
3 statistics that we've looked at for the Fiscal  
4 2021 case review to go along with that, but that  
5 perhaps the real issue is that the rule itself is  
6 too narrow.

7 And then regarding the second  
8 question, it appears to be both from, looking at  
9 some of the case law and from looking at the  
10 cases, it appears that judges are allowing  
11 individuals, other than the named victim in the  
12 charge sheet, to provide impact statements. So  
13 it sounds like some of the challenges, such as  
14 the one, the Perrys faced, have been hopefully  
15 overcome by law. The case law in that.

16 Okay. If we can move to the next  
17 slide please. Okay, now to the recommendations.  
18 So, for these recommendations, these are the ones  
19 that the policy subcommittee has come up with.  
20 We'll provide you all the opportunity to provide  
21 comment on this.

22 I know some of you have already done

1 so. And for the vote you can either recommend to  
2 accept the recommendation as drafted. To accept  
3 the recommendation with amended language if you  
4 have different language you would like to  
5 propose. To reject the recommendation. Or to  
6 decide that the recommendation is not, it  
7 requires more further, you know, further study  
8 and it's not right for vote at this session.

9 So again, these recommendations, the  
10 proposal would be that these go in a public  
11 comment to the Joint Service Committee by their  
12 deadline of December 19th. And that they would  
13 also go into the annual report.

14 So rather than asking each, going down  
15 and asking each person their individual vote,  
16 we'll go one-by-one and I'll just ask if there  
17 are any individuals who are opposed to the  
18 recommendation. And you can speak up if you are.

19 Okay. So the first recommendation,  
20 yes, there we go. The first recommendation is  
21 for the Joint Service Committee to draft an  
22 amendment to the rule that would remove the word

1 "directly" from the definition of impact.

2 So the section currently reads, victim  
3 impact includes any financial, social,  
4 psychological or medical impact on the crime  
5 victim "directly" relating to or arising from the  
6 offense of which the accused has been found  
7 guilty. So this proposed change would remove the  
8 word "directly." And hopefully would allow more  
9 attenuated impact on the victim.

10 I know there was one of the cases that  
11 we reviewed, for example, that the victim in that  
12 case spoke about the assault on her and then  
13 later on in her statement said that she, after  
14 she left the Military she had a difficult time  
15 finding a job and had some financial troubles as  
16 a result. She didn't use the right words perhaps  
17 to tie it directly back to the assault, but it  
18 was very clear that one action stemmed from the  
19 other. The judge would not allow the victim to  
20 make that statement and redlined that out of the  
21 victim impact statement.

22 So it's difficult to always have a

1 recommendation or a way to change the rule that  
2 will tell the judge, you should be more expansive  
3 in what you allow this, but this might be one way  
4 to do that is to remove the word "directly." Or  
5 the alternative is to put, or indirectly.

6 "Directly or indirectly" provide this  
7 information.

8 Do any of the Members have any  
9 comments on that?

10 CHAIR SMITH: I think I like the idea  
11 of adding "indirectly." "Directly or indirectly"  
12 --

13 MS. SAUNDERS: Okay.

14 CHAIR SMITH: -- because it takes away  
15 any question about what's meant by that language.

16 MS. SAUNDERS: Okay.

17 CHAIR SMITH: That's just my take on  
18 it.

19 MS. SAUNDERS: Okay. Are any of the  
20 Members opposed to this recommendation? So that  
21 the recommendation would be a change to add  
22 "directly or indirectly" impact? Are any of the

1 members opposed to that change?

2 Okay. Well that recommendation has  
3 been adopted as amended.

4 Okay, going into the next. The next,  
5 the second recommendation is that the Joint  
6 Service Committee draft an amendment to the rule  
7 to allow victims to discuss the impact of the  
8 crime on the victim's family members.

9 So the law has expanded that would  
10 allow other people other than the named victim on  
11 the charge sheet to come and provide a victim  
12 impact statement. What this is really getting at  
13 is allowing the victim to talk about the impact  
14 on her family members.

15 So we had a, I know General Schwenk  
16 was just mentioning a moment ago there was a case  
17 he had reviewed in which the victim talked about  
18 the impact of the crime on her mother and how her  
19 mother felt about that. That was not allowed in  
20 that case. And we did see that there were a  
21 number of states that explicitly would allow the  
22 victim to talk about the impact of the crime on



1 the victim's family members.

2 So this recommendation would be to  
3 basically add the words "or family members" into  
4 that rule. So it would basically state, victim  
5 impact includes any financial, social,  
6 psychological or medical impact on the crime  
7 victim or the victim's family relating to or  
8 arising from the crime.

9 MEMBER GARVIN: Is there a definition  
10 of family member? And the reason I asked, as we  
11 heard discussed a bit yesterday about that  
12 actually could potentially, is that an intention  
13 choice by the Committee and all of us because it  
14 could be perceived as limiting if it's a non-  
15 traditional identified family. And so I'm just  
16 curious what, that will end up being litigated.

17 (Laughter.)

18 MEMBER GARVIN: So I'm just kind of  
19 curious about the, you know, what we're all  
20 thinking around that as opposed just to discuss  
21 the impact and removing the "on." The  
22 prepositional phrase "on" at all.

1 MS. SAUNDERS: We had not actually  
2 discussed a definition for family members, but  
3 we're obviously open to anything that the  
4 Committee Members want to suggest.

5 MEMBER WALTON: I'm sort of conflicted  
6 in reference to this because I do understand the  
7 objective of permitting the victim to give  
8 information about the effect on one's family, but  
9 I do have concerns about that coming to the court  
10 secondhand. And to what extent you can really  
11 give credibility to what you're being told if the  
12 person themselves has not specifically indicated  
13 the impact it had on them.

14 And because someone can have a  
15 perception to this having an impact on someone  
16 else, and that may not be an accurate perception.  
17 So I understand the objective, but I do have  
18 concerns about that type of secondhand  
19 information influencing a judge's decision as to  
20 what penalty is going to be imposed.

21 MEMBER GRIMM: Paul Grimm.

22 CHAIR SMITH: Yes, Judge.

1                   MEMBER GRIMM: Okay. I think that I  
2 agree that you don't want it to get, you know,  
3 seven degrees of consanguinity of people coming  
4 up there talking about the impact it may have.

5                   But I often see a situation where the  
6 entire family comes in. You can see that they're  
7 all very distraught. And one person is sort of  
8 the spokesperson for the whole family. It's  
9 usually the, you know, the person who is the  
10 direct victim. Or in some of these cases  
11 involving someone who sells fentanyl-laced heroin  
12 to a drug user and the drug user dies, you'll get  
13 the mother or you'll get the sister or someone  
14 like that coming in.

15                   And often times it's very hard for  
16 folks to stand up in public and say what they  
17 say. And one person is sort of the spokesperson.

18                   I agree with Judge Walton that you  
19 don't want to have, you don't want to say it has  
20 to be every individual, I mean, because that may  
21 response, require you to have a much larger  
22 number of people who would want to come in, which

1 may prolong the proceedings. Or it may be that  
2 if it has to be personal that people that just  
3 are terrified of getting up and speaking or are  
4 so distraught that they can't, they're not able  
5 to have their experience shared.

6 I wonder if it would be a helpful, a  
7 friendly amendment to say immediate family. That  
8 would be, you know, that's like your spouse, your  
9 children. It doesn't get aunts and uncles and  
10 all those things. It allows someone to be the  
11 spokesperson for the family.

12 If it's immediate family, then to  
13 Judge Walton's point, they would have knowledge  
14 of that because it's their immediate family.  
15 Imagine the sibling of a victim who laments to  
16 fact that their best friend and their sibling is  
17 so affected by this that they're just not the  
18 same person.

19 You can imagine having a situation  
20 where an immediate member of the family, you have  
21 the opportunity to perceive what they are. You  
22 have most likely the personal knowledge. But it

1 limits it so that you don't get it so remote.  
2 And I wonder if that might be a helpful  
3 suggestion.

4 CHAIR SMITH: I like the immediate  
5 family idea, but then I think you still run into  
6 the, and then do we say or de facto immediate  
7 family members, because you run into the  
8 nontraditional people who are considered members  
9 of family, right? I don't know.

10 MEMBER WALTON: If I could just  
11 respond briefly to my soon to be former  
12 colleague, I hate to be, hate that to being the  
13 case because he's such a great attribute to the  
14 federal judiciary, but I don't, in a sense I  
15 guess disagree with what he has indicated.

16 I mean, obviously if there are other  
17 families who are present and one is speaking on  
18 behalf of everybody, I have less concern about  
19 that. I was envisioning the person coming in and  
20 speaking about both who are not actually in the  
21 court and therefore not there to at least  
22 indicate that they are agreeing with what's being

1 represented on their behalf.

2 MS. GALLAGHER: And I will say that in  
3 these, in the Military cases, that's the  
4 situation you have most of the time because the  
5 trials are not necessarily held where the family  
6 resides. And so most of these limitations have  
7 been with the victim trying to speak, you know,  
8 say, oh you know, and my mom was devastated by  
9 this. Or, you know, it effected the children in  
10 this manner.

11 And the judges are very clear that  
12 those people are welcome to come in and provide a  
13 statement, but they don't let the victim on the  
14 stand testify about that impact. And so it's  
15 trying to get a loosening of that requirement I  
16 guess is what the, we're trying to find that  
17 language.

18 MS. SAUNDERS: Ms. Long, I think you  
19 had a comment?

20 MEMBER LONG: I just, maybe this is  
21 unfair, maybe this is unfair because as much as  
22 we sometimes are critical of judges, we also feel

1 like we really hold you up as able to weigh  
2 everything. And I feel, for me as a prosecutor  
3 it seems like when you're putting the victim  
4 through the trial there is so many limitations as  
5 to what they can say, even in the testimony.

6 And the way I look at victim impact is  
7 it's their time to be heard. And I think we, I  
8 always trusted most of the judges.

9 I was in front of enough to listen and  
10 decide what you really could take into account  
11 and what was just, I don't want to say just the  
12 victim expressing themselves, but rather than  
13 parse whether they could say my mom is  
14 devastated, I feel like the judges are in the  
15 position to say, look, I can't consider this as  
16 evidence but I'm just letting them speak. That's  
17 just how I look at it. So I really do trust you  
18 all to get in the way.

19 MEMBER WALTON: I don't doubt that the  
20 scenario occurs where somebody is indicating the  
21 effect the crime had on somebody else, even  
22 though that other person is not the victim, I

1 have never seen that. Now I'm sure it may  
2 happen, but I've never seen a victim say about  
3 the impact it's having on somebody else. I'm  
4 sure it happens, but I've never seen it.

5 MEMBER LONG: Sometimes husbands, like  
6 rape victims will talk about the impact to their  
7 husband. And sometimes those people come to  
8 court, because you're right, we have pre-  
9 sentence, and this is outside.

10 But I'm also one of those people who  
11 think, if the Military wants to have a court  
12 system that people have trust in, then they have  
13 to start following some of those things. So I'm  
14 also in favor of pre-sentence reports.

15 But sometimes those people don't come  
16 in. Or maybe the victim has gotten a divorce and  
17 they'll say, I guess it's an impact on them, but  
18 they'll talk and we'll just let them talk and  
19 then understand what can be argued and  
20 considered. I don't know.

21 MEMBER GOLDBERG: And if I --

22 MEMBER WALTON: And if there is nuance



1 I guess I, if somebody was the victim of a rape  
2 and they were married at the time and the rape  
3 caused the marriage to dissolve, I could see me  
4 permitting them, and it would be appropriate for  
5 them to say the impact that this had on the other  
6 person, and it resulted in a divorce. So I can  
7 understand that.

8 So maybe I'm not so hard and fast  
9 saying that we should never entertain the effect  
10 it had another person, but I think we have to be  
11 very cautious about that.

12 MEMBER GARVIN: I think, Judge, you're  
13 demonstrating kind of judicial temperament that I  
14 feel like sometimes we weren't seeing in some of  
15 the cases. And that's not a specific criticism.

16 But they have a rule in the Military  
17 that I think some of the judges are feeling  
18 constrained by and so they aren't going through  
19 the analysis of, oh you're not saying that, or  
20 the analysis they seem to be doing is, in this  
21 rape scenario, they want the victim to explicitly  
22 say, and therefore because my husband, or my

1 spouse, depending on the gender of the person  
2 sexually assaulted, was also hurt by this. I  
3 endured an additional impact because. Right?

4 They seem to be requiring that the  
5 victim do the entire syllogism in front of them.  
6 And that seems to be problematic. As opposed to  
7 kind of being like, oh, I can figure out that  
8 this and this are actually impacts on you in  
9 part. At least that's how I'm perceiving it.

10 My concern with family members, I  
11 think immediate family member might aid, I'm a  
12 minimalist when it comes to language because I  
13 too trust judiciary, and so part of me wants a  
14 recommendation that is, you are overly narrowly  
15 interpreting things and impact on victim is more  
16 than what you initially perceived. It's kind of  
17 this impact on community too.

18 And so I, you know, family members is,  
19 or immediate family members is the best edit  
20 because we need specificity in it, if that makes  
21 sense. I just, when I draft, or think about  
22 drafting legislation or rules I sometimes think

1 minimalist is better because you can't have a  
2 broader interpretation. So that was my only, my  
3 only thought. But of course we're observing some  
4 of the bench not doing a broad interpretation to  
5 get to allocation, so.

6 MEMBER GOLDBERG: I appreciate the  
7 conversation. And this is, of course, invaluable  
8 to hear from our judicial colleagues.

9 When we talked about this  
10 recommendation I remember thinking, and I don't  
11 think I said it in the Committee meeting, that I  
12 thought it would be important for the legislative  
13 record on this to indicate, at least my own view,  
14 that family members should be family members as  
15 understood by the victim. Because I think to  
16 refer to immediate might suggest to some people  
17 that a grandparent who may live with the victim  
18 doesn't count or that a non-marital spouse  
19 doesn't count or that step-children don't count.

20 And so I think that family members  
21 doesn't come with a limitation, as we've  
22 described it here, so I don't think it

1 necessarily needs that in writing. But I do  
2 think it would be useful to accompany what we say  
3 here by this.

4           You know, another way to address this  
5 would be to not have impact on family members,  
6 but impact on something broader, like others in  
7 the victim's life. I can anticipate, although  
8 Judge Walton hasn't said this yet, I can  
9 anticipate a reasonable judge saying that  
10 actually we don't want to invite people to talk  
11 about their co-workers and they're, you know,  
12 whoever they, you know, all of the people they  
13 interact with, even though in fact in some  
14 instances the assault may have an impact that  
15 goes well beyond family members.

16           And it's certainly, just to add one  
17 more point here in terms of the people impacted,  
18 and this came up yesterday, is that often one of  
19 the most significant impacts could be on the  
20 person who is support, who is the closest support  
21 for the person who has had the experience, and  
22 they may not fall into the definition of family.

1 So it's a, I think it's a complicated area.

2 In the educational context, which is  
3 where, what I have seen more of, the students in  
4 a Title IX proceeding, this is a comment based on  
5 my experience prior to my current government  
6 experience, but experience at my prior  
7 institution and what I'm aware of at others,  
8 students get to say what they want. It's a very  
9 different setting, but they can talk about the  
10 impact.

11 And there it's particularly often on  
12 their best friend and not on the family members  
13 who they're not living with at the time. So I  
14 realize that's different for adults in the armed  
15 services, but it speaks to the point that I think  
16 there is context for this that would be useful to  
17 go over with any proposed recommendation if we  
18 can provide that.

19 CHAIR SMITH: Perhaps the best thing  
20 to do is to say, this is the Committee's concern,  
21 here are some alternatives for how to address it.  
22 But maybe just saying we are concerned that it is

1 being limited to victims and not including the  
2 impact on those closest to the victim. Whatever  
3 language.

4 But these are some of the things that  
5 we concerned, family members, immediate family  
6 members, others, whatever. Since we can't seem  
7 to kind of agree on what the language should be.

8 MEMBER KRAMER: So I've kind of stayed  
9 out of it, but one of the fundamental tenants of  
10 sentencing, I think, is that the supreme court  
11 has held that information has to be reliable for  
12 a judge to take it into account. And the farther  
13 out we get the less reliable it gets and it's  
14 going to open it up to lots of objections about  
15 the reliability of a judge relying upon evidence  
16 that may not be reliable, and how to test the  
17 reliability of it in a sentencing proceeding  
18 that's taking affect right after the verdict.

19 So it seems to me to be the larger, if  
20 you spread it out, the less reliable it might be.  
21 And that's going to be a constitutional issue at  
22 sentencing that would be raised by defense

1 lawyers.

2 And judges are going to start having  
3 to parsing statements about what they find to be  
4 reliable and what they find not to be reliable in  
5 relying upon things. So it opens quite a large  
6 can of worms.

7 MEMBER GARVIN: If I may just add one  
8 thing, footnote. This also is all contingent on,  
9 right, the right is the right of a crime victim  
10 to be heard. Article 6B. And then we have the  
11 RCM that says a victim.

12 And so, we're also starting with an  
13 interestingly narrow interpretation of the legal  
14 definition of crime victim, because in the  
15 civilian world, many of these situations that  
16 person would also be an independent crime victim  
17 able to allocute also. So that's for a different  
18 conversation about the narrowness of the  
19 generalized interpretation of crime victim.

20 MEMBER LONG: I am sorry to extend it.  
21 Just for A.J. though, don't you think though just  
22 the judges being clear, this is what I'm

1       considering, before they go into their  
2       sentencing, would have the protections or would  
3       you still think it would open up?

4               MEMBER KRAMER: I mean, it's unclear  
5       to me whether the judge -- I'm sorry.

6               MEMBER LONG: No, no. I was saying,  
7       like, because Meghan just was clarifying like a  
8       findings of law, a conclusions of law, or this is  
9       the factual things I'm considering before I make  
10      my sentence that way it's clear what they've  
11      considered. They've put it on the record.

12              MEMBER KRAMER: Well, I think that  
13      happens now, but it's in a process that Judge  
14      Walton and Judge Grimm referred to in the pre-  
15      sentence process of testing what's reliable and  
16      what's not reliable. And the judge is saying,  
17      making rulings on when the defense objects.

18              Now you're talking, but now you're  
19      talking about something that's happened  
20      immediately and the judge is going to have to,  
21      how the judge would even decide what's reliable  
22      and what's not reliable is a little puzzling to



1 me when you start getting, it's real easy, I  
2 think, for a judge to determine whether a victim  
3 obviously is saying the effect on themselves and  
4 maybe a, you know, a partner's spouse, child,  
5 whatever.

6 But it's a whole different thing when  
7 you start stretching that out to friends, co-  
8 workers, extended family members. And for a  
9 judge to determine if that's reliable, and then  
10 you start getting into, I'm not clear that  
11 victims would benefit by the judge saying I find  
12 portions of your statement to be unreliable or  
13 unsupported. And I'm not clear if victims would  
14 want to hear that, to be honest with you.

15 And if defense starts objecting to  
16 saying, look, that's, I understand what the  
17 victim is, but it's not reliable for somebody to  
18 say what the effect was on a co-worker. So I  
19 think the, so I don't know whether it benefits, I  
20 know what you're saying about allowing victims to  
21 vent. I completely understand that. I'm not  
22 sure the way the Military justice system is setup

1 that that's the form for this.

2 MEMBER GRIMM: Grimm.

3 CHAIR SMITH: Go ahead.

4 MEMBER GRIMM: I wonder if we're maybe  
5 over thinking this. I agree that, given my  
6 advanced age, that I was properly reminded by our  
7 colleagues that the age group that we're talking  
8 about in these cases has a different version, a  
9 different definition of family then perhaps I  
10 grew up with. And that these are individuals in  
11 their lives that are important, that are part of  
12 their support group. They know who those people  
13 are.

14 But I also, I think Judge Walton's  
15 experience is the same as mine, you don't see  
16 many problems with these things. The victim gets  
17 up, says what they're going to say. They're not  
18 going to go into, you know, my next door  
19 neighbor's-aunt's-sister's-hairdresser's-cat had  
20 this happen to him as a result of this. They  
21 don't do it. It's hard enough for them to say  
22 what they're going to say on their own.

1           And just trying to remove from the  
2 language the restrictive aspect that invites the  
3 judge, either sua sponte or on an objection from  
4 the defense attorney whose job, understandably,  
5 is to try to remove from the defendant's  
6 sentencing consideration anything that might tip  
7 the scales towards a harsher sentence. I get it.  
8 That's their job.

9           But you don't really see in real life  
10 many problems with these things. They don't go  
11 on too long usually. And if they do, just a  
12 gentle reminder from the judge if you could  
13 finish your remarks please. Especially if there  
14 is several of them to do. A reminder from the  
15 judge in the beginning, please direct your  
16 comments to the court and not to anyone else, as  
17 our wise Chair has pointed out is a good thing to  
18 do.

19           You just don't, in real life, see all  
20 these things happening. And I'm wondering if we  
21 clutter it up with so many qualifications that  
22 we're actually going to do more harm than good.

1 I like removing some of the restrictions, but  
2 basically in real life, at least in my real-life  
3 experience, they don't go far afield from who  
4 they are. In some language that would allow the  
5 victim to express what the impact has been on  
6 her. And those that are close to her, or  
7 something like that, would be better than just  
8 sort of spinning off hypotheticals that, at least  
9 in my experience, don't occur in real life.

10 MEMBER WALTON: On a related issue  
11 regarding sentencing, which I asked about  
12 earlier, if in fact there are the adoption of  
13 these parameters, i.e. guidelines, isn't that  
14 necessarily going to result in a delay of the  
15 sentencing after the finding has been made of  
16 guilt?

17 I mean, I don't see how the parameters  
18 are going to be calculated immediately, so there  
19 is going to have to be some period of delay  
20 before the sentencing goes forward.

21 MS. SAUNDERS: And I'm afraid I'm not  
22 up on how that is going to work. I don't.

1                   MEMBER BASHFORD: Given the amount of  
2 time we have been discussing this, it seems to me  
3 that the conclusion is it's not ready for prime  
4 time.

5                   MS. SAUNDERS: Perhaps it would be  
6 helpful if, you know, as we're writing the  
7 context in the report if we express the  
8 Committee's, you know, what seems to be the  
9 Committee's view that these should be read  
10 broadly. That the victim should, in general, be  
11 allowed to say what she wants and perhaps that  
12 would cover it. Would that suffice and maybe we  
13 don't, maybe the time is not right for this  
14 recommendation? Okay.

15                   MEMBER GOLDBERG: I think that's  
16 right. I just want to express something that I  
17 heard others say which is, that if we don't  
18 communicate something now it will not have the  
19 impact, the impact may be delayed by a year. So  
20 I do think, if I understood that correctly in the  
21 Committee meetings, it sounds like it is  
22 important to be very direct about this

1 recommendation that, at least which I know you  
2 can capture so well, that there is rough  
3 consensus that, right now, the scope is too  
4 narrow. Or treated by many judges as too narrow.

5 MS. SAUNDERS: So perhaps that's  
6 something that we can include in the public  
7 comment of the sense of the Committee, you know.  
8 We'll have to figure out a good way to draft  
9 that, but the sense of the Committee is that this  
10 is drawn too narrowly and it should be read by  
11 judges more expansively. If we can capture words  
12 to that effect. But without the actual  
13 recommendation.

14 Okay, moving along to Recommendation  
15 3. That the Joint Service Committee draft an  
16 amendment to the rule to add a sentence stating  
17 that the victim impact statement may include a  
18 recommendation of a specific sentence.

19 You just saw a second ago that --  
20 okay. You just saw a second ago that the Joint  
21 Service Committee has removed that sentence that  
22 says that the victim may not recommend a specific

1 sentence, although that rule still exists for  
2 capital cases.

3 The thought of the Subcommittee is  
4 that simply removing that sentence may not be,  
5 may not get them where they want to go. That it  
6 should actually explicitly state that the victim  
7 may recommend a specific sentence.

8 This would also make this rule,  
9 regarding victim impact statements, parallel with  
10 the accused right to make an unsworn statement  
11 because, and under the accused, the accused has  
12 the right to recommend a specific sentence in his  
13 or her unsworn statement.

14 We had posed this question to the  
15 Joint Service Committee, and they actually had  
16 responded just yesterday I believe. One of the  
17 things they said is that the JSC views the  
18 language as mirroring the concept in the rule  
19 that applies to the accused.

20 So, by including the explicit  
21 statement in the rule you potentially would avoid  
22 some litigation because without that included,

1 basically the rule limits the victim to  
2 commenting on victim impact or mitigation.  
3 Matters in mitigation.

4 Or a judge could reasonably read that  
5 to say, well, you're recommending a specific  
6 sentence does not fall into either of those  
7 categories and not allow the victim to say that.  
8 So, the recommendation is to explicitly have that  
9 statement in there allowing the victim to  
10 recommend a specific statement.

11 MEMBER KRAMER: So I have very (audio  
12 interference) sorry. I have very mixed feelings  
13 about this because if somebody wants to say that  
14 my client should get probation they should of  
15 course be heard about that.

16 (Laughter.)

17 MEMBER KRAMER: But the problem is  
18 this. It seems to me it opens a huge disparity  
19 and is contrary to the system of guidelines  
20 that's about, I guess about being considered and  
21 is in the federal system because victims run,  
22 I've heard lots of, vary many victim statements.



1 They almost never actual recommend a specific  
2 sentence that I've heard.

3 Put aside capital cases, which I  
4 understand this doesn't apply to in any event.  
5 But there are some victims who are incredibly,  
6 for whatever reason, religious, personal beliefs,  
7 whatever, incredibly forgiving and think that  
8 nobody should go to jail. And there are some  
9 victims who are, again, for whatever reason,  
10 because of what happened, because think that  
11 there should be extremely harsh sentences, and it  
12 seems to me you're introducing a disparity here  
13 that totally contrary to a system.

14 In civil cases the eggshell plaintiff  
15 rule is because you have committed a wrong on  
16 this person who is trying to recover direct  
17 damages for what you've done. And so, if  
18 somebody has a particular susceptibility.

19 But in criminal cases it's societies  
20 interests that are being reflected in the  
21 sentence. Including what happened to the victim,  
22 but not necessarily what the victim wants to

1       happen to the person.

2                   And what happens to a judge who in one  
3 case somebody says they should get probation, I  
4 forgive everybody who's done that. And then  
5 somebody else in the same, essentially the same  
6 circumstances comes in and says, I want that  
7 person to get 20 years, it was horrible for me.  
8 And it just seems to me to introduce a wild  
9 disparity.

10                   And I guess what you, if you think  
11 that that's okay, what you're really saying is  
12 the judge should ignore it. And then what's the  
13 point of allowing it in the first place because  
14 everybody is going to be disappointed by it. The  
15 victim is really, the people who asked for the  
16 extremes are probably going to be disappointed on  
17 every occasion. And so I don't really understand  
18 the purpose of it.

19                   Cap, I guess won't address capital  
20 cases because it doesn't apply to them in any  
21 event, but that one is, there is more than  
22 society's interest in capital cases. And it

1 seems to me to be a different situation.

2 But it's asking the judge to take  
3 account of fact, and I don't see it as parallel  
4 to the accused, whatever the accused has to, in  
5 every case the defendant asks for a specific  
6 sentence. And I don't see it as a counterbalance  
7 to that. That's a person who is actually going  
8 to jail and trying to ask the judge, balance  
9 these factors in my background and balance the  
10 offense.

11 But the victim doesn't have all this  
12 balance of various things. And taking account of  
13 sentencing guidelines.

14 So it just seems to me to be totally  
15 contrary to the purposes of sentencing. Other  
16 than either complete forgiveness, so to speak,  
17 forgiveness or vindictiveness. And in-between  
18 there I'm not sure where we are.

19 So it just seems to me that -- And  
20 balance, I come down against it because of all  
21 those reasons.

22 MEMBER BASHFORD: I'd be worried about

1 unintended consequences with intimate partner and  
2 DV, either direct pressure from the accused or  
3 the accused family to push the victim into saying  
4 whether that's what the victim wants or not, I  
5 want the court to be lenient.

6 MEMBER KRAMER: Harsh, yes. I want  
7 the person to be kept away.

8 MEMBER WALTON: I mean, that obviously  
9 is a legitimate concern in domestic violence  
10 cases. I presided over those cases when I was on  
11 the local court for several years. And I  
12 appreciate that that pressure can be brought to  
13 bear.

14 But again, I do think that the victim  
15 should have a right, contrary to what my good  
16 friend has said, to express his or her  
17 perspective about what the appropriate sentence  
18 is. I mean, that's not going to ultimately cause  
19 me to decide exactly what the sentence should be.  
20 But on the other hand, I don't think I should be  
21 precluded from at least hearing the victim's  
22 perspective.

1           As my good friend indicates, it's very  
2 frequent that defense counsel says, I want you to  
3 give my client probation. I mean, that's  
4 something that happens very frequently.

5           It's infrequent, in my experience,  
6 that victims are coming in and specifically  
7 saying, I want somebody to get a harsh sentence  
8 or a particular sentence. That occasionally  
9 occurs. But in my 40 years as a judge, I haven't  
10 seen it happen that often.

11           But again, I think at bottom, I think  
12 we have to give victims the opportunity to  
13 express their perspective as to what they think  
14 is appropriate. And you take that into account.  
15 And you may not agree, and therefore don't agree,  
16 and you articulate to when you're giving your  
17 sentence why maybe you're not agreeing with what  
18 the victim has wanted.

19           But I just think to, again, put that  
20 type of restriction on a victim who has been  
21 injured by what somebody else did to them is just  
22 inappropriate.

1 MS. SAUNDERS: One of the cases we  
2 looked at was a child victim. The sum total of  
3 the victim impact statement was so and so should  
4 go to jail for a very long time.

5 Even though that's, the argument would  
6 be that is not a recommendation for a specific  
7 sentence, the judge would not allow that. And so  
8 that individual was not able to provide an impact  
9 statement in that case. So go ahead, Ms. Garvin.

10 MEMBER GARVIN: A couple of things.  
11 One, I appreciate the Judge's comment about  
12 removing barriers to what the judge hears, right?  
13 I think that's one of the keys in this. And then  
14 letting the judge hear the perspectives.

15 Because I think a couple of things.  
16 One, in the civilian side, generally speaking,  
17 other than capital because current case law says  
18 capital is different on sentencing  
19 recommendations, right? So we have a current  
20 Eighth Amendment ban on sentencing  
21 recommendations in capital cases in the civilian  
22 side.

1           But in non-capital cases it's the  
2 general practice that sentencing recommendations  
3 are permissible for victims. That's the general  
4 practice, state and federal.

5           The inclusion of the vocabulary  
6 specific sentence is interesting because I don't  
7 know that that's that common. But part of the  
8 evolution of that was to ensure that the victim  
9 was not assumed to agree with the prosecutor.  
10 Because silence on the part of the victim is  
11 often assumed to be concurrent with the  
12 prosecutor.

13           And sometimes that's because they want  
14 to be more lenient, sometimes it's because they  
15 want something harsher. But it's to give the  
16 judge enough information that they can understand  
17 and kind of factor and do their job.

18           And so, you know, I think, again,  
19 removing barriers to what the victim can say in  
20 this space and allowing the judiciary to hear  
21 information and exercise their role appropriately  
22 seems the right path to me.

1                   MEMBER GRIMM: Grimm with a very brief  
2 comment. I don't know whether this might have  
3 some impact in the hesitation on some of the  
4 judges, but I recall several years ago when we  
5 heard from the Military judges that they made a  
6 comment to me that I was astonished by. And that  
7 is, is that they don't explain when they sentence  
8 the reason for the sentence that they imposed.  
9 Because they were instructed that to do that  
10 might create an issue for appellate review. And  
11 so they just say, here is my sentence.

12                   And that is not the practice that I am  
13 familiar with. And often times the explanation  
14 of the sentence is what allows the judge to be  
15 able to validate the experience on the victim,  
16 but also explain that the judge's role is, these  
17 are factors to look at and I balanced it all out  
18 and here's what I say. And that, that's a very  
19 important part, at least in my mind, of what I  
20 think the responsibility of the judge is.

21                   But maybe if the Military, and I don't  
22 know what the justification for that is, and I'm



1 told that maybe there is some change that's being  
2 considered for Military judges, but for them to  
3 just simply say, here is the sentence and then  
4 run off the bench is astonishing to me. And  
5 maybe they're worried about having some  
6 speculation and being about whatever, if they  
7 heard something that they were not going to  
8 regard as part of sentencing that they would be  
9 unable or afraid to say it and so they're going  
10 to preempt it so that they're protecting the  
11 record.

12 I don't know whether that's it or not,  
13 but it is an astonishing aspect to me of the  
14 sentencing that the Military judges feel that  
15 they have to not explain what their sentence is.

16 CHAIR SMITH: Well, with the  
17 introduction of parameters or guidelines, that's  
18 probably going to change anyway, I would assume,  
19 because the judges are going to have to explain,  
20 you know, I'm giving a guideline sentence or I'm  
21 going above the guidelines for this reason or  
22 below the guidelines for this reason. So

1 presumably there is going to have to be more of  
2 an explanation as to how they've arrived at the  
3 sentence.

4 So, what do we want to do with this  
5 recommendation? Because we've been, as Ms.  
6 Bashford said, as we've been stuck on this one  
7 for a while.

8 MS. SAUNDERS: Are you ready for a  
9 vote on this?

10 Obviously we've laid out the options.  
11 You can reject it, or vote to reject it or vote  
12 to accept it or vote for any language change. So  
13 if you're ready for a vote?

14 MEMBER GOLDBERG: May I make one very  
15 quick comment which is, I was also surprised at  
16 the specific sentence language because, you know,  
17 are people really asking for 12 years. But  
18 specific was, as you gave in that powerful  
19 example, Terri, really meant sort of any  
20 reference to any kind of a sentence, at least as  
21 in some of the cases that we saw. So it is  
22 important to keep it there I think. At least for

1 that purpose.

2 CHAIR SMITH: I think we're ready for  
3 a vote.

4 MS. SAUNDERS: Okay. Are there any  
5 members opposed to the adoption of this  
6 recommendation?

7 I see Mr. Kramer. Anyone on the video  
8 screen opposed to the adoption? Okay. So with  
9 an objection for, or not a recommendation for Mr.  
10 Kramer, but everyone else voted for that  
11 recommendation.

12 Okay, moving on to Recommendation 4.  
13 This recommendation is that the Joint Service  
14 Committee should draft an amendment to the rule  
15 allowing a victim to provide an unsworn victim  
16 impact statement by submission of an audio tape  
17 or a video tape or other digital media in  
18 addition to providing this statement orally, in  
19 writing or both.

20 Right now the rule is that it's  
21 limited to the victim providing this statement  
22 orally, in writing or both. We've seen one case

1 where the judge did allow the victim to provide a  
2 statement by videotape. We did see another case  
3 where the judge said, no, that was not allowed.

4 Right now that's unsettled at the  
5 appellate courts. They've made it clear in one  
6 appellate opinion that the trial counsel cannot  
7 be involved with that process, and there was a  
8 case where they set a victim impact statement to  
9 music with slides and the appellate court ruled  
10 that was not permissible.

11 But in terms of actually a victim  
12 providing the statement by video means or audio  
13 means, that is an open question. So that is a,  
14 it appears that is allowed in some jurisdiction,  
15 state jurisdictions, so --

16 MEMBER BASHFORD: Just one friendly  
17 amendment. It would be by submission of the  
18 statement by audiotape, videotape or, but just  
19 putting in a videotape it seems like, I don't  
20 know. It just makes me think of Legally Blonde  
21 or something.

22 (Laughter.)

1 MS. SAUNDERS: To provide the unsworn  
2 statement, okay. Friendly amendment. Are you  
3 ready to vote on this recommendation? Okay.

4 Are there any Members opposed to, with  
5 that friendly amendment of adding the unsworn  
6 statement, are there any Members opposed to  
7 passage of this recommendation? Okay, I hear  
8 nothing, so that recommendation is passed.

9 Moving on to the fifth recommendation.  
10 That the Joint Service Committee should draft an  
11 amendment to the rule to remove the, "upon good  
12 cause shown clause," in order to be consistent  
13 with the Joint Service Committee's proposed  
14 change to the paragraph immediately prior.

15 So the proposed, the JSC, one of the  
16 JSC's proposed rule changes would add the  
17 sentence in one section that says that the  
18 victim's unsworn statement may be made by the  
19 crime victim, by counsel representing the crime  
20 victim or both. But in the very next section, in  
21 the very next paragraph it includes a limitation  
22 that says, upon good cause shown, the Military

1 judge may permit the victim's counsel to deliver  
2 all or part of the statement.

3 What is happening now, that good cause  
4 clause is currently in there. What we're seeing  
5 is, the judge may ask about that, okay, what's  
6 your good cause for this, anything suffices, so  
7 the judge allows it.

8 So my instinct is that they were  
9 trying to get rid of that requirement to show  
10 good cause, but it's still contained within  
11 there. That may be, you know, just something  
12 that was overlooked in the process, I'm not sure.  
13 But it doesn't seem necessary with the proposed  
14 change.

15 Are you all ready to vote on that? So  
16 the proposal would be to remove that clause in  
17 the subsequent paragraph so that there would be  
18 no requirement to show good cause for that.

19 Are there any Members opposed to the  
20 adoption of this recommendation? Okay, that  
21 recommendation is passed.

22 And we're finally on to the final

1 recommendation, which is that the Joint Service  
2 Committee should draft an amendment to the rule  
3 to remove the requirement that the victim provide  
4 a written proffer of the matters addressed in  
5 their unsworn statement to trial and defense  
6 counsel after the announcement of findings.

7 The rule currently requires that the  
8 victim provide a written proffer. That may be  
9 waived by the judge for good cause shown.

10 What we are seeing, and I know it was  
11 discussed yesterday, it's been discussed here  
12 today, is what's really happening is the victim  
13 is providing a written statement. It's being  
14 redlined by, in some cases, by the defense  
15 counsel. There is litigation in court.

16 The judge is making a ruling on  
17 whether those highlighted statements should be  
18 allowed or not allowed. So it's going through  
19 this process.

20 So this, the intent for this would be  
21 to put a stop to this process. And there would  
22 be some accompanying language that the intent

1 would be to allow the victim to say what she  
2 wants to say in her impact statement, within the  
3 definition of victim impact. And then of course  
4 the defense counsel could rebut any statements.

5 They also could object to anything  
6 that is stated, but they could also rebut any  
7 factual statements that they disagreed with in  
8 the impact statements. So that was the idea of  
9 this recommendation. So it's to eliminate the  
10 requirement that the victim provide a written  
11 proffer to defense and trial counsel.

12 Any comments on that? I see --

13 MEMBER KRAMER: Can I ask you a  
14 question? Did the Subcommittee hear from any  
15 trial defense counsel on any of these  
16 recommendations before making them?

17 MS. SAUNDERS: No.

18 MEMBER KRAMER: Okay.

19 MS. SAUNDERS: Okay. Are there any  
20 Committee Members who are opposed to this  
21 recommendation?

22 Mr. Kramer. Anyone on the video



1 screen? No.

2 MEMBER CASSARA: Mr. Cassara. Mr.  
3 Cassara.

4 MS. SAUNDERS: Oh, Mr. Cassara. Okay.  
5 So Mr. Kramer and Mr. Cassara opposed. And so  
6 that recommendation passes with those two  
7 dissents.

8 Okay, those are all the  
9 recommendations. We will draft this up into a  
10 public comment and include this in the report.  
11 Thank you all for your full discussion of this.  
12 This is going to be incredibly helpful to the  
13 staff as we prepare those documents.

14 CHAIR SMITH: Thank you.

15 COL BOVARNICK: Ms. Smith, do you want  
16 to break for lunch and then we'll reconvene for  
17 about a half hour for the public meeting before  
18 we close that?

19 CHAIR SMITH: Yes.

20 COL BOVARNICK: Okay. So we're on  
21 break for lunch. Is 1 o'clock okay? Forty  
22 minutes? Or do you want an hour?

1                   MEMBER BASHFORD: I would just like to  
2 say --

3                   COL BOVARNICK: Oh sorry. Yes, ma'am.

4                   MEMBER BASHFORD: -- just, we spend a  
5 lot of time criticizing the Military on some  
6 things, and I would just like everybody to be  
7 mindful that 81 years ago today we lost a lot of  
8 Military members at Pearl Harbor.

9                   CHAIR SMITH: Yes, thank you for that.

10                   COL BOVARNICK: So I say 1 o'clock.  
11 We'll reconvene at 1:00 for 40 minutes.

12                   (Whereupon, the above-entitled matter  
13 went off the record at 12:21 p.m. and resumed at  
14 1:10 p.m.)

15                   COL BOVARNICK: Okay. I think we're  
16 ready to get started. So this is the last  
17 session for the public meeting. And I'm just  
18 going to cover some matters for the deliberation  
19 for the group for the March 2023 5th annual  
20 report, talk about meeting dates for the next  
21 year, for calendar year '23, and then a preview  
22 and get the panel's thoughts on topics for the

1 February meeting.

2 The slides are at Tab 10. However,  
3 I'll note for everyone that I've updated them  
4 since. So they don't follow exactly because I've  
5 added some in. And for those online, obviously  
6 we have it up on the screen as well.

7 So we'll start with our next slide,  
8 please. First thing I want to -- here's a quick  
9 agenda. We're going to cover the meeting dates  
10 as I mentioned, some discussion. That middle  
11 block there was originally on the slides, that's  
12 going to cover the March 23 report. And then  
13 finally, we'll end with recommendations for  
14 topics for the February meeting. Next slide,  
15 please.

16 So for everyone on the Committee,  
17 these are just dates that have been cleared,  
18 discussed previously. I know we had some  
19 confusion on this particular meeting. But we'll  
20 focus on the future.

21 So February 21st and 22nd and March at  
22 a minimum are locked in, as are the other dates.

1 But most importantly for the members, hopefully  
2 everyone was tracking, and if not, perhaps seeing  
3 it for the first time. But the next meeting --  
4 next public meeting is going to be two days,  
5 February 21st and 22nd.

6 That March 14th date is going to be,  
7 like I say, quick. But it'll be a virtual  
8 meeting. And that's going to be for the final  
9 vote on the March '23 annual report. And so we  
10 will have to have the full committee or at least  
11 a quorum for that Zoom meeting.

12 You see the June meeting the 13th and  
13 14th, September 19th and 20th, and December 5th  
14 and 6th. And of course, we'll send those out as  
15 well to everybody to make sure you have them.  
16 But most importantly, that next one, February.  
17 Okay. Next slide.

18 All right. So we're going to talk for  
19 a few minutes -- and again, I say deliberations  
20 here. But it's really just to get the panel's  
21 confirmation on how we want to handle the 5th  
22 annual report. That's the statutory requirement

1 because many of the members -- former members are  
2 familiar with this.

3 But that's the requirement. It is  
4 March 30th and not 31st, but March 30th. Report  
5 to SECDEF to HASC and SASC. Okay, next. And so  
6 what you see there is -- and again, it's in your  
7 slide up there now -- is essentially what the  
8 prior reports were.

9 They were going to call them 1st and  
10 2nd, but they essentially were the 1st and 2nd,  
11 the initial report there, the one that's called  
12 annual report the 2nd, the 3rd, and the 4th. The  
13 break in between was one of them. When I say,  
14 DoD interim, that was literally a letter, a short  
15 couple sentence letter from the general counsel  
16 to the chairman of the HASC And SASC essentially  
17 is right when -- around when COVID hit.

18 There was a zero base review. And so  
19 the panel's operations were suspended by SECDEF.  
20 And then so basically that interim report, that  
21 one that's up there for March 2021 is essentially  
22 a letter just saying there is no report.

1           The March '22 one, we briefed the  
2           Committee on when you all came on board. The  
3           staff produced that report. It's not a DAC-IPAD  
4           report. It's a DoD report on kind of covering  
5           what happened in that interim period with the  
6           DAC-IPAD including the fact that there's a zero  
7           based review, et cetera.

8           So that was an interim report. So  
9           this literally is going to be the 5th annual  
10          report for the DAC-IPAD. Next. And so the  
11          recommendation -- and of course, I have a hard  
12          copy here. There's a couple copies over there.

13          But the recommendation really for the  
14          new committee is just to kind of get  
15          confirmation. You want to follow the same format  
16          that was produced for those first four with the  
17          fancy covers. So unless there's an objection or  
18          any discussion -- I don't think we need to have a  
19          big discussion.

20          But unless I hear an objection, like,  
21          no, don't use that format, we never liked it.  
22          Nothing heard, so we'll go with this format. But

1 I do actually -- I'd like to -- we can leave that  
2 slide up there for a second.

3 One thing I do want to confirm with  
4 the Committee so it'll save us some big back and  
5 forth later with the computers and all that, is  
6 number one is a page that all the Committee  
7 members sign. And obviously you can kind of see  
8 up there. You can't really see individually.

9 But it's the literal signatures as  
10 opposed to digital signatures that are allowed  
11 for a lot of computers now. But if the members  
12 want to do that, we just want to get confirmation  
13 on -- the staff will work with the members on how  
14 we're going to capture your digital signature, if  
15 we have an old one. So just now -- so in other  
16 words, a final vote takes place in March.

17 And we're going to produce the letter  
18 like this that the Committee all agrees with.  
19 It's just that whole application of your digital  
20 signature of all the -- unless any members  
21 object, we'll work with you to get that copy of  
22 your -- again, I say digital signature, the

1 script type signature that we'll paste in on your  
2 behalf as opposed to doing the old, like,  
3 circulate this letter, get a signature, however  
4 they would try to do it now. Nothing heard, so  
5 we'll work through that process when it comes up.  
6 Next.

7 Okay. Actually, we just covered that.  
8 So nothing was heard, so we'll do that. Next  
9 slide. So you do have in your binders there and  
10 what -- there's two pages of essentially what's a  
11 table of contents. And so really we'd like to  
12 get confirmation of now and again subject to any  
13 conversation, discussion is the contents.

14 So again, unless I hear something,  
15 I'll just go down the list. So we start with an  
16 executive summary. By the way, this whole report  
17 is all going to be circulated to the members.  
18 Right now, all I'm simply talking about is how  
19 we're going to format it and the content.

20 So we have an executive summary, the  
21 summary of the findings, observations,  
22 recommendations, for example, any recommendations



1 that are going to come out of the victim impact  
2 statements were all just discussed, the SVC  
3 report which we'll discuss when we get to that  
4 Chapter 4. Have an introduction, of course. And  
5 then the concept for Chapters 1, 2, and 3 would  
6 essentially be the input from those subcommittees  
7 not limited to what it says up there like just an  
8 OSTC update from special projects or just  
9 appellate case review.

10 But those subcommittee attorneys would  
11 work with their subcommittees and determine what  
12 is the important going to be from those  
13 subcommittees that would fall into that  
14 particular chapter of the report. The one that  
15 we do have and was raised by Chair Smith today  
16 with the general counsel for DoD was what's the  
17 status of that. So that's kind of a separate  
18 thing.

19 But what will go into this report is  
20 the fact that the Committee has those  
21 recommendations. So we would do, for example, an  
22 EXSUM of the SVC VLC report. We're not going to

1 copy and paste that entire report into this 5th  
2 annual report but summarize that and certainly  
3 including the findings and recommendations. So  
4 there'll be a chapter on that.

5 A short chapter on those that have  
6 observed the courts martial and those that went  
7 to the courses. So we kind of developed that and  
8 then whatever the Committee thinks as far as the  
9 way ahead for the next year. Next slide. I  
10 think the next -- so basically, yeah, so subject  
11 to any comments and discussions, I mean, that's  
12 what we're looking at for the format.

13 Does anyone disagree with the Chapters  
14 1, 2, and 3 kind of dedicated to each  
15 subcommittee? Nothing heard, so we'll go with  
16 that. Chapter 4, again, we outlined the SVC  
17 report.

18 And again, kind of pending as Chair  
19 Smith asked the DoD GC. And certainly if there's  
20 an update on what's happened with that report  
21 since then, we would add that into this. So I  
22 have Chapter 5 blank. I forget what I even had

1 up there for Chapter 5.

2 Oh, that's where we just put in a  
3 little summary of those members that have been  
4 out again to observe a court martial or training  
5 and certainly if there's anything that occurs  
6 between now and then and then Chapter 6. So for  
7 the appendices because we didn't have the list up  
8 there, if anyone is looking at Chapter -- the Tab  
9 10 in their binder, those are kind of standard  
10 what we've seen in prior reports. In fact, from  
11 the 4th annual report, the Committee's  
12 authorizing statute, the charter balance plan,  
13 stuff about the members, of course, your bios.

14 The subcommittee stuff I mentioned at  
15 the start of the public session, the confirmation  
16 on the membership and the terms of reference to  
17 the subcommittees that went out to the members.  
18 Recommendations to date, request for info, we'll  
19 have all that in there. There'll be a chapter  
20 that covers each of the meetings, a little  
21 summary of each of the meetings, summary of  
22 public comment, then the standard stuff at the

1 end with the staff and sources consulted.

2 So nothing heard. So that'll be the  
3 format. Next slide, please. This is a revised  
4 timeline. So different than what you're seeing  
5 in your book if you're looking at Chapter 10.  
6 But this incorporates that February 21, 22.

7 So what we would do, kind of similar  
8 to what we do with the SVC report. But the staff  
9 will start to work with the subcommittees on  
10 those particular chapters and the rest of it, put  
11 this thing together, circulate it to the full  
12 committee, looking for comments and of course no  
13 comments by a certain date will mean concurrence  
14 or whatever. But certainly the subcommittee  
15 chairs really need to look at their section to  
16 kind of clear those specifically.

17 And you can kind of see the timeline.  
18 So we would then get the full report back  
19 together, circulate that draft to the full  
20 committee for any comment. And the key being  
21 that when we come into the February meeting,  
22 that's when the Committee would look at,

1 deliberate the final report and we'd actually  
2 have it there. And then if there's any changes  
3 to that, we'd make right after the meeting within  
4 those couple weeks and then finalize the report.

5 And then essentially that March 14th  
6 virtual thing would be, like, yeah, this is it.  
7 And then that's when we would kind of start that  
8 final process of doing that cover letter with  
9 everybody's signature on it and finalize it to  
10 get it out by the March 30th deadline. So if  
11 nothing heard, that's what we will start to do.

12 I see the hard work is actually  
13 putting this thing together. So this was just  
14 really a discussion of the format and the  
15 timeline. Okay, next. Okay. So this is not in  
16 your slide packet but throwing up there for  
17 everyone based on kind of we just put this  
18 together based on things we heard.

19 So the internal review team on racial  
20 disparities, that's what the general counsel  
21 mentioned in the discussion. But bottom line, so  
22 that's recommendation to bring folks in to talk

1 about that for the February meeting. Trial  
2 defense organizations leads from those and again  
3 with the focus on how do they feel in comparison  
4 to knowing that kind of the discussions yesterday  
5 that you had with the general counsel and TJAGS  
6 and SJA to the Commandant of the Marine Corps.

7 How we're ensuring and how do they  
8 feel about their organizations being on par with  
9 the new Office of Special Trial Counsel.

10 Recommendation to bring an SME who wrote about  
11 and experienced a pilot program that the Army ran  
12 a number of years ago on random jury selection.  
13 So if folks are -- obviously, I know it's in the  
14 topic of interest.

15 But we can actually bring someone in  
16 to talk about that. I also have subject matter  
17 experts available to talk about the -- so someone  
18 who experienced the pilot program. But have  
19 folks again available to start to answer some of  
20 these specific questions that came up in your  
21 recent discussions about --

22 CHAIR SMITH: Sorry to interrupt.

1 General Schwenk is --

2 COL BOVARNICK: Sorry. Yes, ma'am.

3 Oh, sorry.

4 CHAIR SMITH: -- is giving us that he  
5 can't hear. I think he's --

6 COL BOVARNICK: Oh, wow.

7 CHAIR SMITH: -- waving his hands. I  
8 think that's what that meant.

9 COL BOVARNICK: General Schwenk, can  
10 you hear? Judge Grimm? We were on mute the  
11 whole time?

12 MEMBER SCHWENK: Yeah.

13 COL BOVARNICK: Oh, my gosh. So  
14 interestingly, so other than right now, prior to  
15 this, there was no comments from anyone on the  
16 slides that we ran through for the March '23  
17 report. Did you have any comments or objections  
18 to the format of that report?

19 MEMBER SCHWENK: No.

20 COL BOVARNICK: Okay.

21 MEMBER CASSARA: This is Mr. Cassara.

22 I first want to apologize for not muting

1 everybody when I was on the other call. I just  
2 found out about it. I'm terribly embarrassed.  
3 But then again finding that you all had muted us  
4 during the first parts of this call, I feel  
5 somewhat better about my lack of technical  
6 competence, so --

7 (Laughter.)

8 COL BOVARNICK: It all worked out.  
9 Perfect. So --

10 MEMBER CASSARA: Thank you.

11 COL BOVARNICK: -- the discussion now  
12 is -- and it really hasn't started. But these  
13 are recommendations for the Committee if you  
14 would like the staff to start working on bringing  
15 in panels for at least those first three topics.  
16 And then any objection to any of those three?

17 MEMBER TOKASH: This is Meghan Tokash.

18 COL BOVARNICK: Yes, ma'am.

19 MEMBER TOKASH: Could you just get us  
20 the article on that random jury selection?

21 COL BOVARNICK: Yes.

22 MEMBER TOKASH: I think I've read it



1 before. It's kind of -- it's a study that  
2 happened, like, over ten -- at least ten years  
3 ago, right, over in --

4 (Simultaneous speaking.)

5 COL BOVARNICK: Right. Yes, ma'am.

6 MEMBER TOKASH: Yeah, just I think  
7 that might be a good primer for us before we  
8 decide if we want to use bandwidth to have a  
9 presentation on it. Maybe we do. But I would  
10 also propose a presentation at the next meeting  
11 on updates to military sentencing because I know  
12 a lot of that came up today in our discussions on  
13 the victim impact statements. So there may be  
14 some utility to getting a presentation from  
15 someone within DoD or the services who can tell  
16 us about what's happening with respect to  
17 sentencing parameters and military judge alone.  
18 Thank you.

19 COL BOVARNICK: Yes, ma'am. And then  
20 what about former military judges? I know those  
21 discussions and Judge Grimm mentioned it about --  
22 and I know there was because I've observed a

1 panel once we had former military judges. Any  
2 interest in that for the next meeting or --

3 CHAIR SMITH: To discuss what?

4 COL BOVARNICK: -- maybe a future  
5 meeting?

6 CHAIR SMITH: To talk about sentencing  
7 or to talk about --

8 COL BOVARNICK: Well, just -- yes,  
9 ma'am.

10 CHAIR SMITH: -- anything in general?

11 COL BOVARNICK: It could be anything.

12 CHAIR SMITH: Anyone want to weigh in?

13 COL BOVARNICK: We could kind of  
14 develop the agenda for that. But I'm open to any  
15 --

16 MEMBER CASSARA: I know of several  
17 former military judges who I think would be  
18 wonderful panel members if that's what we're  
19 asking.

20 COL BOVARNICK: Perfect. And then  
21 ma'am, we'll develop what topics to focus on and  
22 for the questions and stuff like that. Okay. So

1 for now we'll scratch the random jury selection.  
2 But we'll definitely provide read ahead on that  
3 article, and then judges, the panel of former  
4 military judges and update on military  
5 sentencing.

6 For the last one -- and I'll come back  
7 to the one prior to that in a second. So we have  
8 a request from -- separate from the public  
9 comment that folks go through a processing  
10 request to come in as you all are very familiar  
11 with come in. We have a request because it's  
12 more than five minutes. In fact, it's a request  
13 maybe perhaps 45 minutes to an hour for the  
14 League of United Latin American Citizens to come  
15 in. And it presents specifically on issues such  
16 as, like, wrongful conviction.

17 And so there's a request from members  
18 of that and a member that also came in and  
19 testified before the panel, Mr. Owens, who I  
20 believe is probably in the room with us, to  
21 provide a presentation to the Committee. So  
22 again, it's more than the public comment

1 designated session. So, like, the panel members,  
2 if we want to vote on that.

3 MEMBER BASHFORD: Sir, is that a  
4 military-based group or just a civil rights  
5 group?

6 COL BOVARNICK: A civil rights group.

7 MEMBER BASHFORD: But --

8 COL BOVARNICK: There's a number of  
9 former --

10 MEMBER BASHFORD: -- of military  
11 members or just across the general citizenship?

12 COL BOVARNICK: General citizenship.  
13 Obviously, there's a lot of -- I shouldn't say  
14 obviously or generally. I don't know the  
15 statistics. But I know that there's many former  
16 military members and current military members  
17 perhaps that are part of it.

18 MR. OWENS: Correct. So ma'am, with  
19 all due respect. So LULAC is a civil rights  
20 organization. But it's the military sector, the  
21 veterans group to talk about wrongful  
22 convictions, some of the impacts, some of the

1 things that I haven't heard discussed by the  
2 Committee that happened in many of those cases.  
3 It's something like that.

4 COL BOVARNICK: Yeah, I apologize.  
5 That's right. It's the military sector of that  
6 larger group.

7 CHAIR SMITH: Colonel, I'm just  
8 curious. Is there a -- either an officers --  
9 minority officers group or a female officers  
10 group that focuses on or has one of its issues as  
11 the military justice and treatment of minorities  
12 or women in that system and then -- or maybe a  
13 bar association? I know there's the military  
14 spouse's bar association. Is there a comparable  
15 bar association, minority or women's bar  
16 association, that might have some expertise to  
17 share in terms of experience with the military  
18 justice system specifically, obviously, sexual  
19 assault?

20 COL BOVARNICK: I will find out. I  
21 don't know if anyone is familiar with that off  
22 the top of your head.

1 MR. OWENS: NNOA, National Naval  
2 Officer Association. Your Honor, with all due  
3 respect, approach them about it. And they don't  
4 have an emphasis or a focus on it. But they have  
5 an actual interest in it.

6 COL BOVARNICK: But I'll find out,  
7 ma'am, if there's other groups.

8 MEMBER KRAMER: The American Bar  
9 Association has a military justice -- I'm not  
10 sure the exact name of it. But they have a  
11 military justice section.

12 COL BOVARNICK: We'll look into that  
13 and make a proposal back to the group.

14 (Simultaneous speaking.)

15 MEMBER CASSARA: -- military law  
16 committee meetings at the ABA. At least he's  
17 supposed to.

18 COL BOVARNICK: So for now, is the  
19 panel interested in hearing from this particular  
20 group or what until we determine if there's going  
21 to be other groups? So we'll table that one for  
22 now. Okay. We'll wait on that one and then

1 determine if we could have a future meeting that  
2 will have representatives of other groups as  
3 well. Okay.

4 For the FY23, Ms. Hagy, are you able  
5 to switch over to those couple PDFs? So two I  
6 wanted to show in particular and then I'll come  
7 back to that for the next meeting. This one  
8 you'll see Section 543. I'm sorry. I can't do  
9 it without my glasses. Yeah, so the  
10 randomizations, this was mentioned today about  
11 the proposals. I just wanted to throw it up  
12 there for the --

13 MEMBER SCHWENK: We don't see any new  
14 slides on the VT screen.

15 COL BOVARNICK: Oh, you're can't see  
16 them?

17 MEMBER SCHWENK: We see the same old  
18 slides with -- review team on racial disparity,  
19 et cetera.

20 COL BOVARNICK: One second. I'm going  
21 to show you two sections of the proposals for the  
22 FY23 NDAA. One is specific to the DAC-IPAD.

1 MEMBER SCHWENK: Got it now.

2 COL BOVARNICK: Got it. So that's  
3 Section -- we're just going to kind of scroll  
4 through it here to show you what's out there for  
5 '23. And then the request at the end of these  
6 two is if you want someone to come in and talk in  
7 general about these FY23 proposals at the next  
8 meeting. So you can see there about this was  
9 mentioned.

10 Can you scroll down a little bit? And  
11 it's basically giving you the timing of that one.  
12 And then for the one for the DAC-IPAD, can you  
13 switch over to the other one? Thank you, 549B.

14 So this one here kind of summarize  
15 them as you scroll through it. But this is  
16 basically asking the DAC, so a year from  
17 enactment of this one for the DAC-IPAD to report  
18 on the feasibility and advisability of  
19 establishing a uniform policy for sharing of  
20 information described -- with victims under  
21 defenses under the UCMJ with Section C. So I  
22 know we're kind of scrolling through.



1           But with Section C, specifically, it  
2 has to do with recorded statements of victims,  
3 records of forensic examinations of victims, and  
4 medical records in general. So what the statute  
5 is asking, does the DAC-IPAD study the  
6 feasibility of providing that and sharing  
7 information with counsel for victims of offenses  
8 under the UCMJ. And then to consider if it  
9 feasible the privacy concerns, criminal  
10 investigative process, the military justice  
11 system in general.

12           And if feasible, when in the process  
13 would the information be provided? So again,  
14 this is just a preview of what's in the FY23 NDAA  
15 proposal. Just wanted to share that because it  
16 specifically references the DAC-IPAD.

17           So back to the beginning is -- and if  
18 we could go just back to the slide. I just want  
19 to see if the panel is interested in getting a  
20 general update on the FY23 proposals at the  
21 February meeting. No objection, so we'll build  
22 that into the schedule as well.

1           And finally, just back to the slides,  
2           I think that's actually -- oh, and I think we  
3           should have a slide on due-outs. If you could go  
4           to the last slide. I don't even know if I added  
5           it or if it's just in my notes there. Okay.

6           So Common Access Cards, so this is  
7           kind of just the wrap-up by the way. So we'll  
8           build the agenda, then I'll discuss with Chair  
9           Smith but build it based on everything we said.  
10          So a two-day agenda for February which will  
11          including deliberations on the March report at  
12          that time.

13          So separate from that, so we're done  
14          with that, Common Access Cards. Bottom line, I  
15          think there's some confusion, a lot of back and  
16          forth on what that is, is we can get the members  
17          who want them a Common Access Card for not only  
18          access to the building but to be able to, like,  
19          actually put it in a computer with the  
20          certificates and then, for example, come into the  
21          office to view cases. So Mr. Trexler from our  
22          team will work with those members who want that

1 card and we'll help them to get it so that you  
2 have access to the building and access to work on  
3 a computer, a government computer.

4 And if you want a government laptop  
5 issued, we can work with that as well. But not  
6 all members want everything. So that's why I  
7 said before. We'll work individually with one  
8 POC so there's no confusion back and forth.

9 Okay. Courts martial observation, I  
10 know folks are updated. I know we have a couple  
11 of folks already working, a few folks working  
12 with Terry Gallagher and the staff for upcoming  
13 cases. So we'll continue to update that list to  
14 provide members the opportunity to look at it and  
15 pick a case. The best we do out about three  
16 months and not all the services have them three  
17 months out because as you all know it's just  
18 going to be unreliable.

19 Like, okay, here's a docketed in June.  
20 That sounds great. Probably not going to happen.  
21 So we'll continue to send that to the members.  
22 Just let the staff know, and then we will get you

1 linked up with an escort for those cases.

2           So you also heard and I know there's  
3 a specific request or invitation, Ms. Goldberg,  
4 you mentioned to this Navy course. So again,  
5 we're going to also send a list -- a consolidated  
6 list from all the services for their upcoming  
7 courses that any member wants to attend. We have  
8 a list of many, many courses that are upcoming.

9           But I think there was one specific  
10 invitation. Ma'am, did you want to mention -- I  
11 think you mentioned yesterday the Navy offered.  
12 And I don't know if we have a Navy rep, that  
13 there's a course of particular interest in April.

14           Of course, there'll be others.  
15 There's going to be some from the Air Force, the  
16 Army, the Marines. But I feel like you said you  
17 got, like, a specific invite.

18           MEMBER GOLDBERG: So Vice Admiral  
19 Crandall yesterday, a JAG for the Navy, said that  
20 they are running a course. I think it's in --

21           COL BOVARNICK: In Newport.

22           MEMBER GOLDBERG: -- in April in

1 Newport, Rhode Island that they're very excited  
2 about where they do great training of their  
3 victim counsel. So it sounded like a great  
4 opportunity that he wanted to extend to the DAC-  
5 IPAD to observe some or all of the course.

6 COL BOVARNICK: Perfect. And I'll, of  
7 course, get the details out to the members on  
8 that. But just like when General Risch mentioned  
9 a specific invitation, I wanted to make sure we  
10 noted that for the record, a specific invitation  
11 from the Navy. Okay. And the Marine Corps  
12 mentioned one as well.

13 Again, we'll get the specifics in.  
14 And the Army's OSTC certification course is in  
15 June. So again, more pending on all of that.

16 Okay. And finally as we wrap this up,  
17 the request for information we're tracking. So I  
18 don't know. I think we captured it in the last  
19 couple of slides. Quickly, we're trying to put  
20 them together.

21 Bottom line with these next couple is  
22 understand that the Committee wants more specific

1 information on the diversity statistics, kind of  
2 the discussion at the end of the day yesterday  
3 with Mr. Mason when he briefed it. But we're  
4 going to capture all that, put it in an official  
5 request for information back out to the services.  
6 So the JAG Corps diversity statistics, there's a  
7 question about, is it too hard to request --  
8 like, what is the composition of a panel and the  
9 breakdown of that?

10 We're going to request everything and  
11 at least have the answer back on, hey, we can do  
12 that, we can't do it. But we're going to request  
13 all that. There's one other slide, I believe. I  
14 think we captured it all on one.

15 But there's basically all the  
16 information. So we're tracking that stuff rather  
17 than belabor it and read everything specific. We  
18 have the transcripts and we'll have it from this  
19 meeting.

20 But everything requested, we are on  
21 it. Any last minute requests? I know we want to  
22 close this particular meeting because there's

1 other stuff coming up. I'll open it up. Yes,  
2 ma'am.

3 MEMBER TOKASH: I know you mentioned  
4 before about the military magistrates. And I did  
5 want to say I don't know if that's more  
6 appropriate for the special -- I know it's one of  
7 the Special Project Subcommittee tasks. So maybe  
8 that's something we'll explore further. But I  
9 think that is something that we should continue  
10 to look at.

11 COL BOVARNICK: Request information on  
12 that, ma'am? Sorry.

13 MEMBER TOKASH: Yes.

14 COL BOVARNICK: Got it.

15 MEMBER CASSARA: Colonel Bovarnick,  
16 really quick. In addition to going to courts  
17 martial, I think for some of the board members,  
18 it might be helpful to look at the CAAF and/or  
19 service courts of appeal oral argument calendars.  
20 And the only reason I thought about that was when  
21 I saw the dates for the next meeting, I may be in  
22 oral argument at CAAF one of those days. So it

1 just occurred to me that might be helpful for  
2 some of the board members who don't have any  
3 appellate knowledge or experience to either go to  
4 or listen to oral arguments from either the  
5 service courts of appeal or the CAAF.

6 COL BOVARNICK: Yes, sir, tracking.  
7 So we'll include that when we provide these lists  
8 of dates for opportunities for panel members  
9 tracking oral arguments from the service courts  
10 of appeal and CAAF. Anything else? Ma'am, do  
11 you have any closing comments for the public  
12 meeting?

13 CHAIR SMITH: I actually don't. I  
14 think we've done good work. Thank you to the  
15 staff. Thank you.

16 MR. SULLIVAN: This public meeting is  
17 closed.

18 (Whereupon, the above-entitled matter  
19 went off the record at 1:39 p.m.)  
20  
21  
22



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In the matter of: Public Meeting

Before: DAC IPAD

Date: 12-07-22

Place: Arlington, VA

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