

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

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MEETING

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WEDNESDAY
 JUNE 14, 2023

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The Advisory Committee met in Salon D of the Renaissance Arlington Capital View Hotel located at 2800 South Potomac Avenue, Arlington, Virginia, at 8:25 a.m., the Honorable Karla Smith, Chair, presiding.

PRESENT

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

ALSO PRESENT

Mr. Dwight Sullivan, Designated Federal Official

DAC-IPAD STAFF

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

Mr. Dale L. Trexler, Chief of Staff

Ms. Stacy Boggess, Senior Paralegal*

Ms. Alice Falk, Technical Writer-Editor

Ms. Theresa Gallagher, Staff Attorney

Ms. Nalini Gupta, Staff Attorney*

Ms. Amanda Hagy, Senior Paralegal

Mr. 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

Ms. Evie Ankele, Intern

Mr. Yonah Berenson, Intern

Mr. James Van Drie, Intern

*Present via video-teleconference

Witnesses

Special Victims' Counsel Organizations

COL Carol Brewer

Col Tracy Park

CAPT Daniel Cimmino

LtCol Iain Pedden

Ms. Elizabeth Marotta

Civilian Advocacy Organizations (Victim Services)

Ms. Jennifer Elmore

Mr. Ryan Guilds

Civilian Advocacy Organizations (Diversity)

Ms. Elisa Cardnell

Ms. Lorry Fenner

Ms. Rafaela Schwan

DoD Office of Diversity, Equity, and Inclusion

Dr. Lisa Arfaa

Public Comment

Ms. Holly Yeager*

Mr. Jerry Clifft*

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

2 8:29 a.m.

3 MR. SULLIVAN: Good morning, I am still
4 Dwight Sullivan, the designated federal officer
5 for the Defense Advisory Committee on
6 Investigation, Prosecution, and Defense of Sexual
7 Assault in the Armed Forces, better known as the
8 DAC-IPAD.

9 Day two of this meeting is officially
10 open. Judge Smith, you have the con.

11 HON. SMITH: Good morning everyone. I
12 think we're going to jump right in and get
13 started.

14 COLONEL BOVARNICK: I think Ms.
15 Bashford, did you have a comment?

16 MS. BASHFORD: Yes. We learned, the
17 DAC-IPAD learned last month of the untimely
18 passing of Jim Markey. Jim, I knew him for years
19 before the DAC-IPAD was constituted.

20 He had a long and illustrious career
21 investigating sexual assaults. His good humor
22 and his insights were invaluable to the DAC-IPAD,

1 and he is deeply missed, both on a professional
2 and personal level.

3 And I wish his family all the best.

4 HON. SMITH: All right, thank you.

5 Colonel?

6 COLONEL BOVARNICK: Yes, so this
7 morning we have our three panels for the members
8 first to focus again on Section 5.9b.

9 But I'm going to hand it off to Ms.
10 Meghan Peters, to introduce our first panel.

11 MS. PETERS: Good morning, Chair Smith
12 and committee members. This morning leaders from
13 the Special Victims Counsel, and Victims Legal
14 Counsel Programs in each of the military
15 services, have joined us to continue our
16 discussion of a victims, and victims counsels'
17 access to case materials.

18 At the February public meeting, you
19 asked to meet with various stakeholders to
20 discuss the policies and practice, for the
21 disclosure of materials in sexual assault
22 investigations and trials.

1 In particular, your task focuses on
2 disclosure of a victim's recorded statements to
3 law enforcement, the victim's medical records,
4 and the investigative file, and the records of a
5 medical forensic examination.

6 That is a non-exclusive list of areas
7 of focus for your tasking.

8 I'm going to offer brief introductions
9 for our speakers today, and then turn the floor
10 over to the chair and the members, for questions.

11 Colonel Carol Brewer is the Chief of
12 the Army Special Victims Counsel Program.

13 Captain Dan Cimmino is the Chief of the Victims
14 Legal Counsel Program for the Navy.

15 Colonel Tracy Park is the Chief of the
16 Victims Legal Counsel Program in the Air Force.

17 Colonel Ian Pedden is the Chief of the Victims
18 Legal Counsel Program for the Marine Corps.

19 And Ms. Elizabeth Marotta is the Chief
20 of the Special Victims Counsel Program from the
21 U.S. Coast Guard.

22 They bring a wealth of experience and

1 a variety of military justice roles as
2 prosecutors, defense counsel, staff judge
3 advocates, and other assignments.

4 Their professional biographies are
5 available at tab 9 of your meeting materials.

6 And the remainder of the time, I leave
7 to you for questions on victims counsels' access
8 to information.

9 Thank you.

10 HON. SMITH: So I think I'll start off
11 with the first question, which is just generally
12 describe the current practice for obtaining that
13 information.

14 COLONEL BREWER: And we'll do our
15 normal where we start at one end and move on
16 down. And for the folks online, I'm Colonel
17 Carol Brewer.

18 In the Army in general, during the
19 investigative process, depending on the
20 interactions between the prosecutors and the
21 victim's counsel, or victims who are
22 unrepresented, materials may be provided as they

1 become available.

2 But at the time that charges are
3 preferred, it's required that all of any
4 statements made by the victim, or evidence
5 provided by the victim, copies of those are
6 provided to the victim at that time.

7 Then throughout the process preparing
8 for a court martial, additional materials may be
9 provided as they're necessary to prepare that
10 victim, ask follow up questions, and prepare for
11 trial.

12 But really, no additional ones are
13 required at that point. And then if there's a
14 situation where we decide we cannot proceed to
15 trial, usually then there's much more open
16 discussion and sharing of information from the
17 investigative file at that point, to make sure
18 that a victim understands why a prosecution was
19 not possible.

20 But in general, what is required is at
21 the time of preferral, is all the victim's own
22 statements and evidence, and then as we progress,

1 it's going to be a copy of the charge sheet, and
2 especially the charges that are related to that
3 specific victim.

4 That's our general process.

5 COLONEL PARK: Good morning, Madam
6 Chair, ladies and gentlemen.

7 In the Air Force, the victim's counsel
8 may file a official use request for the
9 investigative file, and records.

10 The SJA is the discretionary, is the
11 release authority. The authority is
12 discretionary. But in practice, we, victim's
13 counsel do in fact, receive the, a redacted copy
14 of the ROI pursuant to the request.

15 Typically, our victim's counsel submit
16 the request at the time that they actually send
17 the notice of representation. So, very early on
18 in the process.

19 We have found that even again, even
20 though it is discretionary, typically we see ROIs
21 being released in full, redacted, but in full.

22 CAPTAIN CIMMINO: For us in the Navy,

1 a similar practice in that the trial counsel upon
2 request, will turn over most of the documents for
3 clients that are represented by our counsel.

4 Obviously, we don't represent every
5 victim. But for those that do, it's a normal
6 practice and with part of our appointment they'll
7 submit requests for all of the documents, at
8 least that were authorized for.

9 And I think later in the discussion,
10 we'll get in more onto where we think we might
11 need to go to, as far as getting access to more
12 information.

13 But that initial stuff that's required
14 under the instruction, we obtain through the
15 initial process and our request for that
16 material.

17 COLONEL PEDDEN: Good morning, ladies
18 and gentlemen.

19 Those practices are generally the same
20 in the Marine Corps that we'll typically receive
21 the statements of the victim. And any evidence
22 derived directly therefrom, that's a term that's

1 open to a significant amount of interpretation.

2 Medical reports that are in the
3 possession of the government, including the safe
4 exam, less some of the materials occasionally
5 associated with them.

6 That information is generally provided
7 on request. Sometimes it's provided prior to
8 preferral by NCIS. Other times, it's provided by
9 the government counsel.

10 Thank you.

11 MS. MAROTTA: Hi, Elizabeth Marotta
12 from the Coast Guard.

13 Our practice is very similar. We are
14 also receiving copies of the statements and
15 documentary evidence adopted, produced, or
16 provided by the victim.

17 We are receiving that from the trial
18 counsel at the investigative stage, preferral of
19 charges.

20 We're entitled also to video, excerpts
21 of the charge sheet, and then you'll get some
22 additional information.

1 Case-by-case it can differ, so
2 sometimes we will receive some information before
3 preferral of charges; sometimes after.

4 It's really dictated by the trial
5 counsel, the type of evidence and whether or not
6 they can understand that, the importance of
7 victim's counsel being able to review it.

8 MR. CASSARA: I am trying -- the world
9 has changed in the 30 years I've been trying
10 court-martials (sic) just a little bit.

11 And I'm trying to get them a handle on
12 what exact information is being released, and
13 when.

14 So for example, you said, Colonel
15 Park, you said that the ROI would go to the
16 victim's counsel fairly early in the process,
17 redacted.

18 So if you've got a case, it's sort of
19 a two-prong question. If you've got multiple
20 victims, will they get, will each individual
21 victim get a copy of all of the statements of all
22 of the victims, or just their own statements?

1 That's question one.

2 And question two is, at what point
3 would an alleged victim get copies of statements
4 by other witnesses, those that may be exculpatory
5 to the accused, and those that may be inculpatory
6 to the accused?

7 Thank you.

8 COLONEL PARK: Sir, for multi-victim
9 cases, if there is a, each, if each victim is
10 represented by a victim's counsel, they will all
11 have individual requests to the SJA to release
12 the documents.

13 So I asked this question of the field
14 and they said, so all PII is redacted but in
15 terms of whether or not the other victims in the
16 case, it's not consistent on whether or not all
17 of it is redacted or included, when the ROI is
18 turned over to each of the victims' counsel.

19 If it's an unrelated offense, they
20 typically will see more redactions on that. But
21 if it's related to the sex assault or whatever
22 the offense was for which they get a victim's

1 counsel, that they may see more information on
2 the other victims in the Report of Investigation.

3 COLONEL BREWER: And sir, just along
4 the same lines in the Army, they would get only
5 their own statements.

6 And we do that very deliberately not
7 to open up that victim to cross-examination about
8 the impact of having other witnesses statements
9 available to them prior to their testimony.

10 CAPTAIN CIMMINO: Sir, for us in, with
11 NCIS after yesterday's testimony I think they
12 made it clear, we don't receive any of that for
13 the Navy.

14 At least the NCIS's practice is we
15 don't receive anything but the victim statements,
16 and stuff directly related to them.

17 I think in part of our discussion,
18 we'll talk about the evolution of where we, at
19 least from the Navy's perspective on the Victim
20 Legal Counsel Program, would like to take the Air
21 Force approach, and one step further of giving
22 victims more access to information, instead of

1 less.

2 But currently, all they get is the,
3 their statements and the basic medical
4 information. Nothing about other victims, or
5 witnesses, or anything else related to the case.

6 COLONEL PEDDEN: And that's the
7 practice in the Marine Corps, as well, sir.
8 There are some exceptions to that.

9 For example, where a staff judge
10 advocate who is in possession of a command
11 investigation that might be tangentially related
12 to a criminal investigation that's already under
13 way, might release that information in the
14 command investigation, to the victim's legal
15 counsel.

16 And in the process of that, we might
17 get statements of other folks, other witnesses in
18 a case. But that's quite rare.

19 A much more common practice is just
20 the victim's statement, and things derived
21 directly from it, and other documentary evidence
22 in the investigation, not to include the ROI.

1 So the same NCI practice for us.

2 MS. MAROTTA: And in the Coast Guard,
3 we don't receive or get to review the ROI, or any
4 statements from other witnesses.

5 Now if an SVC is able to articulate to
6 a trial counsel a need for some specific
7 information, and that trial counsel understands,
8 then there would be an exception.

9 They might give them a summary of
10 what's contained, other, otherwise in the file.
11 But nothing is ever turned over.

12 COLONEL PARK: May I actually follow
13 up?

14 So in terms of receiving the Report of
15 Investigation or any statements, it is disclosed
16 to the victim's counsel.

17 And because it's part of a official
18 use request, we do not, we're not authorized to
19 then turn it over to the victim for review.

20 It is for the victim's counsel review,
21 and to advise the client on you know, providing
22 the best recommendation, legal advice to the

1 client.

2 But we do not turn over the Report of
3 Investigation, or any of the other witness
4 statements to the victim. That has to be
5 released through the SJA, and has to be with the
6 consent of the SJA.

7 MS. TOKASH: This is Meghan Tokash
8 speaking. I first wanted to acknowledge you,
9 Colonel Park, for what, using what I consider is
10 a best practice in reaching out to the Office of
11 Victims of Crime Technical Training and
12 Assistance Center, to train your workforce on
13 resiliency and burnout.

14 This committee as you know, studied
15 SVC and VLC tour lengths and I just wanted to
16 acknowledge you, and say that I think that's a
17 best practice. And that the OVC stands by to
18 help train the services in that regard.

19 With that, we as a committee may hear
20 at least anecdotally, that some victims are not
21 getting access to pleadings that victims in the
22 civilian sector would have access to either

1 through their attorney, or through a public, the
2 public-facing PACER system.

3 Is that your experience? Are you
4 hearing that from your workforce? And if so,
5 what are you hearing?

6 Thank you.

7 COLONEL PARK: Ma'am, first thank you.
8 You're one of the briefers with our resiliency
9 training, so we really appreciated that.

10 With regard to your question, we do
11 have a docketing or a SharePoint site, that we,
12 that our victim's counsel are able to get access
13 to the motions and filings.

14 We also will get them through the
15 legal office. And yes, sometimes we do have to
16 follow up with them. They're very good about
17 responding to them if we were accidentally left
18 off any of the emails, or in receiving that
19 information.

20 They are good about fixing that
21 problem, and we can definitely raise it up the
22 chain to, to you know, get earlier access to it.

1 But we have different ways to receive
2 the information, at least the victim's counsel
3 do.

4 COLONEL BREWER: And we have the Army,
5 I would say it's very similar. It is the
6 government's responsibility to disclose any
7 motions that impact victim's rights, or victim
8 testimony.

9 And so normally, those are provided
10 upon filing by either party to the victim's
11 counsel, so that victim's counsel can respond
12 accordingly.

13 It's obviously more difficult for
14 victims who are not represented because
15 possession of those materials may not be helpful,
16 or you know, comprehensible to somebody who is
17 representing themselves.

18 But for the counsel I work with,
19 there's occasions where just like when the Air
20 Force, somebody forgets to provide it or you
21 know, there's a dispute about whether a certain
22 pleading should be provided.

1 On those rare occasions, sometimes we
2 will get involved from the program level and just
3 reach out to somebody else within that OSJA, and
4 it always turns out to either be a
5 misunderstanding, or an oversight and it's easily
6 corrected.

7 And in the few cases where it has
8 impacted victim's rights, we've then supported
9 the victim in trying to find a remedy for that
10 late notice.

11 But in general, the practice is there
12 should be provided to our counsel upon filing.

13 MS. TOKASH: As a follow up, and I'd
14 like to hear from the other services. When you
15 say filing, is that an email transmission?

16 COLONEL BREWER: Yes, because obviously
17 when either the defense or the government are
18 filing one of these motions, they're doing it
19 electronically to the judge.

20 Ideally the judges would ask you know,
21 why the victim counsel wouldn't have been
22 included in that email.

1 But if they, oversight, usually one
2 side or the other will realize that victim
3 counsel wasn't included and then the SVC will get
4 that follow up email, hey we forgot to notify
5 you.

6 Of if they just being in the same you
7 know, general office area hear about it, they'll
8 ask and then say you know, and provide it at that
9 time.

10 But in general, when they're sending
11 that email, the special victim counsel is one of
12 the people who's on the copy line and then has an
13 opportunity to respond, usually in accordance
14 with the judges docketing order that they
15 provided as soon as the case was referred.

16 CAPTAIN CIMMINO: Again, our
17 communication is through email, as well. We're a
18 decade into this project of the victim legal
19 counsel program.

20 So where we were to where we are now
21 as far as the communication, is light years ahead
22 of how we're included.

1 I think if you have some of the gaps,
2 it's probably from inexperienced trial counsel.
3 And, I think this is one of the positives of OSTC
4 with more experienced counsel going in.

5 I think those gaps should be closed
6 almost hopefully airtight so you don't have them.
7 But I think general as a matter of practice, the
8 communication is very good today in 2023 versus
9 2013, very different.

10 But there may be gaps. There may be
11 seams. There may be places that we missed, but
12 my counsel are generally satisfied.

13 And when they're not, they make it a
14 point to let leadership on the trial side know
15 hey, there was an oversight. I was skipped here,
16 I was not made a part of that.

17 And they let us know, as well, so we
18 can communicate that up chain.

19 MS. TOKASH: And again, I'd like to
20 hear from the other services but you sparked a
21 question in my head.

22 Are you and the other chiefs here

1 already having those conversations with the lead
2 special trial counsel?

3 CAPTAIN CIMMINO: I'll answer myself
4 and then pass. I speak frequently with the
5 Navy's lead special trial counsel.

6 COLONEL PEDDEN: Same here, ma'am. I
7 speak frequently both to General Wordard
8 (phonetic) and Colonel Hines. And we exchange a
9 fair amount of information.

10 To your question about the pleadings,
11 I do see gaps there. And I agree with Captain
12 Cimmino that this practice has improved
13 immeasurably in the decade that these progress,
14 or that these programs have been maturing.

15 That said, much like the Army's system
16 in the Marine Corps, the VLC will receive
17 pleadings related to matters that impact the
18 victim's ability to enforce rights.

19 Which sounds good in practice.
20 However, it creates another analytical step that
21 in my view, is unnecessary.

22 Rather, that process should be

1 automated, so that the VLC receives all pleadings
2 on the same terms that the parties to the
3 litigation do.

4 Unless there is some compelling reason
5 not to provide that, then that compelling reason
6 should be articulated so it can be brought to the
7 attention of the VLC, and if necessary,
8 potentially brought to the attention of the
9 military judge.

10 Email is a pretty good system, but
11 sometimes as Captain Cimmino mentioned, we're
12 occasionally playing catch up where folks are
13 inadvertently left off on messages.

14 If the VLC were simply served on the
15 same terms as the other counsel in the case, that
16 would close those gaps and then vest the
17 discretionary determination where it rightly
18 belongs.

19 And so now for example, it's up to the
20 trial counsel to determine whether or not this
21 particular motion and the pleadings associated
22 with it and other documents, relate to the

1 enforcement of the victim's right.

2 That judgment better resides with the
3 victim's legal counsel, who has a fiduciary
4 obligation to that client.

5 Not with the government, not with
6 counsel, but as a fiduciary obligation to another
7 client.

8 MS. MAROTTA: We have a very similar
9 experience in the Coast Guard that the practice
10 is evolving, and it's definitely gotten better
11 since our trial services are consolidated. And,
12 our counsel are not as scattered around the Coast
13 Guard.

14 So, we're getting better procedures as
15 far as being included on things. But on filings,
16 it should be you know, filings should be provided
17 to the victim, victim's counsel upon filing.

18 However, what we're finding is it
19 typically would be a defense motion. The defense
20 decides this doesn't impact the victim's rights,
21 so I'm not including the SVC.

22 It goes to the trial counsel. They

1 don't think about it, and so you have some
2 litigation that they haven't identified an issue,
3 that we might have identified. And we get
4 included late in the game.

5 So once you know, they'll be down the
6 practice of responding and all of a sudden
7 realize oh, I should have had the SVC in this.

8 And then we might end up with just two
9 days to respond, as opposed to if we had received
10 the defense motion when it was filed, we would
11 have been able, you know, had the whole time to
12 think about it and prepare our answer.

13 So that happens less and less as we
14 are progressing. But it still is a, and we
15 believe that our new computer system that we've
16 just adopted, NCORS, where everything's going to
17 be electronically put into a database that we all
18 have access to, that that should solve a lot of
19 these problems with being able to look at what's
20 being filed.

21 That's our experience so far.

22 And just to add regarding on behalf of

1 the Army are communication with the prosecution
2 wings.

3 We provide instruction at all of our
4 advocacy courses regarding victim notifications
5 that are required and how to build a relationship
6 with our clients, while also working with our
7 counsel.

8 And tomorrow I'm providing instruction
9 at our special trial counsel certification
10 course, on this exact issue.

11 COLONEL PEDDEN: And ma'am, one more
12 point, if I may.

13 Ms. Marotta brought up a great point
14 that it's the government counsel who in turn,
15 provides these documents in many cases, to the
16 victim's legal counsel.

17 I think that's sort of a relic of the
18 past where we viewed victim's rights and the
19 victim's legal counsel, as sort of ancillary to,
20 or an accessory to, the government's case, rather
21 than functionally and professionally independent,
22 which they are now.

1 And so the NCORS system that she also
2 mentioned is good, but computing can't really
3 substitute for policy and bridge that gap in a
4 meaningful way. And computers can always be told
5 to do different things.

6 I think the better practice is to
7 regard VLC as functionally independent, and make
8 sure that they're served on the same terms as
9 other counsel.

10 MS. TOKASH: And is that computerized
11 system that you both mentioned, accessible to the
12 public or is it just an internal system?

13 CAPTAIN CIMMINO: I think NCORS is
14 going to be through us. It's internal to our
15 system.

16 MS. MAROTTA: It's a Navy system, so --
17 (Simultaneous speaking.)

18 CAPTAIN CIMMINO: Yes, it's our new
19 database. We're light years behind but getting
20 caught up.

21 MS. TOKASH: Hey, you have a system,
22 that's something, so.

1 COLONEL PEDDEN: We have a system under
2 development.

3 CAPTAIN CIMMINO: Yes.

4 COLONEL PEDDEN: But I'm very
5 cautiously optimistic about that system, and the
6 openness and transparency that it will bring to
7 our practice.

8 We're not fully functional. I'm not
9 the NCORS expert and would invite you to ask
10 those folks to come and testify, too. They'd be
11 much better able to explain how it works.

12 MS. TOKASH: Because we've heard
13 anecdotally as a committee, that at least some of
14 the those stakeholders in the victims services
15 community, would like to see the military move
16 towards a PACER-like system that is not only a,
17 almost like a simultaneous distribution of
18 information when a pleading is filed, but also
19 public-facing.

20 What are your thoughts about that, and
21 then I will pipe down.

22 CAPTAIN CIMMINO: Only because I'm not

1 a tech expert, but I do agree with Colonel
2 Pedden, bring our NCORS folks in because there is
3 a public-facing part of this process.

4 Because I think they were looking at
5 how the public would get access to certain
6 information. I'm just not technically savvy
7 enough to explain.

8 We've been working in the weeds on how
9 NCORS could be used for our counsel, not
10 necessarily the other side, the government's
11 figuring that out.

12 But I think they can tell you what
13 their plan is, because it's a big financial
14 investment the Department of the Navy has made.

15 MS. MAROTTA: I do, I agree. I believe
16 that this is one of the reasons why they're
17 developing the system was to solve that problem
18 of having public-facing documents.

19 COLONEL BREWER: And I'm not tracking
20 anything that's going on in the Army, by
21 obviously on behalf of victims, we wouldn't have
22 any objection to having it easier for them to be

1 able to access when motion hearings are
2 happening, when court martial proceedings are
3 moving forward.

4 And having the public aware of that,
5 as well. It seems like it would be you know,
6 just spreading a little more sunshine on the
7 system.

8 But I'm not aware of anything in the
9 Army that we're doing to better do that. Our JAG
10 Corps website does have access to our court
11 docket, but how effective and how well-maintained
12 that is, I couldn't describe for you.

13 COLONEL PARK: So the field has said
14 that there are two ways that they get it. One is
15 through the judiciary, so there is some site that
16 they would have access to.

17 I don't know if it's public-facing and
18 that in addition to the email communication that
19 they have with the legal office.

20 And then to your other point, I do
21 talk with the Office of Special Trial Counsel.
22 We have them brief at our certification course to

1 better establish the working relationship. And
2 actually, we had another training with them
3 yesterday.

4 So definitely want to build that
5 because I think with those relations, we do get
6 better access to information and that just
7 provides a better service to victims.

8 COLONEL BREWER: I just really wanted
9 to add one more thing. The person who's most I
10 think consistently responsible for notifying not
11 just victims, but all witnesses of court martial
12 proceedings, is our victim witness liaisons that
13 we have at every single you know, legal office
14 and preparing.

15 And so this is someone who's main job
16 is to keep track of every person who's going to
17 be a witness.

18 All of their contact information, and
19 to keep them updated on any time a date changes,
20 any time they might be required to testify And
21 all the procedures in terms of travel, and all
22 those other things.

1 So, we already have that system where
2 there's a specific person hired in the office to
3 help walk these people through.

4 And then within the special trial
5 counsel, they always have a special victim
6 witness liaison and that person is really focused
7 on our clients.

8 And then all the victims who are,
9 whether they're represented or not, making sure
10 they understand the court martial process and all
11 of their responsibilities, and when they'd be
12 requested to come and testify.

13 So there's already that personal
14 touch. Adding the electronic would be great, but
15 I don't think we would ever get rid of that
16 because that's kind of the person that you go to
17 to ask those questions.

18 And that's been from my experience,
19 very effective.

20 MR. KRAMER: Thank you all, very much.
21 I've got a couple of questions.

22 What's the rough percentage of people

1 who ask for representation by the SVC as opposed
2 to complainants who don't want, or for whatever
3 reason?

4 And if you have any idea of what
5 reasons people may not want to request the SVC
6 again, I'm sure it's anecdotal but that's the
7 first question. And then I've got a couple more.

8 Thank you.

9 COLONEL BREWER: We were asked for
10 these stats probably about a year and a half ago.
11 So my memory you know, due to my memory and time
12 that has passed, there was only about I want to
13 say it was like 20 or 30 percent of people who
14 ever said no.

15 And we do see some folks who when
16 they're offered victim counsel then later on as
17 things progress, the investigation goes further
18 and now they have questions about court martial,
19 or they're aware that you know, CID wants to look
20 at their, their telephone or records.

21 And then they'll said wait, do I still
22 have a right to victim counsel.

1 But I would say the vast, vast
2 majority of victims who are eligible for our
3 services, do request it and follow through with
4 those services.

5 COLONEL PARK: Sir, I'm sorry, I don't
6 know the data on that of, I know they're all
7 notified of the availability of victims counsel.

8 I think that seeing the numbers come
9 through and the request for extraordinary
10 circumstances request, meaning those, you know,
11 for those who are not statutorily eligible or by
12 policy, we do get quite a few of those.

13 So, I see as a great demand for
14 victims' counsel services.

15 CAPTAIN CIMMINO: Great question, sir.
16 So we're actually doing a tasker now to collect
17 some of the data.

18 But I just, I've been to 31 Navy
19 installations in the last 12 months and when I
20 meet with the SARCs and the victim advocates,
21 interesting conversations where I go is what's
22 the take rate and your AOR, some of the

1 differences.

2 And one of the interesting, I use that
3 as a measure to see where we are. And if I see a
4 disparity that's not common across everywhere
5 else, I start to ask questions. And I really
6 haven't seen that in many places

7 But interesting when I was on one
8 installation and I asked, you know, a SARC why
9 the take rate was only 50 percent on their
10 installation.

11 And they said you know, interestingly
12 enough for them, a lot of the sailors that were
13 coming over just wanted a paper record that they
14 could turn over to the VA when they leave.

15 They didn't want services. They
16 didn't want anything. They wanted a document
17 that they could show it.

18 And that was an interesting take for
19 me because prior to that, I hadn't heard that
20 kind of assessment. But in that particular
21 location, that was what the SARC frequently saw.

22 Average, we do about a 90 to 95

1 percent take rate of a consultation. And I track
2 on an average month how many people come in, and
3 how many people may just come for a consultation.

4 As a simple example, last month I
5 think we had six people come in for a
6 consultation that decided not to use service, out
7 of 100 that probably came in.

8 So the take rate was probably 94
9 percent roughly. But there is no data. We're
10 looking at it now to get a better answer, sir.

11 COLONEL PEDDEN: I think we're in a
12 similar position. I regret not being able to
13 answer with precision the question, which I think
14 is a very good one.

15 Like Captain Cimmino, I'm in the
16 process of traveling to all of the VLC offices
17 globally. I've been to about a half a dozen in
18 the last three months. And generally, our take
19 rate is also very high.

20 We do have those anecdotal cases where
21 folks request the victims legal counsel very late
22 in the process, which can be difficult to, to

1 accommodate, but we always do.

2 And with respect to the number of
3 folks on the take rate side that aren't always
4 in, or excuse me, aren't statutorily or otherwise
5 entitled to counsel, that number is relatively
6 low.

7 As of last month, I think about 6.5
8 percent of our cases were what we refer to as
9 ETP, or exception to policy cases for folks where
10 the offense wasn't one that would entitle them to
11 victims' legal services.

12 Or they were not a person subject to
13 the code, or a dependent, right.

14 Up until a couple of months ago, I had
15 granted all of those requests. I've denied a
16 couple very recently, but that's also rare.

17 So, again take rate is very high.

18 On the question of why they don't
19 accept counsel, my impression is that I think
20 they underestimate the complexity of the military
21 justice process.

22 And, the questions that they'll be

1 called on to answer as that process wends its way
2 throughout our system.

3 I think that's why we get some folks
4 who opt for counsel late in the process, is when
5 they're confronted with some of that complexity
6 and the questions that they're not able to
7 answer, and they want to come back to us, which
8 is fine. We're always there and we're always
9 available.

10 But that's what I suspect. I don't
11 have the data to back it up.

12 MS. MAROTTA: It's a very small
13 percentage of cases that an SVC wouldn't be
14 assigned eventually, if it's going. And I'll
15 break it down into some categories.

16 So you might have a situation where a
17 person says to the SARC, I don't need an SVC. I
18 don't, you know, but if there's going to be a
19 CJIS interview, CJIS is then going to be the next
20 stop gap.

21 And we've gotten to the point luckily
22 that CJIS wants the SVC's involved. They

1 understand now, the importance and what we can do
2 to make, help make sure that that interview goes
3 smoothly.

4 So typically, you're going to have
5 CJIS then say hey, you know, you really need to
6 talk to an SVC, and you might, you'll most likely
7 get picked up at that stage.

8 If you don't get picked up at that
9 stage and the case is going to go forward to a
10 courts martial, the trial counsel will then be
11 the next one saying hey, why don't you have an
12 SVC. Have you, you know, what reason, and talk
13 to them.

14 So I think it's if you have a case
15 that's going to go through the military justice
16 process, you're most likely going to pick up an
17 SVC somewhere along that path.

18 Now if it's a case where you've got a
19 military dependent, they're entitled to SVC
20 services but that case is going to be handled in
21 the civilian court, they may not want an SVC.

22 Or they most likely will come in for

1 a consult, we'll explain the process. We'll tell
2 them please feel free to call us if you have any
3 additional questions.

4 But we probably not going to undertake
5 a representation during that process, unless we
6 see that there's something that we can assist
7 them with as far as the military is concerned.

8 MR. KRAMER: So I have one quick follow
9 up, and one more question. But first of all, I
10 want to tell you how much I like this panel
11 because nobody ever says I ask good questions.
12 And certainly in court.

13 So, I take it a public face, to follow
14 up on something Ms. Tokash said, I take it a
15 public-facing system for document to be able to
16 see what's been filed, would be particularly
17 helpful to people who are not represented by SVC
18 because they would then be able to, to go and I
19 don't really know if that needs a response unless
20 I'm wrong.

21 But the other thing I wanted to ask
22 you, this is kind of unrelated where we've been

1 tasked with looking at these three questions
2 about the information, recorded statements of the
3 victim to investigators.

4 And, I get from your answers that
5 that's routinely provided. The record of any
6 forensics examination of the victim, the SANE
7 exam, and I take it that that's also pretty
8 routinely provided.

9 But the third one is the mystery to
10 me. Any medical record of the victim that is in
11 the possession of the investigators, or the
12 government.

13 Is that something you see frequently?
14 And if so, is it provided along with the other
15 two?

16 I get the impression the first two
17 categories are routinely provided, but the third
18 category I'm a little mystified by what it is,
19 and if it's provided to you.

20 COLONEL BREWER: I'll get us started.
21 So I mean, often the medical records can be a
22 very tricky subject because there are certain

1 medical records that may be highly relevant to
2 the charges or some other you know, aspect of
3 the, the defense or the prosecution's case.

4 The strange part about this question
5 for us, is that the victim always has rights to
6 their own medical record.

7 And so whether they're in the civilian
8 world or within the military system, the victim
9 can not only access them themselves, but can also
10 request and sign a waiver so that their counsel
11 has access to them.

12 And for us, that's a great practice
13 because if the government or defense says hey, we
14 want some part of your medical records, we, our
15 special victim counsel can ask the victim to sign
16 the waiver, go acquire those, and then go through
17 them with their client and potentially decide to
18 disclose something that hey, this one part is
19 relevant to try to get ahead of that, to maintain
20 confidentiality and the privacy of the rest of
21 their records.

22 So we think that's a better practice.

1 In terms of the government just
2 seizing all of the medical records, in general we
3 think that leads to inadvertent you know,
4 disclosure of things that should not have been
5 disclosed to the government.

6 We have cases where mental health
7 records are just commingled with the remainder of
8 their medical records.

9 And those can be extremely private and
10 then can, sometimes judges will then rule that if
11 well it's already been disclosed, therefore, I'm
12 going to provide fewer protections to it.

13 So any rule that was going to require
14 the government to acquire those things in order
15 to disclose them to victims, to me does not make
16 much sense because obviously the victim already
17 had access.

18 And it might encourage the government
19 to go ahead and seize things that are not
20 critical, or really even necessary, to the
21 preparation of their case.

22 We think it's a much better practice

1 for them to work that action through the victim.
2 Sometimes the victim and their counsel will say
3 we don't want to give you anything, and then it's
4 going to go through the normal process of filing
5 a motion to gain access to that.

6 And allow the judge to see whether or
7 not they meet the criteria for breaching that you
8 know, doctor/patient issue, and then going
9 forward with those records.

10 So we think that's smarter but I'm not
11 sure what other things in terms of the SANE
12 examination. Our victims generally are going to
13 get whatever statements they provide, but they
14 may not get the forensic analysis of it.

15 That may be kept separately, or only
16 disclosed if it's necessary to help ask them
17 follow up questions about you know, why does it
18 show this in the forensic exam.

19 But in general, forensic exams have
20 either their, the bodily fluids or other samples
21 taken, or even samples taken from their clothing
22 or bedding, or other evidence may not be

1 disclosed to the victim at that time.

2 But their own statements are always
3 going to be provided.

4 COLONEL PARK: From the Air Force, I
5 concur with the Army on the medical records that
6 victims, it's their own medical records. So they
7 should be able to obtain them.

8 I think what we have potentially more
9 of an issue with is government as she noted,
10 Colonel Brewer noted, getting access to those
11 records first.

12 And so I will say that in the Air
13 Force, we've had several cases being litigated on
14 victim medical records, access, and disclosure.
15 So, those are currently in the system at least
16 for us.

17 And with regard to the SANE that she,
18 Colonel Brewer also mentioned, if that's part of
19 the Report of Investigation, then it would likely
20 be disclosed to at least the victim's counsel.

21 CAPTAIN CIMMINO: Just similar practice
22 is we would ask and you know, speak to the victim

1 and make sure they were trying to seek as much of
2 the information as possible, to help advise them
3 in the process.

4 Because they are the decision makers.
5 So giving their VLC as much access to information
6 as possible, will help them in their advice.

7 Because depending on where the case
8 goes, they make some decisions based on
9 information in their medical record, they may
10 make a decision based on some of that
11 information, as well.

12 So it's important to have a holistic
13 approach when you're providing them legal advice.

14 COLONEL PEDDEN: I agree with Captain
15 Cimmino, but before I do more of that, sir, I'm
16 not going to miss the same softball that my
17 colleagues did, you ask great questions.

18 Your first question, sir, had to do
19 with the utility of public-facing aspects of
20 NCORS, or another digitized system for
21 unrepresented victims.

22 And, I would wholeheartedly agree with

1 that. That level of transparency and their
2 ability materially to participate in their case,
3 shouldn't depend on whether or not we represent
4 them.

5 And for those victims, either who
6 elect to proceed without counsel, without
7 military counsel, or elect to proceed with
8 civilian counsel who doesn't otherwise have
9 access to military computing systems, would be
10 greatly enabled by a public-facing system like
11 that.

12 So I would support it.

13 With respect to the medical records
14 issue, first I'd note that I share Colonel
15 Brewer's concern with regard to the inadvertent
16 spillage of other matter that is privileged.

17 As we all know, there is no
18 doctor/patient privilege as it were, in the
19 military justice system because commanders have
20 an inherent need to know about the medical
21 readiness and welfare of their Marines.

22 That said, there is as we all know, a

1 psychotherapist/patient privilege. And we do see
2 a fair amount of spillage there.

3 In my view, I do not believe that that
4 spillage compromises a privilege in any way, to
5 the extent that a military judge views that
6 material and decides that it has to be disclosed,
7 the proper remedy isn't disclosure because the
8 patient hasn't waived the privilege.

9 The proper remedy is recusal of that
10 judge and the passage of the case to another
11 jurist who hasn't viewed the material, because it
12 was spilled inappropriately and without an
13 opportunity for the patient to object.

14 The second important distinction I
15 would note with respect to medical records, is
16 that it's important not only for a victim to have
17 access to their own records, but also to receive
18 from the government those medical records that
19 are in the government's possession. Here's why.

20 If the two aren't the same, the
21 disparity between the two could have a dramatic
22 impact on a case, and directly impact a victim's

1 right under statute, under Article 6b to consult
2 with a government counsel in the case.

3 And to ask that question hey, did you
4 know where a blood type is different, or there
5 was treatment for another condition that might
6 affect something here.

7 That's a very, very important question
8 to answer. And so it's important not only for
9 the victims to have access to their medical
10 information through ordinary channels, but also
11 to know what the government knows so that we
12 don't miss an opportunity as a result.

13 Thank you.

14 MS. MAROTTA: We have a similar
15 practice. I would point out that over time it's
16 changed. It used to be more common where the
17 government would seek access to medical records.
18 Whereas now, it is more in response to a motion,
19 defense motion for production of.

20 And they must meet all the hurdles and
21 then be, it would be in-camera review by the
22 judge.

1 So we are now seeing it, the practice
2 has evolved so the government is much more
3 reticent to go and access documents at the
4 medical treatment facility.

5 MS. GOLDBERG: Suzanne Goldberg. Thank
6 you very much, you've described a number of
7 different issues.

8 And so I'd like to pose an open-ended
9 question to you, which is what challenges do you
10 see in the processes we're talking about today or
11 more generally, that you think the DAC-IPAD
12 should be thinking about both in terms of policy
13 and possibly future, future research?

14 I, of course, am tempted to provide
15 you with my short list of issues that I've heard.
16 But I think it would be useful for the committee
17 to hear this from you.

18 COLONEL BREWER: I think, as I
19 discussed earlier, one thing we do see is just
20 consistency. And I agree with my colleagues that
21 I do think that the movement to OSTC and the
22 professionalization, or I shouldn't say

1 professionalization, I think more just, that will
2 have more senior people working on courts
3 martial, and with eyes on courts martial that
4 involve special victims, will greatly increase
5 the progress that we've made already with having
6 all of our prosecutors and government you know,
7 teams understand what they have to provide. Or
8 should be providing to victims.

9 We've already seen progress and I, we
10 expect that that's going to continue to become
11 more standard, and more understood by this team.

12 And I think we're going to see fewer
13 of those things. Because that has been a common
14 problem, just that you know, somebody just
15 doesn't think or in their judgment, they don't
16 think something's owed to victim counsel and now
17 they're just understanding that no, the SVC gets
18 it, and when in doubt, provide it to the SVC in
19 terms of motions. And information.

20 As I provided in my written response,
21 I do oppose providing the entire investigative
22 file because I, I do think the dangers greatly

1 outweigh the benefits.

2 However, standardizing what is
3 provided not only by all government counsel so
4 that it's standard, it's regular, all victims can
5 rely upon it, I do think that policy should be
6 standardized.

7 As my colleagues were just pointing
8 out, it doesn't matter whether they are eligible
9 for special victim counsel or not.

10 If you are a victim in one of these
11 you know, proceedings, you should have the same
12 rights regardless of whether or not you're
13 eligible for legal assistance under 1044.

14 Just that shouldn't be the deciding
15 factor of what rights you're afforded, in our
16 opinion.

17 And so whatever the rules are, we do
18 think they should be standardized. And that may
19 impact what people want to provide because right
20 now, we do have things that are only provided to
21 military victims, but wouldn't be provided to
22 civilian victims because of the sensitivity of

1 the information. And we think that puts some
2 victims at a disadvantage.

3 So I think those are two things we
4 see, but we are seeing just such progress and we
5 think OSTC is only going to continue that.

6 COLONEL PARK: From the Air Force, we
7 like our process. So, not a lot. So I ask you
8 know, again, what are you seeing out there that
9 we could potentially raise.

10 And they think that overall, the
11 process works well. They get the information
12 that they need, and then there are fixes.

13 So the legal offices and the
14 leadership are responsive to requests, or any
15 issues that are raised.

16 With regard to unrepresented victims,
17 there is still a mechanism in our policy for the
18 victim to file a routine use request for the same
19 information.

20 So we file an official use request
21 subject to the Privacy Act, I mean under the
22 Privacy Act and FOIA to obtain the information.

1 There's still mechanisms in the DAC
2 policy for unrepresented victims to obtain
3 information, as well.

4 So, again, from the Air Force, overall
5 don't have any specific other recommendations.

6 CAPTAIN CIMMINO: Ma'am, so this is
7 Christmas in June so I'll ask for a wish list of
8 things. I'll focus first on what you've asked
9 for initially for today.

10 I think I would like this to go one
11 step further than just what Congress asked you to
12 look at and the specifics.

13 I would like us to get to a uniform
14 policy across the services, so that it isn't
15 different for an Army victim, and an Air Force
16 victim, and a Marine victim.

17 If we're talking about trust and
18 transparency, it should be something that we
19 could have trust and transparency, regardless of
20 your service.

21 We've made great strides in the
22 decade. I've said that and I agree with my

1 colleagues, we have service differences and how
2 we practice, and how we operate in the field and
3 at home.

4 But at the end of the day, we're at a
5 stage where if we're really talking about trust
6 and transparency, it matters to the victims
7 involved in this process.

8 As an example, right now we represent
9 about 900 victims. Last year, the Navy tried 150
10 courts martials.

11 That means there's a delta of 750
12 victims that didn't see a court. They have
13 rights to access to information, too.

14 We're just focused here on the court
15 martial process, but the vast majority of victims
16 don't see their day in court.

17 So it is important that they have
18 access to information that helps them build trust
19 and transparency, in what actually is going on.

20 Hiding information, and I don't mean
21 in a nefarious manner, but hiding information in
22 our system is different.

1 Because in the civilian sector, a
2 prosecutor's not necessarily going to give over a
3 whole investigation to a victim either.

4 However, I was fortunate to
5 participate, I know Ms. Garvin's on so this is a
6 plug, I was at NCVLI last week and I met a lot of
7 victim advocates around the country.

8 And we talked about a lot of things,
9 and I think we're in a position for us in the
10 military now, one, if we're really going to make
11 transparent and transformational change, we
12 should be uniform in our practice.

13 And we should be honest about that and
14 say hey, give the victims access because most of
15 our victims in the Navy are uniformed. They took
16 their right hand and they raised it to support
17 and defend the Constitution.

18 We should give them that right and
19 privilege in the process if we really want to
20 build trust and transparency, give them access to
21 that.

22 So I would like you to look beyond

1 just the core things they asked you to look at,
2 because we're getting that. That's the tip of
3 the iceberg.

4 And I tell you, I traveled the Navy
5 and everywhere I've gone SARCs have told me this,
6 VAs have told me this. Lawyers have said it.
7 Getting that information will make victims
8 believe more into the system. That's a trust and
9 transparency issue.

10 On the second prong of what else we
11 could do, today we're here for these particular
12 issues.

13 But I'd welcome the opportunity to
14 come back and talk about a proposal we're working
15 up to expand Article 6b rights, to bring Article
16 6b in alignment with the Crime Victims' Rights
17 Act.

18 And talk about appellate rights, and
19 the things that don't exist right now. It should
20 be almost identical in most ways.

21 But that's my major wish list that
22 we'd like to come back and maybe do at another

1 time. Because the legislative cycle for DoD
2 takes so long, we'd be looking at fiscal year 25
3 to get anything at this point.

4 Victims shouldn't have to wait any
5 longer to get this stuff done sooner, because I
6 believe Congress would want to do that.

7 MS. TOKASH: So what you're saying is
8 you loved our report that came out on Friday
9 about creating uniform prosecution standards?

10 CAPTAIN CIMMINO: I'll withhold my
11 comment right now, ma'am.

12 (Laughter.)

13 MS. GOLDBERG: And just if I may, a
14 quick follow up before we continue. Thank you
15 for the wish list and for the specifics here.

16 When you speak about the victims
17 having access to the file, a number of, I mean,
18 all of you have spoken about this.

19 I think there are questions of timing
20 that have been raised by others who have spoken
21 to us, and concerns about the integrity of the
22 investigation process.

1 And so the question that would be
2 helpful for you to address either right now, or
3 after we've come around is, are your thoughts on
4 timing, and also the question whether you have
5 seen any trends in misuse or over sharing by a
6 victim of information in ways that compromise the
7 integrity of the process.

8 Not are there one-offs because there
9 are one-offs in every area we could ask about,
10 but are you seeing trends, and is that a concern
11 for you?

12 CAPTAIN CIMMINO: Okay, I'll ask and
13 then I'll turn it over to Colonel Pedden. So the
14 first question, we don't have access to that now,
15 so I don't have data to tell you if we had a
16 misuse issue.

17 And I'm not opposed to the Air Force's
18 approach of giving it to the counsel, helping
19 them determine what, what they should use it
20 with.

21 I don't like the Air Force's policy on
22 discretion. It gives the SJA the decision making

1 authority.

2 So I'd remove that SJA discretion and
3 give it to the victim legal counsel, and then
4 they make a legal determination. They're
5 representing the counsel. They're barred and
6 they're licensed, so they can make it.

7 I don't know of spillage. There could
8 be spillage. That is a concern of the
9 prosecutors that if you tell them this, it might
10 change testimony. It might do this; it might do
11 that.

12 Those are a lot of things we'd have to
13 work through with the wickets. But if you're
14 giving it to the VLC and they understand their
15 obligations, and you look at the rules, under the
16 PR rules, if they don't have to share necessarily
17 everything, they could work around it, I think we
18 can get to the right answer.

19 Because if the victim feels their
20 attorney has all that information and is working
21 in their best interests, they are their counsel
22 not the government's, I think we can go a long

1 way without having to worry about that.

2 And then avoid some of the spillage
3 issues that may happen.

4 But I turn to Colonel Park, because I
5 think she's the only one with the benefit of
6 having all that information, and may be able to
7 tell us about spillage.

8 But I don't think my counsel would
9 violate that really on a regular basis.

10 COLONEL PEDDEN: I concur, ma'am. I
11 think on the wish list front, my big three would
12 be access, appeals, and counsel.

13 We've talked here today quite a bit
14 about access to information. I think the answer
15 is likely before you in sort of a hybrid format.

16 In terms of scope of information, I
17 think an Air Force model is good again, with the
18 caveat that I would respectfully not vest any
19 discretionary authority in the SJA, because the
20 SJA has a client. And that's not my client. And
21 those interests are more than occasionally
22 adverse. And so, independent judgment in that

1 regard is welcome.

2 The other I think model that I would
3 encourage adoption of is the Coast Guard model,
4 which triggers disclosure of this information
5 without request. It's earlier in the process.

6 And so things like the Freedom of
7 Information Act requests, are likely far too late
8 to be useful to an attorney who's advising a
9 client on the prudence of supporting or not
10 supporting a plea agreement, for example.

11 Because the FOIA process isn't going
12 to be able to catch up to something that early in
13 an investigation.

14 And so hybridizing those two models,
15 which favors a lot more disclosure much earlier
16 in the process and without a specific request, I
17 would find very favorable to clients.

18 A lot of my attorneys come to me with
19 concerns about professional responsibility, and
20 the quality of advice they're able to offer
21 clients, based on the amount of information that
22 they're given to do that.

1 That's problematic. And in the
2 written materials I submitted to the committee
3 for this hearing, I highlighted a couple of the
4 rules of professional responsibility for
5 attorneys practicing under the cognizance of the
6 judge advocate general of the Navy.

7 And the rule regarding competence, it
8 specifically enumerates access to evidence, as a
9 critical component of fully and ethically
10 advising a client. And I can't overstate the
11 importance of that.

12 And we just don't get enough
13 information. To the extent that we do get
14 information from the government counsel,
15 occasionally as I mentioned earlier, provided a
16 little bit too late, but it's also not provided
17 by the right source.

18 The same thing applies to docketing
19 requests, and things of that nature. I'm not
20 aware right now of a request for a continuance
21 that was made by a victim's legal counsel that
22 was granted.

1 I'm sure that there are some, but it's
2 exceedingly rare. Much more often, VLC are
3 regarded as fungible assets that can just kind of
4 be transplanted across clients to make sure that
5 we keep the docket moving forward.

6 That's problematic from a PR
7 perspective, as well.

8 On appeals, in my vision I think right
9 now we don't have one. We have a Code 45 and a
10 Code 46 at the Navy yard that speak to appellate
11 matters for the defense, and for the government.

12 We don't have a Code Wilco, and we
13 should. Right now, appellate matters are a part
14 of trial practice for line VLCs whose clients
15 have a right to petition for a writ of mandamus
16 at the Court of Criminal Appeals.

17 And Article 6b was recently amended to
18 provide for appellate review jurisdiction at the
19 Court of Appeals for the Armed Forces.

20 Those are complex and highly technical
21 appellate tasks that rate complex and highly
22 technically trained counsel for those tasks.

1 And so, I think we should formalize
2 that process and make it more uniform across the
3 services.

4 And the last piece is just counsel.
5 Everybody wants more people. I would offer you
6 that right now, we don't have quite the numbers
7 that the Navy does, but we also don't have quite
8 the counsel.

9 I think last month we had 603 clients
10 across the Marine Corps and VLC enterprise. And
11 that's for 23 victims' legal counsel if you
12 include me. And we could use some more folks.

13 I'm skeptical that we're going to make
14 our 25 case per counsel deadline in December,
15 although we're working very hard to make sure
16 that we're able to do that.

17 So those are my big three. Access,
18 appeals, and counsel.

19 MS. GOLDBERG: Thank you very much.
20 And just want one quick followup before we go
21 further.

22 So in response to concerns from trial

1 counsel about the integrity of the process, and
2 concerns about compromising their ability to
3 prosecute.

4 Your position would be that victims
5 counsel is bound by professional responsibility
6 code, and that their having the information would
7 not pose those risks to the integrity of the
8 process? Or is there some additional response
9 that I'm not catching?

10 COLONEL PEDDEN: I think there are two
11 components to that, ma'am. The first is what
12 effect, if any, disclosing this information to
13 the VLC would have on the testimony of a victim
14 at trial.

15 We have rules in place for that, and
16 those are standard trial tasks for the government
17 counsel, or a defense counsel for that matter,
18 should know how to rehabilitate the credibility
19 of a witness on the stand. That is meat and
20 potatoes litigation.

21 And secondly, I'd also offer that I
22 think in our written materials, we provided some

1 anecdotal evidence. My initial survey was that
2 this is a pretty common theme.

3 With regard to communication with
4 clients, attorneys have an obligation to disclose
5 information. We don't necessarily hand over
6 everything, right.

7 And whatever we are going to disclose,
8 can always be subject to restrictive orders by
9 the military judge, for example, that would
10 ensure that that material isn't used in an
11 inappropriate way.

12 I think all of us have probably heard
13 or seen of some incident of spillage on an
14 anecdotal basis. I haven't seen any of that as a
15 trend.

16 And my counsel would be very averse to
17 sharing an information in an inappropriate way,
18 not just because it jeopardizes their license,
19 but because it likely jeopardizes the cause of
20 their client.

21 So, I don't view these as
22 significantly difficult issues. I would say that

1 government counsel often offer that as the
2 explanation for why they refused to disclose
3 almost anything related to a case, other than
4 exactly what they're required, and only what the
5 required to do.

6 And so I understand they have a
7 client, too. I respect that. And I think that
8 the way to handle that again, is through a
9 uniform policy that applies to all of us.

10 HON. SMITH: I know Ms. Garvin has a
11 question, and then Ms. Bashford.

12 (No audible response.)

13 HON. SMITH: You're on mute.

14 MS. LONG: On my end I'm not.

15 HON. SMITH: I can hear you, Ms.
16 Garvin.

17 PARTICIPANT: I can hear you, Meg.

18 MS. LONG: Wonderful, thank you all.
19 And if my internet cuts out, I will email my
20 question.

21 I have two questions. The first one
22 I believe, is pretty brief. And so I'll ask them

1 at the same time, and you can just roll your
2 answers into them.

3 The first one is that there's been
4 kind of a conversation around how OSTC, as well
5 as the evolution of SVC/VLC has really improved
6 things.

7 And I would echo that just from my own
8 experience as a victim's lawyer, but I also want
9 to just have confirmation that it's improving
10 things for particular crime victims.

11 But the NDAA Article 6b rights apply
12 to all victims in the military. And so I just
13 wanted to just have some response to that of, and
14 it may be outside your expertise, but I would
15 like to just have that on the record, your
16 thoughts on that.

17 But then more specifically, I believe
18 it was Colonel Brewer, but I may be wrong and I'm
19 looking to the side because I have notes over
20 here, have indicated, it may have been someone
21 else, that if something does go wrong in the
22 disclosure of the information that you are

1 entitled to, that you quote, try to find a remedy
2 for that.

3 And I'm curious what that looks like,
4 particularly if something significant has already
5 happened and you didn't timely get the
6 information, what remedies you do have or don't
7 have. I would like to hear a little bit about
8 that.

9 In the civilian world right, we would
10 go for a reconsideration of a proceeding. We'd
11 go for a vacation of a proceeding.

12 Something along those lines, or even
13 recusal of someone if there was and I think it
14 was Colonel Pedden's vocabulary, spillage.

15 So I'm curious what the remedies are
16 if you either do not get information you're
17 entitled to, or someone else gets information
18 that you would have made a motion to redact
19 further on.

20 COLONEL BREWER: No. Thank you for
21 that question. That was me. This is Colonel
22 Brewer. And it depends on the case and

1 obviously, it depends on what the error is. But
2 the case that came to mind for us is we did have
3 an SVC fail to request the proper remedy in a
4 timely fashion and then used that as a teaching
5 point as we moved forward when training our
6 special victim counsel to make sure they
7 understood that there are remedies that are
8 available to them.

9 So if it's early in the process, the
10 remedy may be reaching out to a chief of justice,
11 that prosecutor involved, or even the staff judge
12 advocate to say, hey, we are entitled to this and
13 for whatever reason, we have not received it in a
14 timely fashion. And sometimes that has involved
15 me reaching out to staff judge advocates to
16 explain that like hey, your counsel are ignoring
17 special victim counsel, and I'm willing to come
18 out there and teach a course to your folks to
19 make sure they understand that we take this very
20 seriously. And usually that remedy is pretty
21 effective.

22 But we can also petition the court.

1 We can say you've set a deadline for response to
2 this particular motion of x day; however, the
3 parties to this failed to give the special victim
4 counsel or the unrepresented victim notice until
5 day five of that, you know, one week deadline.

6 We would ask that you extend that deadline and
7 allow that delay. Now sometimes will be that
8 that delay is not in our client's interest, and
9 that can be the real tension. And so we've had a
10 few instances where a special victim counsel out
11 in the field says, hey, my client doesn't want a
12 delay but they really want to respond to this,
13 this is something I've never done before. And
14 then me and my team will be looking at a motion,
15 you know, that night to make sure that they can
16 file it first thing in the morning.

17 So whether it's us at the policy level
18 providing that direct support, whether it's
19 asking the judge to intervene and grant
20 additional time, or whether it's kind of regular
21 reaching out to those prosecutors and their
22 supervisors, those remedies have been very

1 effective, but there's definitely there's those
2 one-offs where the victim was -- the case I'm
3 thinking of they were unable to communicate with
4 this victim prior to a motion hearing that
5 absolutely impacted that victim's rights to be
6 heard, and that victim lost the right to be heard
7 at a particular motion hearing. And at that
8 point, the judge was unwilling to take any kind
9 of remedial action, and so based upon that
10 failure, that opportunity was lost for that
11 victim. And I've personally spoken with that
12 victim about it. We've spoken to the counsel
13 about it, but that case has moved along and that
14 wasn't satisfactory to anybody involved. And so
15 we worked to make sure that those rare instances
16 where something happens that impacts a victim
17 right becomes part of training for not just my
18 counsel but for the prosecutors involved so they
19 understand that this has real impact and
20 thankfully, we don't see that very often, and we
21 work very hard to make sure we don't.

22 And I'll pass to the rest of my team

1 if they have anything else about that, and then
2 I'll just say I do want to discuss the request my
3 colleagues made regarding access, cause I
4 completely disagree. But I'll just put that out
5 there.

6 CAPTAIN CIMMINO: Her time has
7 expired.

8 COLONEL PARK: So in the Air Force, we
9 have -- you know, Ms. Wells is our appellate
10 counsel. So when things kind of go sideways at
11 the trial level, we are -- she is in frequent
12 discussions with our victims counsel on looking
13 at different options to remedy whatever the error
14 was. When it comes to getting late notice,
15 judges will frequently give extra time for a
16 victims counsel to file a response on that.

17 And you also mentioned, you know, the
18 victims counsel or OSTC improving it for some but
19 not all victims. I think that with everything,
20 you know, the victims counsel program has also
21 been an evolution, right? We took on sex assault
22 victims in 2013, domestic violence victims, and

1 we continue to grow. And you can see that not
2 only in our practice and the scope of what we do
3 but even in the, you know, discussions about
4 access to information.

5 I will say that we started
6 discretionary, but as I noted, you know, over the
7 past, I would say this is about five years going
8 that we've have had these, you know, the official
9 use. So we don't use FOIA. We use the official
10 use request and to get the information, that
11 really, we're at a point where most SJAs do it.
12 We've trained them enough. They've come to
13 realize that providing the information also gets
14 quicker victim input and more clarity, right, and
15 informed victim input on what the case
16 disposition should be. So they find it to be --
17 to actually improve the process for victims.

18 And so I know that it is for, again,
19 particular victims but we are moving there.

20 Again, at least, you know, in the Air Force, we
21 do have ways to get information to other crime
22 victims if they would like that, maybe not 100

1 percent access to victims counsel, but we also
2 have a program where we provide legal
3 consultation with other crime victims and victims
4 of interpersonal violence as that next step, at
5 least in our practice.

6 CAPTAIN CIMMINO: I have nothing else
7 to add, ma'am.

8 COLONEL PEDDEN: Good morning,
9 Professor Garvin. Colonel Pedden here. I think
10 you already know my position on this and broadly
11 speaking, in my view, the link between rights and
12 remedies is too weak, and that draws many folks
13 to the conclusion that the statutory rights in
14 Article 6B are aspirational. They shouldn't be.
15 They should be enforceable and where, for
16 example, the government has abrogated its duty
17 properly to notify victims, properly to afford
18 them notice and an opportunity to be heard, say,
19 for example, during an Article 32 proceeding
20 prior to referral, then there should be some
21 means by which a victim can seek remedy for that.
22 A victim should be able to seek remedy for the

1 incorrect or unauthorized disclosure of their
2 protected health information, of their privileged
3 records of communications between a patient and a
4 psychotherapist.

5 And there aren't specific remedies
6 that are in place. I could offer one anecdotal
7 example from a case about a month-and-a-half ago
8 where victims were incorrectly advised by
9 Government counsel throughout the process about
10 their rights to be present during the Article 32
11 hearing. Ultimately, that precipitated in a very
12 late detailing of victim's legal counsel, because
13 they weren't properly advised of their right to
14 counsel early in the process.

15 They came to us and our counsel
16 determined that the only means by which we could
17 give meaning to their rights under Article 6B was
18 to make a motion to the military judge to dismiss
19 the charges and the specifications, prefer them
20 anew, and then go back through the Article 32
21 process and the plea agreement negotiation
22 process so that they could participate in a

1 meaningful way. And in that case -- and I'm not
2 casting an aspersions on the military judge, I'm
3 confident that that judge applied the law as that
4 judge saw the law needed to be applied in that
5 case. What that tells me isn't that the judge
6 was wrong. What it tells me is that the policy
7 isn't right yet.

8 And so there need to be more
9 enforcement mechanisms in place that enable VLC
10 to advocate on behalf of their clients. Thank
11 you.

12 MS. MAROTTA: Well, I've been having
13 this conversation with Colonel Pedden since about
14 2015 when he was an instructor at the JAG school.
15 So yes, we do agree that 6B just doesn't have the
16 teeth that we would want it to in circumstances
17 that are outside of things that you would be able
18 to file a writ for. It's -- I really just
19 becomes the SVC's ability to work with SJA and
20 the trial counsel to have remedies and work-
21 arounds.

22 Again, we do believe now that all of

1 our trial services are consolidated under one
2 organization. You know, the O-5 there used to be
3 an SVC, so I know there are people there that
4 understand what's supposed to happen, and it
5 makes it a lot easier, but that's personality-
6 driven. Policy is better.

7 And then as far as going back to the
8 original question you were discussing about
9 challenges, I just wanted to add that the Coast
10 Guard does support the Air Force's view -- Air
11 Force policy where the special victim counsel can
12 request official use at review of the ROI. We --
13 I can't tell you how many times I've had
14 discussion with my counsel with their frustration
15 of not understanding what's happening in a case.
16 And they say, "Well, how come the Air Force gets
17 to see the ROI." And when we've had discussions
18 with our investigative services, they say,
19 "Absolutely not. It's going to compromise the
20 investigation." But I believe that the Air
21 Force's model addresses that concern as far as
22 just having the information be with the counsel

1 and certainly, there are other examples in the
2 military justice process where military counsel
3 has access to information that they can't turn
4 over and classified information would be -- would
5 certainly fall in that category.

6 So there are mechanisms in place.
7 There are other policies that we could look at,
8 but we support the Air Force policy.

9 COLONEL PEDDEN: If I could follow-up
10 just with one comment on what Ms. Marotta just
11 said. It illustrates a very important point. A
12 victim's rights should not depend on the service
13 of the offender, right, and so we, across the
14 interservice coordination committee, we have a
15 cross-detailing arrangement, we often detail our
16 counsel to other cases and vice versa. And so
17 the Marine Corps represents several Air Force
18 attendants and Air Force service members and so
19 on and so forth.

20 Your rights to access the information
21 shouldn't turn on the color of the uniform that
22 that person is wearing and where you're a victim,

1 in an Army case or a Navy case. Your rights
2 should be the same. They should be uniformly
3 enforceable and this, frankly, speaks to why we
4 have a uniform code going back into the early
5 1950's is because the disparate treatment of
6 service members at the hands of commanders was,
7 in the view of Secretary Forrestall,
8 unconscionable and he saw a need and Congress
9 did, too, for a uniform code. We need uniform
10 policy for the treatment of victims as well.
11 Thank you.

12 MS. BASHFORD: We asked you to discuss
13 two areas, and I know we're even over time now
14 but do you believe that the Article 25 criteria
15 currently in place yields fair and impartial
16 panels in these cases and panels that are
17 perceived by your clients to be fair and
18 impartial?

19 COLONEL BREWER: I agree with many of
20 the comments that you've already been provided.
21 We were able to read what the kind of learned
22 counsel, so to speak, provided and found it, you

1 know, very enlightening. But I -- and I will say
2 I don't know what the right solution is, but I
3 do think that particularly, one of the folks who
4 will speak in the next panel pointed out, is
5 that, you know, having a diversity when you look
6 at a trial where we ask the fact finders to use
7 their knowledge in the ways of the world to guide
8 their analysis of the facts presented and the
9 evidence presented where it does end up being 100
10 percent male just because of the demographics of
11 the military in general. I think it does put
12 that fact-finding panel at a disadvantage by not
13 having someone on that panel with the experience
14 of having female body parts and a woman's
15 experience. I think that that is an unfortunate
16 result that if there was a way to not cause delay
17 or disruption in our justice process, that we can
18 continue moving forward and have panels selected
19 rapidly and so that they are properly qualified
20 but increase that diversity so that there's more
21 likely to be somebody to have that experience to
22 be able to inject that way, knowledge of that

1 perspective of the world. I think that's of
2 benefit to victims and so many of our victims are
3 women and their bodies and their experiences are
4 frequently at issue.

5 I thought that was an incredibly
6 insightful thing that was brought forward and
7 agree with it, the different methods of how that
8 panel could be selected to increase that. I
9 think those are all great things to be
10 considered, but we don't have the capability to
11 decide or to even recommend what the most
12 effective way will be cause, again, we don't want
13 to slow down the justice process, but we do want
14 to make that fact-finding panel as capable as
15 possible to really evaluate that evidence and
16 those facts.

17 COLONEL PARK: So from the Air Force
18 Victims Counsel perspective, I, you know, asked
19 the team of their thoughts on the composition of
20 the panel and how it affected the courts martial
21 or the outcome for the victim, and they -- we
22 just didn't have a lot of strong input on those

1 particular criteria and the impact that it had on
2 the final outcome for the victim. So we -- you
3 know, we had our responses and have really
4 nothing more to add to that.

5 CAPTAIN CIMMINO: Ma'am, similar for
6 us but an interesting dynamic, if you actually
7 looked at the Navy last year, I think we
8 contested 50 cases across the entire organization
9 and what the makeup of those 50 panels were and
10 the number of acquittals was fairly high. I
11 don't think it was based on the makeup per se,
12 but the number of contested cases we see has
13 really dropped over the last decade or so. And
14 using the criteria, our folks didn't have a lot
15 of input that there may have been differences
16 based on those things.

17 But I do agree with Colonel Brewer
18 that in a dynamic of a male-dominated force, you
19 may not have gender diversity. And I read all
20 the articles you all provided and some of the
21 dynamics -- I sat yesterday through the
22 randomization. There is a difference between how

1 randomization occurs in the Army because of the
2 forward part. We would always send our courts
3 back stateside, always. We would never have that
4 kind of scenario. So there are definite
5 differences amongst the services that something
6 like randomization might happen and how the jury
7 or the panel is made up. But generally, our
8 counsel have not expressed that and I don't know
9 of anything universal where victims have
10 expressed that there were not enough men or women
11 or people of different backgrounds on a
12 particular panel.

13 COLONEL PEDDEN: Similarly, in the
14 Marine Corps, ma'am. I think in my written
15 materials I mentioned that I would support, and
16 strongly support actually, randomization on the
17 front end to get around the problem of commanders
18 not sending who's best qualified but who's
19 available.

20 The other thing I'd offer is that
21 randomization across commands would be helpful as
22 well, and I would -- in the words of the judge

1 that I clerked for many, many years ago, I would
2 cast this as a form of civic duty within the
3 military, that you have a duty to serve the
4 justice process that serves and disciplines us
5 all so well. I think that would be well-served
6 by having service members from several different
7 commands randomized and then they're assembled.
8 The Article 25 criteria can then be applied to
9 that venire, and then those folks are obviously
10 subject to a voir dire down the road. And so I
11 think there's room to combine a lot of these
12 norms.

13 As to the criteria themselves, I think
14 those are all salutary aims. I don't have any
15 reports from my folks about concerns for under
16 representation of women or persons of color or
17 any other category for that matter, and so I
18 guess I would say that I'm skeptical that with
19 the small sample size that we have, we could
20 effectively make sure that all of those groups of
21 people are well-represented on our panels given
22 the voir dire process. But I'd be open to

1 efforts to do that. Thank you.

2 MS. MAROTTA: I can provide a comment
3 not from my Coast Guard SVC hat but from my prior
4 experience as an Army officer judge advocate.
5 I've been involved in the panel selection process
6 several times, and my experience is that the
7 convening authority takes it very seriously as to
8 selecting the right people, the right balance of
9 people, having diversity on the panel, having
10 people with the right maturity and will take it
11 seriously. And even his decisions about excusing
12 people for certain duties were very seriously
13 considered, because he viewed it as, you know,
14 this is your primary duty and I'm selecting you
15 for this very important duty. So I think it's --
16 we have very good panels as compared to the
17 civilian sector where you're just -- it's luck of
18 the draw almost.

19 So the other thing I would consider is
20 our overall population in the military is very
21 different than the civilian sector, so we
22 predominantly have 18 to 22 year olds. So you

1 have to look at, you know, if you just strictly
2 start picking people, who are you going to end
3 up. The population may look very different than
4 it would in the civilian sector, so there is a
5 reason why the convening authority is picking,
6 you know, some people that are more senior
7 because we're a different society, and we have --
8 we -- it's -- we live together, we work together,
9 and a lot of people view it as like an extended
10 family type situation where people have grown up
11 in the military. They -- you know, they live
12 with these folks. So it is different than the
13 civilian sector.

14 So I think that the -- and the purpose
15 of the military justice system was -- is to
16 promote good order and discipline in support of
17 national security. So it's got a much more
18 serious -- it's more important, I would say, in
19 many regards than juries in the civilian sector.
20 So I am not in favor. I think that everything
21 can be improved and everything should be looked
22 at, but I am not in favor of wholesale throwing

1 out all of the criteria.

2 HON. SMITH: I pressed, I though.

3 Okay. I think that will conclude --

4 MS. TOKASH: I think Colonel
5 Brewer --

6 HON. SMITH: Oh.

7 MS. TOKASH: -- I'm sorry,
8 ma'am.

9 HON. SMITH: Okay. Great. Thank you.

10 COLONEL BREWER: And I promise I'll be
11 brief. I just wanted to, in terms of victim
12 access, to emphasize to all of you that the
13 reason that the Army program does not support the
14 request that my colleagues have made is because
15 when we look at this question as a victim-driving
16 and victim-informed process, we think looking at
17 it from those two scopes would result in the
18 exact opposite recommendation. If we think about
19 being trauma- and victim-informed, we realize
20 that victims' accounts and their ability to
21 explain what happened is going to change
22 drastically from the initial report, especially

1 if it's shortly after the incident throughout the
2 process.

3 Currently, our special trial counsel
4 are able to help rehab, like we've talked about,
5 that client and that allegation that their
6 statements have changed over time by bringing an
7 expert to explain how trauma has impacted their
8 brain and their ability to recall that
9 information. That ability to rehab that victim
10 client is going to be greatly decreased if that
11 time span has also been influenced by access to
12 other victim statements, forensic information and
13 other investigatory material. If you review the
14 entire investigation, then all of a sudden that
15 expert who's explaining how trauma is the cause
16 of the change in testimony is going to look far
17 less credible. And so we think it undercuts
18 being victim-informed and allowing that true
19 science to stand out and influence the fact
20 finder.

21 Then in terms of being victim-driven,
22 our process is we inform victims to the greatest

1 extent we can, and then we do what that victim
2 directs us to do. We do not do what the
3 government directs us to do. So if the
4 government does not want us to share information,
5 that is great but that is not binding on us both
6 because of our ethics rules that require our
7 devotion to our client. And if our client wants
8 that information, our client will receive it.
9 And, therefore, if we say we're going to give
10 this information to the special victim counsel
11 but we're going to then tell them that they
12 cannot share it, that is not ethically sound from
13 our analysis. So we believe that the victim
14 counsel should be representing a witness, not a
15 party, and -- because the obligations that fall
16 on parties to the proceedings are something that
17 we do not want our victim clients to have to
18 comply with in terms of additional disclosure and
19 all kinds of other things that both the defense
20 and the prosecution have obligations to provide
21 throughout the process. We want to protect this
22 victim client and make sure that their goal of

1 conviction has the best chance possible and that
2 our special victim counsel are able to represent
3 them in the most honest way and the most victim-
4 driven way and in the way that allows them to
5 always be consistent with their state and our
6 ethical rules.

7 And so based upon that, we do not
8 support the way the Air Force is currently doing
9 it nor would we want that to be required for all
10 of the services. We'd like to maintain our
11 ability to proceed as where we treat the victim
12 as a witness with a great deal of special
13 treatment in terms of their representation
14 Article 6B rights, but we would not want to go
15 further towards kind of becoming a third part to
16 the proceeding.

17 COLONEL PARK: So in terms of what we
18 provide to the victim, we go over, actually, in
19 our scope of representation that we will be able
20 to make an official use only request to the
21 government, but we will not be able to turn that
22 information or disclose it or hand over the

1 investigation to the victim. So right up front,
2 they understand what the process and what the
3 limits are, and we have them sign it so that they
4 understand that even if we get it. But again, it
5 kind of comes with the trust that they have that
6 we have seen the information. We are here to
7 navigate them through the military justice
8 process. We are experienced in the UCMJ. And so
9 this just adds to, right, our ability to provide
10 the best most competent representation of the
11 victim so that's our --

12 CAPTAIN CIMMINO: And I know we're
13 over time, but I just want to put something in
14 perspective and Carol will probably kill me for
15 this, but I don't know the numbers, but if I
16 looked at us combined, we might be representing,
17 say, 3,000 victims right now across all our
18 services. If 10 to 15 percent of them see their
19 day in court, I'll take the risk that we can't
20 fix the problem. If it's going to help
21 transparency and trust in the system, that's the
22 change we may need to make. I think we can get

1 there, but I think we have to look at the raw
2 data to show that, you know, the vast majority of
3 victims that come forward, they don't see their
4 day. So if there's a way to help build trust,
5 maybe we should go that route and this board,
6 this panel can maybe help push the services to
7 get there.

8 COLONEL BREWER: Well, I'll just
9 everyone know the Army routinely does provide a
10 great deal of information when there's not the
11 possibility of going to court martial or some
12 other administrative type procedure that would be
13 adversary. So it's very typical our special
14 victim prosecutors, soon to be special trial
15 counsel, will discuss what it is within the case
16 file, what the evidence is. That was always my
17 practice to then sit down as the special victim
18 prosecutor and explain because these other
19 statements were provided, because at that point,
20 there's no longer a risk of causing all of the
21 harm that this earlier disclosure would cause,
22 because -- and I do think it's for exactly the

1 reason that Captain Cimmino brings up, because
2 that victim needs to understand if they're going
3 to be able to feel like they were heard
4 throughout the process why we could not go
5 forward.

6 However, I think that the timing of
7 that is critical. The timing of that, once that
8 decision has been made so that the victim can
9 understand that information and potentially
10 challenge it I think is fair. But providing it
11 across the board to all victims I think
12 undermines their credibility as the critical
13 witness in many of those trials.

14 HON. SMITH: All right. Now -- thank
15 you very much. We should have done 90 minutes.

16 MR. SULLIVAN: We did.

17 HON. SMITH: We did?

18 (Laughter.)

19 HON. SMITH: All right. Thank you
20 very much to the panel. That was very helpful.

21 COLONEL BOVARNICK: We'll just change
22 out the panels, take like a five-minute break and

1 then get the next panel members up.

2 (Whereupon, the above-entitled went
3 off the record at 9:54 a.m. and resumed at 10:03
4 a.m.)

5 COLONEL BOVARNICK: Before we announce
6 the next panel, I have a quick announcement. So
7 we are going to do the two other panels this
8 morning to go up to the noon hour. And the thing
9 that appears on the agenda, the session that
10 appears. OSTC Course Observation Feedback, we're
11 going to push to the afternoon because one of the
12 presentations in the after that's slotted for 75
13 minutes will not take that long. So we'll be
14 able to make up that time in the afternoon.

15 So the next panel, Ms. Peters will
16 introduce and we'll take a short break in between
17 prior to the last panel.

18 MS. PETERS: Members, good morning.
19 This is Meghan Peters. Our next group of
20 presenters offer an important perspective to the
21 DAC-IPAD on its statutory task to assess policies
22 for the disclosure of case materials to victims

1 and victims' counsel.

2 Representatives from Survivors United
3 are here today. Survivors United is a nonprofit
4 organization dedicated to serving individuals who
5 have been sexually assaulted by a United States
6 military member. Mr. Ryan Guilds and Ms. Kylisha
7 Boyd volunteer much of their time in supporting
8 and advocating for victims of sexual assault in
9 the military. Ms. Boyd has appeared before the
10 DAC-IPAD before in 2018, and Mr. Guilds' insights
11 have informed the work of this committee on past
12 projects including your study of victim impact
13 statements presented in presentencing proceedings
14 at courts martial.

15 Ms. Jennifer Elmore is also a familiar
16 face to this committee and a welcome source of
17 information for the DAC-IPAD. As CEO for Protect
18 Our Defenders, she has been the face of this
19 well-known human rights organization and
20 advocated fiercely for victims of military sexual
21 assault.

22 And with that, I'm going to turn the

1 floor over to Mr. Guilds who has prepared remarks
2 as our other speakers have today. Thank you.

3 MR. GUILDS: Great. Thank you. Madam
4 Chair and Members of the Committee, it is my
5 great privilege to offer my experience and
6 perspective on the important issue of victim
7 access to information. I appear today both as a
8 pro bono victim legal counsel with over a decade
9 of experience representing military-connected
10 sexual assault survivors and as counsel for
11 Survivors United, a victim-created, victim-led
12 organization providing crime survival
13 perspectives on the military justice system.

14 Victim access to information is a
15 bedrock principle of victim-defined justice.
16 Sexual assault is an extreme violation. It takes
17 agency away from the victim, power. The goal of
18 victim counsel is to bring that power back to
19 empower the victim moving from victim to
20 survivor. Unnecessary limitations on victim
21 access to information not supported by the law or
22 good trial practice undermine this important

1 objective and results in re-victimization and a
2 loss of trust.

3 The issues concerning victim access to
4 information are broader and more complex than
5 simply access to investigation materials and
6 investigators and trial counsel's files. As an
7 initial matter, victims do not automatically
8 receive their statements from criminal
9 investigators. Army TJAG policy does not require
10 a provision on victim statements to the victim
11 pre preferral even upon request. Compounding
12 matters, unrepresented victims are not
13 automatically provided their statements unless
14 and until they request them, something victims
15 are frequently unaware of. And as a result, all
16 too often, victims receive their own statements
17 for the first time shortly before trial as part
18 of trial counsel's final trial preparation
19 efforts.

20 Of note, an initial report to law
21 enforcement is frequently the first time a victim
22 speaks in detail about their assault to a

1 stranger. Indeed it may be the first time the
2 victim describes the details out loud to anyone.
3 It is a time of intense anxiety and frequently
4 residual trauma. It is, therefore, not unusual
5 for my clients to express difficulty remembering
6 what happened during a law enforcement interview
7 or even what was said.

8 Furnishing victims their statements in
9 a proactive and timely way allows them to point
10 out additional information or facts that may not
11 have come out in an initial interview, and it
12 ensures the victim is informed and knowledgeable
13 about their prior statements before any
14 subsequent interview by investigators or trial
15 counsel. These important objectives do not
16 undermine the government's case or negatively
17 impact the accused's rights. Moreover, pre
18 preferral victim access to their statements is
19 particularly important when victims are asked to
20 express an opinion regarding military or civilian
21 jurisdiction or the possibility of an
22 administrative separation in lieu of court-

1 martial. For these reasons, the proactive
2 mandatory and timely provision of all victim
3 statements, including interview summaries, to the
4 victim is essential and should be implemented
5 immediately.

6 Evidence submitted during the Article
7 32 hearing and access to the Article 32
8 preliminary hearing officer's report are
9 additional categories where victims are
10 unnecessarily prevented from receiving timely and
11 complete information. Military-connected victims
12 have a federal right to be present at the Article
13 32 regardless of whether they testify and obvious
14 recognition of the importance of the victim's
15 right to participate in the Article 32 process.
16 Victims also have an express right to receive the
17 preliminary hearing transcript, a further
18 recognition that victims should know what is
19 happening during the Article 32 process.

20 Despite these rights, in my
21 experience, victims and their counsel do not
22 routinely receive preliminary hearing evidence

1 for the PHO's recommendation. Limitations on
2 access to preliminary hearing evidence needless
3 undermines the victim's trust in the process.
4 Any limited Privacy Act concerns can be addressed
5 with basic redactions. The accused is not harmed
6 by the victim's receipt of this information, and
7 the government can overcome any concerns victim
8 access to non-privileged evidence creates through
9 an informed exchange between trial counsel and
10 victim legal counsel.

11 The harm to the victim in not
12 receiving preliminary information is significant.
13 Article 32 hearings are largely paper affairs
14 currently with few, if any, witnesses. Without
15 access to the evidence submitted, the victim's
16 right to participate and receive a transcript of
17 the Article 32 hearing is meaningless. Even
18 worse, victims are told that the hearing will
19 impact whether the result will proceed to trial
20 and yet the very opinions that inform that
21 decision are often withheld from them even though
22 this information is not privileged and even

1 though, again, any Privacy Act concerns can be
2 addressed with manageable and focused redactions.

3 FOIA is not a viable alternative for
4 victims to receive this or any other information
5 developed through the Article 32 or court-martial
6 processes. Unrepresented victims do not know or
7 understand the process and even represented
8 parties do not receive timely or meaningful
9 information in connection with a FOIA request.
10 Unnecessary redactions in that process obliterate
11 the substance and the standard response is often
12 very delayed.

13 Mandatory provision of all non-
14 privileged Article 32 evidentiary exhibits to the
15 victim or her counsel and contemporaneous victim
16 receipt of the full report should be implemented
17 immediately, especially if Article 32's probable
18 cause determination becomes binding.

19 Victim access to information is not
20 materially better in the lead up to trial.
21 Victims are not routinely provided with
22 underlying evidence about their cases and even if

1 the information is directly about them. More
2 startlingly, victims counsel is frequently not
3 served with all pleadings or motions filed in the
4 court-martial leaving it to trial counsel or luck
5 to determine which motions victims receive.

6
7 Victims counsel should automatically
8 be served contemporaneously with all non-
9 privileged filings in the court-martial. That is
10 because everything that happens in the court-
11 martial has some potential relevance to the
12 victim. Informing the victim about proceedings
13 and overall court-martial process is a core
14 obligation of victim counsel. This can only
15 happen if counsel knows what is happening and is
16 not beholden to third parties for what others
17 perceive as relevant.

18 Trial counsel and the court cannot be
19 relied upon to decide what matters to a victim
20 nor should they have to, because everything
21 matters to the victim. Motions that seemingly
22 have no direct relation to the victim can have an

1 impact on their federal rights. For example,
2 I've seen motions to exclude evidence, motions
3 for witnesses, motions for discovery or
4 production, and even witness lists directly
5 impact the victim's rights. In the end, what
6 impacts the victim is up to the victim and her
7 attorney if she has one.

8 Even when the victim has a clear right
9 to receive a motion, for example, in the context
10 of an MRE 412 or 513 situation, some trial
11 counsel unnecessarily redact supporting
12 evidentiary exhibits. Redactions in this context
13 are not required by the Privacy Act, and it
14 substantially impedes victims counsel's ability
15 to do their job. I cannot adequately respond to
16 a defense MRE 412 motion, for example, that
17 analyzes the accused's constitutional rights if I
18 do not have all the facts that form the basis of
19 that motion.

20 Victim access to information is
21 consistent with trial counsel's obligation and
22 does not infringe on the accused's rights.

1 Defense counsel is free to cross-examine the
2 victim about what they reviewed and is free to
3 argue to the trier of fact regarding the
4 relevance of the victim's prior knowledge.

5 Similarly, the battle between the
6 government's trial objectives and the informed
7 victim is a false choice. I have never seen a
8 court-martial negatively impacted in my 10 years
9 by the victim's access to information. In my
10 experience, members expect victims to review
11 their own statements. Good trial counsel
12 prepares victims for what they may be asked in
13 cross-examination including the statements of
14 other witnesses, and if there is counterintuitive
15 behavior, good government practice addresses it
16 directly, or at the very least prepares the
17 victim for the likely cross-examination.

18 The idea that a victim should be --
19 should go into their trial testimony uninformed
20 and without proper preparation is simply not good
21 practice as confirmed by the experienced military
22 trial counsel I have worked with who take the

1 necessary time to educate and inform victims in
2 the lead up to trial.

3 The history of victim rights in the
4 military over the last decade is one of
5 substantial progress and empowerment. The work
6 of this Committee and like-minded advocates and
7 policy makers have expanded and enhanced the
8 rights of victims, but more work can and must be
9 done. That is why we appreciate the opportunity
10 to speak here today, and it is why with great
11 pleasure I look to hear from Survivors United
12 founding member, Kylisha Boyd, regarding her
13 experience. Thank you for your time today, and I
14 look forward to answering any questions you may
15 have.

16 HON. SMITH: Thank you.

17 MS. BOYD: Thank you for your time and
18 allowing me to speak here today on the issue of
19 victim access to information during the military
20 justice process. My name is Kylisha Boyd. I am
21 a sexual assault survivor. After my trial in
22 2017, I met Adrian Perry. We discussed our

1 experiences and found similarities in what we had
2 experienced. Adrian and I both felt that there
3 was a need for an organization completely focused
4 on the experiences of all victims of military-
5 connected sexual assault. We wanted to provide
6 victims with both information and a voice, a
7 place where victims would feel heard and would
8 find understanding. We created Survivors United
9 to serve this purpose.

10 In addition to serving on Survivors
11 United board, I am a victim advocate working in
12 the Commonwealth of Virginia. Access to
13 information is important for several reasons.
14 For the victim, the justice process is scary and
15 intimidating. Victims are often uninformed, as I
16 was, and do not understand what is happening. As
17 cofounder of Survivors United and a victim
18 specialist in my professional life, I know that
19 information is something that gives victims a
20 sense of comfort and inclusion during a process
21 that is re-traumatizing and often excludes the
22 victim.

1 The military has acknowledged the need
2 for legal professionals to act on behalf of a
3 victim by providing victim counsel and victim
4 advocates. Without full access to legal filings
5 and information, victims counsel cannot protect
6 the rights of victims or explain what is
7 happening to the victim.

8 My assault occurred in July of 2016 by
9 an active duty member of the U.S. Air Force.
10 There were several points in the process where
11 information was not provided to me or to my legal
12 counsel. The information I did not receive
13 included my own statements, the motions filed
14 seeking my medical and therapy records, the
15 charge sheets, and eventually the court
16 transcripts. After I reported, I asked for a
17 victim counsel but I was told I did not qualify
18 for the vast majority of my experience leading up
19 to trial. Therefore, I was not represented.

20 As an unrepresented victim, I was not
21 aware I had a right to receive my police
22 statements, and I was not provided with a copy of

1 them or a copy of my forensic exam results. In
2 fact, the prosecutor refused to provide my exam
3 results to me, and I had no other way to obtain
4 them, at least until I got a lawyer one week
5 before trial.

6 I was not informed what other
7 witnesses might say or evidence existed that I
8 might be able to help explain. I was left in
9 complete ignorance. Eventually, I was able to
10 procure pro bono legal counsel after contacting
11 Protect Our Defenders. By that time, I was only
12 a week before my court-martial. I was not aware
13 of the charges or the questions that might be
14 asked of me on the stand.

15 During my trial, my legal counsel was
16 treated like an outsider. He was only provided
17 with information when he demanded to be included
18 and even then, some information was withheld. My
19 lawyer should have been the one to determine if
20 the statement to Defense Advisory -- I'm sorry --
21 if something was relevant to me and not the
22 government. This is exactly why there is a

1 distinction in the role of victim counsel versus
2 a prosecutor or a defense attorney.

3 After my assault, I was interviewed by
4 prosecutors following the transfer of my case to
5 the military. The prosecution team asked me to
6 retell the assault and establish a timeline. At
7 the end of the interview, I asked, "Considering
8 all of the evidence and circumstances, what will
9 he be charged with?" The prosecutor's response
10 was, "I'm not going to discuss the charges with
11 you because I want an organic response when I
12 question you on the stand." I did not agree with
13 this, but I assumed that because he's the
14 professional, he must be right.

15 We were finally informed of the
16 charges and defense responses to charges the day
17 before trial. I was completely shocked at what
18 was not included and needed further clarification
19 on what was included in the charges. The
20 questions that came up on the day before the
21 trial were painted at trial as changes in my
22 testimony or outright lies. But if I had been

1 better informed, I could have addressed those
2 issues well before trial. I was very clear and
3 consistent every time I told investigators what
4 happened to me. But when my -- when they asked
5 me questions, I had additional information.
6 Having my statements and being informed would, I
7 believe, had led to a different outcome in my
8 court-martial, and it has left me believing that
9 the process was fundamentally unfair.

10 Anyone can understand how a sexual
11 assault changes a person forever. What is not
12 always understood how a victim feels. The
13 verdict is always important but information and
14 understanding throughout the justice process is
15 deeply important. After my experience, I
16 questioned whether it was worth reporting. It
17 took some time to come to the conclusion that it
18 was. I choose to believe that the best way to
19 make sense of it all is to look at what went
20 wrong and try to make things better for future
21 survivors.

22 I sincerely thank you all for your

1 time and your consideration, and I welcome any
2 questions.

3 HON. SMITH: Thank you. Ms. Elmore,
4 did you have any opening remarks?

5 MS. ELMORE: I do. Who is asking?
6 Oh, it's -- so -- Madam Chair, yes, I do, if
7 that's okay. Good morning, Madam Chair and
8 distinguished Members of the Committee. Thank
9 you for allowing me the opportunity to be a part
10 of this very important discussion on the sharing
11 of information with special victims' legal
12 counsel or other counsel representing a victim of
13 military sexual assault or harassment. My name
14 is Jennifer Elmore and I am the President of
15 Protect Our Defenders.

16 Protect Our Defenders is a leading
17 contributor to legislative reform and culture
18 change in the United States military and uniquely
19 provides legal representation for military sexual
20 assault and sexual harassment survivors through
21 its pro bono network. As a cofounder of the
22 network, Ryan Guilds, is an excellent example of

1 the quality and caliber of representation
2 provided, and it makes the difference in the
3 experiences of victims coming forward. We
4 wholeheartedly endorse Ryan's testimony before
5 this Committee and do not, at this time, have
6 additions to make to his substantive
7 recommendations.

8 Every year Protect Our Defenders
9 receives hundreds of requests from victims
10 seeking help with their cases. I am here
11 representing the organization that takes those
12 requests for help, the collective experience of
13 those victims relating to their access to
14 information, and personally as a survivor having
15 faced the challenges of being able to access
16 information through the investigative and
17 prosecution processes.

18 When a victim comes forward, they
19 understand their rights as defined by the
20 Department of Defense. I studied these and was
21 committed to exercising them. I was unaware of
22 any other rights. I knew my right to be treated

1 with fairness and respect, with dignity and
2 privacy. I knew I had a right to be reasonably
3 protected from the accused offender. I knew I
4 had a right to reasonable, accurate and timely
5 notice of public preliminary hearings, pretrial
6 confinement hearings, court proceedings, and
7 clemency and parole hearings related to the
8 offense. I had a right to be present at public
9 hearings. I had a right to confer with trial
10 counsel. I had a right to available restitution.
11 I'm not actually quite sure what that was but I
12 had the right to it; the right to be reasonably
13 heard at a public hearing; a public hearing
14 concerning the continuation of any pretrial
15 confinement of the accused, a sentencing hearing
16 related to the offense, or a public military
17 department clemency and parole board hearing
18 related to the offense; the right to submit a
19 written statement for consideration by the
20 convening authority prior to taking action on
21 findings and sentence; and finally, the right to
22 proceedings free from unreasonable delay; the

1 right to be provided information, if applicable,
2 about the conviction, sentencing, imprisonment,
3 convening authority's action, appellate review
4 and release of the offender.

5 Why is a victim's right to access
6 information pertaining to their case limited to
7 these situations? Without information, how does
8 a victim experience or exercise well any one of
9 their other rights? Information such as
10 statements, oftentimes very voluminous case
11 filings, witness lists, and other materials is
12 needed for victims to make decisions and be
13 equipped for meaningful participation in their
14 cases.

15 As the thousands of victims that
16 Protect Our Defenders have assisted tell us, the
17 lack of access to information contributes
18 significantly to revictimization and trauma that
19 they experienced from the investigative and
20 prosecution processes, consistently describing
21 their experience as worse than the assault
22 itself. Victims of military sexual assault and

1 harassment are walking into investigations,
2 hearings, and trials less than fully equipped and
3 without pertinent information that would allow
4 for a fair and just process. Too often victims
5 are having to resort making FOIA requests on
6 their own behalfs and even then, FOIA responses
7 are inconsistent, delayed, heavily redacted, not
8 reliable, and a poor substitute for victims'
9 appropriate access to case information.

10 Thinking about these issues in the
11 context of my personal experience, I am reminded
12 of how important it was to have as much
13 information as was possible. It was imperative
14 to be at every hearing, regularly informed
15 throughout the process, and to have access to
16 case materials such as filings and reports.

17 As is the case for most victims, I
18 didn't know what to expect when giving my initial
19 statement, which was followed by subsequent
20 statements and interviews. The sheer volume of
21 information taken was overwhelming.

22 After a five-year investigation, I

1 needed statements to assess and navigate the
2 trial process. I needed the preliminary hearing
3 officer's report, which was only provided heavily
4 redacted and after relentless pestering by my
5 counsel, Ryan Guilds. Having testified at the
6 preliminary hearing, I understood the impact that
7 the PHO, the preliminary hearing officer's,
8 recommendation held. Access to that report was
9 critical.

10 At a separate hearing, we learned of
11 an important filing which we had no prior
12 knowledge of, and it required an argument in
13 court to procure. In that filing, I learned that
14 my initial SVC was being called as a witness. I
15 considered that critical information that would
16 have been traumatizing to encounter without
17 warning in trial. In my experience and the
18 experience of so many others, access to
19 information is an elementary factor to a fair and
20 just system and trial process.

21 On behalf of Protect Our Defenders and
22 the survivors we serve, we adamantly support the

1 implementation of a policy ensuring victims'
2 rights to access to critical information. Thank
3 you.

4 HON. WALTON: I hear what you say and
5 I'm sympathetic to what you say, but there's
6 another perspective that we also get. And that
7 is, you know, from the perspective of those who
8 are accused and who say that these scales have
9 shifted unfairly in favor of victims as compared
10 to those who are accused and the claim that as a
11 result of that, people are being wrongfully
12 convicted. What's your response to whether there
13 is an imbalance in the system now?

14 MR. GUILDS: I am very concerned about
15 anyone who is wrongfully convicted. I've walked
16 people off of death row in the civilian world who
17 were wrongfully convicted of crimes. It is not
18 an issue unique to the military, and I do not see
19 a course correction that's resulting in a large
20 scale conviction of innocent offenders. I just
21 don't see it. I have far greater concerns on the
22 civilian side with defendants who do not have

1 adequate defense counsel, candidly, than I see in
2 the military. It doesn't mean it's not an issue.
3 It doesn't mean that we shouldn't hear, take
4 seriously all of those who come forward and claim
5 that they're innocent, but providing the victim
6 with access to information is not why individuals
7 are being wrongfully convicted. There's much
8 more systemic reasons for that that are,
9 candidly, not unique to the military.

10 HON. WALTON: I mean, you are -- and
11 I'm not saying it's incorrect -- advocating for
12 rights to a greater degree as it relates to
13 victims than is available to victims in the
14 civilian world. Is there a justification for a
15 difference in the quality or amount of rights
16 provided to victims in the military system as
17 compared to the civilian system?

18 MR. GUILDS: Yes, that's a fair
19 question. Yes, because the civilian system is
20 not good. That's the answer, sir. And I don't
21 mean to be disrespectful.

22 I think, candidly, I've been across

1 the country and I'm aware of what victims' rights
2 look like in rural Alabama or downtown
3 Philadelphia or Northern California. And victims
4 do not have the same rights that they have in the
5 system.

6 And that's why I'm very proud of the
7 work that this Committee and many other good
8 policymakers have created over time. This is the
9 best system in the world for victims, and I tell
10 victims that. And many people are surprised when
11 they hear that from me; it's the best system in
12 the world. And it's one that has created some
13 trust among survivors.

14 The victim experience on the civilian
15 side is not great -- not that it's ever a
16 situation that anyone would want to encounter,
17 but it's not great. There are countless
18 survivors across this country on the civilian
19 side who do not have lawyers.

20 But the fact that it is bad in the
21 civilian world doesn't mean that the military
22 justice system cannot continue to enhance and

1 improve its practices. And victim access to
2 information, particularly information that would
3 be, candidly, available in a docketing system
4 that exists on the civilian side, are not the
5 types of things that are going to undermine the
6 defendants' rights.

7 The victims' rights and defendants'
8 rights is not a binary choice. It's a false
9 choice. I firmly believe in the rights of
10 defendants. It's, candidly, what pays the bills
11 in my house.

12 So, I do not have any problems with
13 the idea that victims -- or that defendants,
14 rather -- should have access to all of the
15 information that's in the government's files
16 that's material to the defense. They should be
17 provided that information in a way that allows
18 them to use it at trial. They should be afforded
19 adequate investigative resources, so that they
20 can conduct an adequate defense investigation. I
21 believe in all of those things. And I think many
22 of the survivors -- I know the two survivors

1 sitting here -- believe it as well.

2 But access to information is not going
3 to undermine their case. I have seen survivors
4 who have had access to information, and I have
5 seen effective defense counsel cross-examination
6 of that information.

7 "Well, you saw this piece of
8 information, didn't you?" "And you said this on
9 day one, and now, you're saying this on day
10 three. And so, your testimony has changed today,
11 hasn't it now?" That is an effective cross-
12 examination. It's an examination I've seen in
13 virtually every case. And the fact that the
14 victim has had access to that information,
15 candidly, gives the defense even more information
16 to question.

17 So, what value is it beyond just
18 informing the survivor, which Kylisha very
19 eloquently spoke of? It's really very important.

20 If you take Kylisha's case, for
21 example -- do I have permission to share? -- if
22 you take Kylisha's case, for example, her initial

1 report was five hours after the assault, and she
2 had been sitting in the hospital. She had taken
3 a forensic examination and she had no lawyer.
4 And she came from a community where, candidly,
5 she didn't trust the police or law enforcement,
6 or anyone outside of her neighborhood.

7 And so, to be expected to remember a
8 year later what she said in that statement, when
9 there were followup questions from trial counsel
10 three days before trial, is not a good process.
11 And when she gave additional information, as a
12 result of those questions, that was entirely
13 consistent with what she had said before, but was
14 new because she was asked a new question.

15 Trial counsel was forced to turn that
16 information over, as a result of his Brady
17 obligations. And that led to an argument at
18 trial that Kylisha had lied. But all Kylisha had
19 done was answer a new question.

20 And no amount of expert testimony and
21 no amount of forensic examination after the fact
22 can make up for the fact that, if someone had

1 shown her her statement, and she had counsel to
2 explain it, that she could have further clarified
3 and explained what happened. Because no one who
4 reports their initial sexual assault does so like
5 a film. We know that. I don't need to tell this
6 Committee that. We know how memory works.

7 And so, as a result of that, having
8 access to that information is particularly
9 important. I'm not suggesting that every piece
10 of investigative information should be turned
11 over. That's not what I'm advocating for.
12 That's not my proposal.

13 I understand that during the course of
14 an investigation there may be a need to withhold
15 information. And, in fact, that is something
16 that I, typically, inform my clients regarding;
17 that there are legitimate trial reasons why you
18 may not know what's happening in the
19 investigation as it's unfolding. But, as it
20 unfolds, and as information comes up, certainly,
21 the victims should receive more and more
22 information over time.

1 And that is absolutely true when it
2 comes to the types of things that I've described
3 today: the victim's own statement, the
4 preliminary hearing officer evidence, and any
5 filings in the case. That is not the entire ROI
6 unredacted. Those finite things that only
7 improve the victim's rights and do not undermine
8 the accused.

9 And I feel like I'm getting on a
10 little bit a stand here. I apologize.

11 HON. WALTON: Thank you.

12 I know that you didn't specifically,
13 the panel, address this question, but I know it's
14 an issue in the criminal justice system. And
15 that is, should an alleged victim -- I'm going to
16 say, "alleged victim" because it's an allegation
17 -- be able to preclude the government from
18 entering unto a plea agreement with a defendant
19 that the victim does not agree with?

20 MR. GUILDS: That's not the law. So,
21 I will say that. That's not what the law says.
22 I don't know the answer to that. I mean, I,

1 ultimately, understand that the government has a
2 different obligation.

3 I would think and hope that, whether
4 it's the convening authority or the judge, would
5 take seriously the rights of the victim and their
6 interests of the victim. But, at the end of the
7 day, the victim does not control the process; the
8 victim has a right to be heard.

9 So, without consulting my clients,
10 just my personal opinion, I would say that, while
11 I would be disappointed in that result, I do not
12 believe that a victim can block a plea agreement,
13 especially, as I think about it, when the
14 government controls the evidence and the ability
15 to prove the case.

16 So, I don't see a viable way that the
17 government can move forward on a case that they
18 thought they couldn't prove, just because of the
19 victim said that they weren't going to take a
20 plea. That would result, I suppose, in a
21 dismissal. So, I would not be in favor of that.

22 MS. TOKASH: This is Meghan Tokash.

1 So, the federal system has something
2 that's known as the Victim Notification System,
3 the VNS. Could you comment on your thoughts with
4 respect to such a system in the military and
5 whether that would be beneficial, and how that
6 would serve sexual assault victims and your
7 organizations?

8 MR. GUILDS: I haven't studied it
9 closely. I'm aware of the D.C. system, you know,
10 practicing in D.C. And I've seen it operate in
11 other jurisdictions. I think there are
12 components of that in the military already that
13 are not necessarily institutionalized in one
14 office.

15 Kylisha, she would be interested in
16 your thoughts on this, since I feel like it's
17 your area of practice.

18 But, for me, personally, I think it's
19 helpful, but it is not a replacement for the
20 things that we are suggesting here today. I
21 don't think it overcomes the type of automatic
22 notice victim information that we are referencing

1 here.

2 MS. BOYD: So, in my professional
3 life, I do work with sort of a victim
4 notification system. I think the automation, for
5 the purpose of fulfilling that it has to be done,
6 works.

7 But I think, for the military, and in
8 our system, we still have a live person who still
9 follows up with that victim, who still calls that
10 victim and requests on their behalf and advocates
11 on their behalf, and notifies the victim of any
12 -- like if there's a release; if there's a
13 pleading; if there's a filing; if there's a
14 petition; if there's anything, really, relevant
15 to the victim, there is still a live person who
16 follows up outside of that automatic
17 notification. And I think it should remain that
18 way.

19 Because a lot of times, you know, the
20 notification comes. People don't check their
21 email. So, we're putting, again, the
22 responsibility on the victim to -- "Well, we

1 notified you, but you didn't read your email.

2 So, oh, well, you had your right met."

3 I think it's more important to have an
4 actual conversation with the victim because they
5 have questions. Victims always have questions.
6 So, that's an opportunity to explain to them why
7 this trial is proceeding -- just procedural
8 questions.

9 HON. WALTON: I don't know if the
10 allegation is accurate or not, but we've heard
11 previously at another hearing that, while victims
12 have a right to speak at sentencing, that in
13 military courts, at least some judges are not
14 scrupulously respecting that right. Do you
15 disagree with that or agree with that?

16 MR. GUILDS: Are you asking me, sir?

17 HON. WALTON: Any of you.

18 MR. GUILDS: Okay. I think it's fair
19 to say we all agree. We agree that judges are
20 not consistent -- there have been improvements,
21 as we've discussed. But, in terms of limitations
22 at sentencing, they continue; I continue to see

1 limitations at sentencing.

2 I think I described the last time I
3 was here redlining by a court down the road with
4 respect to a victim's statement. So, yes, I do
5 continue to see those limitations.

6 And I believe that, particularly as we
7 go to judge sentencing, that there should be
8 given wide latitude to the victim to say what
9 they want to say. And I think that's consistent
10 with what the recommendations are, have been of
11 this Committee previously.

12 HON. SMITH: So, I have a question.
13 I just want to be sure that I understand, we
14 understand exactly what it is you're advocating
15 for.

16 So, you said mandatory disclosure
17 without request and that it be timely.

18 MR. GUILDS: Yes.

19 HON. SMITH: So, we know that you're
20 talking about the charges, correct? Or do you
21 get that now? I know that -- I can't remember
22 which witness said it.

1 MR. GUILDS: Sure. Sure. I mean, I
2 think that the charge sheet would be a good
3 example of the type of mandatory information that
4 we think should automatically be turned over.
5 And I certainly can provide the Committee with a
6 more comprehensive list that we have previously
7 advocated for. But the charge sheet would be an
8 example of that.

9 The victims' statements are, in
10 particular, a focus, right? And when I say,
11 "victims' statements" -- and I'm going to get the
12 number wrong -- I don't mean just their
13 transcribed statement to military investigators,
14 but I mean the subsequent summary statements that
15 are provided by trial counsels/paralegal.

16 They should know what they are
17 recorded as having said. I think that -- may I
18 share? -- in Jennifer's case, for example, there
19 were trial counsel summaries that were incorrect.
20 And when she reviewed them -- I mean, that was
21 human error; it wasn't something intentional --
22 but when she reviewed them, she needed to correct

1 them. Those are types of things that victims
2 should automatically receive.

3 And when victims are unrepresented --
4 they don't know to ask for these things --
5 receipt of that is something that can be very
6 helpful. If they don't want to review it, they
7 don't have to review it.

8 I heard some testimony yesterday, or
9 at least a suggestion perhaps in a question, that
10 victims -- let me be respectful to the question
11 -- victims may not want to review their
12 statement, and it may be more harmful for them to
13 review it. And that's true there. I have had
14 some victims who are not interested in reviewing
15 their statement, and I tell them they don't have
16 to.

17 But victim voice, victim choice means
18 that they are the ones that should decide, not
19 someone else. And I think it's just low-hanging
20 fruit. I think just provide the statements to
21 them. There's no reason not to. We know they're
22 going to review them. Do it in a timely way.

1 So, that's an example of what I would
2 automatically provide. I would, also,
3 automatically provide the full report and the
4 exhibits to the full report, for the reasons that
5 I've described.

6 And then, in terms of filings, I just
7 don't understand why we have this process. I'm
8 getting myself all worked up about this. I don't
9 understand why we have this process. Because if
10 I was trial counsel, I don't want this job. Like
11 I'm preparing for trial. I don't want to have to
12 be someone else's paralegal and figure out and
13 have to put myself in the shoes of them.

14 And, for example, in Jennifer's case,
15 a very fine trial attorney, outstanding trial
16 attorney. She just missed the witness list that
17 happened to have Jennifer's prior victims' legal
18 counsel on it. She just missed that. She didn't
19 see it because she was busy. That's going to
20 happen. There's no reason not to create this
21 automated process.

22 And it's not getting better. I was at

1 Fort Bliss three months ago. And there was a 412
2 argument that was buried in a Motion for
3 Production, and it was not served on victims'
4 legal counsel. And when that hearing happened,
5 there was no one there for the victim.

6 And I was not currently representing
7 the victim at the time. But what happened after
8 that hearing is that's when Protect Our Defenders
9 got called. And I could not undo the damage
10 caused by the filing and granting of that motion.
11 I couldn't do it. The only way to have done it
12 would have been to delay the proceeding, which
13 the victim was not willing to do, understandably.

14 So, these types of things that we're
15 asking for, they are not monumental changes.
16 Many of them are things that civilians do get
17 access to. And even where they don't, the fact
18 that the civilian world has not come as far as
19 the military institution in protecting victims'
20 rights is, respectfully, not a great reason not
21 to improve the victim experience, especially
22 when, in my view, it is not the cause of anyone's

1 -- I mean institutionally as part of a trend,
2 right? -- any unjustified convictions of innocent
3 individuals.

4 Can I get my wishlist question? Will
5 you be asking me that?

6 (Laughter.)

7 Okay. Great.

8 HON. WALTON: Having in my prior
9 existence in the Superior Court in D.C. served in
10 the Domestic Violence Unit, do you have concerns
11 that in a situation like that, which may involve
12 a sexual assault, that providing the information
13 to a victim without request, and the victim
14 having access to that information, could be used
15 against them if the perpetrator finds out about
16 her possession of that information, and
17 therefore, knows what's been accused and puts her
18 at greater risk?

19 MR. GUILDS: I mean, I always believe
20 in strong safety planning, right? So, if that is
21 a specific concern in that case, I would suggest
22 there would be a lot of safety planning, not just

1 possession of that particular document --
2 possession of the parking receipts related to
3 going into the courthouse, right? Possession of
4 a number of things that I would advocate for a
5 domestic violence survivor that they would want
6 to take into account as part of the safety plan.

7 And that may very well mean we don't
8 have any paper record of that in that particular
9 circumstance, but that would be the victim's
10 choice, based, hopefully, on good, sound safety
11 planning with an advocate.

12 HON. WALTON: But she wouldn't have
13 that choice, would she, if it's being
14 automatically provided to her without her
15 request?

16 MR. GUILDS: So, I mean, now we could
17 get into the brass tacks of it. I mean, this is
18 the way, for example, the victim has a right to
19 the -- what is the thing at the end; what do you
20 call it? -- the record of trial. Sorry. I'm not
21 sure why I'm asking Kylisha. She doesn't
22 practice law. She's a victim advocate.

1 (Laughter.)

2 The record of trial. And there's a
3 form. The military loves its forms and its
4 acronyms, right? There's a form. If she doesn't
5 want it, then you fill out the form and say, "I
6 don't want to receive that piece of information."

7 So, I think that there are ways to
8 address that, right, that make it a real choice,
9 as opposed to "Here is a lengthy piece of paper
10 in 10-point font for you to read, even though
11 you've never practiced law, that tells you about
12 your rights." I think there's a real meaningful
13 way we can do it.

14 Listen, I appreciate the
15 consideration. The safety concerns on the
16 domestic violence front are real, and we should
17 make sure we take every step to make sure we
18 protect those survivors for sure.

19 MS. BOYD: I would just like to add to
20 that. The system that I do work with that has an
21 automatic system for notification, there is an
22 ability for other people to register on their

1 behalf. So, I don't know if that would create
2 other privacy issues, but there is an opportunity
3 for someone else to be notified on their behalf.

4 MS. GOLDBERG: Thank you very much.

5 This is Suzanne Goldberg. Maybe two
6 points or one observation, and then, I will try
7 to get to the wishlist question, which I did not,
8 for the record, frame that way.

9 (Laughter.)

10 But also for the record, you said
11 something about the military justice system being
12 the best system for victims, or comparatively,
13 better than the civilian system.

14 MR. GUILDS: Yes.

15 MS. GOLDBERG: And I want to note,
16 just for the record, also, that we have heard,
17 notwithstanding your point, we have heard a great
18 deal from victims about the challenges of that
19 system and from some of the harms they have
20 described as experiencing in that system.

21 So, I think, comparatively, you know,
22 I take your point. That's your experience. I

1 just want to be clear that we have heard a
2 variety of testimony over time suggesting that
3 there continue to be real challenges.

4 The question that I have is, if you
5 could speak more specifically to timing, and, in
6 particular, to the concern of trial counsel that
7 victims having this information may diminish
8 their ability to gain a conviction in a case.
9 You spoke to that just a little bit in your
10 opening testimony, and I wanted to create an
11 opportunity of you have more to say in response
12 to the concern that has been raised by a number
13 of different trial counsel.

14 And then, the followup question would
15 be, are there other problems or issues that you
16 think the DAC-IPAD should be looking into as a
17 policy matter here?

18 MR. GUILDS: Great. Thank you.

19 Yes, to your first point, the fact
20 that I believe that the victim experience in the
21 military is far superior than the vast majority
22 of victim experiences in the civilian world does

1 not mean I think it's a good one. So, I'm
2 totally tracking that victims' experiences
3 continue to be challenging, and that, often,
4 victims in the military justice system do not
5 receive the type of justice and fairness that the
6 law says that they're entitled.

7 With respect to concerns from trial
8 counsel, I just don't see it. I think that any
9 lawyer would say they would never allow -- well,
10 let me start over.

11 In my experience, good lawyers want
12 their clients to be informed, particularly about
13 what they've previously said, particularly when
14 they're going to be examined on the same topic.
15 I have never heard of a lawyer who said, "I
16 really think it's important for my client to go
17 in cold." It just doesn't make any sense to me
18 in terms of preparation.

19 And I think that everyone understands,
20 when you have a witness, that they need to be
21 refreshed with respect to their recollection,
22 especially when these investigations are not

1 often months, but years in the making.

2 So, the idea of refreshing their
3 recollection with respect to their own
4 statements, I think that's a low-hanging fruit.
5 I think that happens. And candidly, it does
6 happy, but, oftentimes, it doesn't happen until
7 immediately before trial, when the damage is
8 already done. So, that's the first thing.

9 The second thing is that, in my
10 experience, experienced trial counsel want the
11 survivor to be informed about areas of
12 examination, both their own examination and,
13 likely, cross-examination.

14 And for me, the proof of that is the
15 more the media is paying attention to the issues
16 of my client's case, the more senior the trial
17 counsel is in the case, the more meetings there
18 are, the more trial prep there is, the more
19 effort there is to adequately inform the client,
20 because that's good trial practice in my
21 experience.

22 It's the cases that no one's paying

1 attention to, the lance corporals that no one
2 knows, those are the cases where no one's
3 watching, where I see trial counsel withholding
4 information or simply just not providing that
5 information because of other obligations. That,
6 ultimately, at trial, leads to significant real
7 material damage to the victim's statements at
8 trial. Because it appears as if they've changed
9 their story. They've added information.

10 The number of times that I've seen a
11 cross-examination that starts with, "You knew it
12 was important to be honest with the police,
13 right? And you knew why they were there, right?
14 They were there to get all of the information,
15 right? And you knew that you needed to provide
16 all of that information because you were seeking
17 justice, right? And you knew that leaving
18 something out of your statement would be wrong,
19 right? But you didn't say `X' on day one, did
20 you? And you didn't say `Y' on day one, did
21 you?" -- this is the type of examination I see
22 every day on courts-martial across this country,

1 and that's the type of examination that can be
2 addressed with a well-informed victim.

3 You don't look happy with my answer.

4 Okay.

5 (Laughter.)

6 MR. KRAMER: Can I ask a quick
7 question? And you talked about the criticisms of
8 the victims in how they get the materials. Are
9 you talking about people who are unrepresented by
10 counsel? And I think, Ms. Boyd, you were not, I
11 think you said. Or are you talking about, also,
12 people represented by SVCs?

13 MR. GUILDS: Despite being a most
14 excellent question, I actually didn't understand
15 the first part. Can you ask me again?

16 MR. KRAMER: Oh, are you -- the
17 problems you've said about people receiving
18 information, are you talking about people
19 unrepresented by counsel, complainants
20 unrepresented by counsel, or people also
21 represented by SVCs? Both or one or the other?

22 MR. GUILDS: Yes, I see the question

1 now. It's still an excellent question.

2 In terms of statements, I don't let my
3 clients speak to anyone if I don't have all of
4 their statements. And I think that, routinely,
5 VLCs would try to seek to get that information.

6 So, I think, with respect to
7 statements, a good VLC practice, a good victims'
8 counsel practice would be to require all of those
9 statements early on, pre-preferral.

10 I have had a situation in the Army
11 where they refused to provide that to me pre-
12 referral, citing their TJAG instructions. But I
13 whined a lot and, eventually, we got that
14 information.

15 So, I think that automatic provision
16 is more important for unrepresented parties or,
17 candidly, for parties who may not have that
18 relationship with their lawyers where they know
19 that they're entitled to it.

20 Oftentimes, I get cases where things
21 have gone wrong, and I understand that. Like I
22 understand I'm not on the line where everything

1 is great in the cases that we typically receive
2 from represented parties. When things go wrong,
3 they rarely have any information, even when
4 they're represented. So, I think that automatic
5 provision is important.

6 With respect to service at court-
7 martial, that is a uniform. And when I mean
8 "uniform," it's like collectively across all
9 branches not receiving all of the filings.

10 That, it does not matter whether
11 you're represented or not. In fact, it's more of
12 an issue when you are represented because your
13 lawyers can do something about it, and they're
14 not receiving the adequate information in the
15 timely way. So, I think it's a bit of both, Mr.
16 Kramer.

17 And if I could, Mr. Kramer asked a
18 question previously, another great question that
19 I think I'll try to answer here, which is, why do
20 victims not take victims' legal counsel? So, for
21 those who are entitled to it, who do not go with
22 military-detailed victims' legal counsel, my

1 experience there's multiple reasons why.

2 No. 1, they will never trust someone
3 in uniform to represent them, and that's no
4 disrespect on the uniform. It's the result of
5 their experience. So, having someone who is in
6 uniform, even if they were in uniform or even if
7 they are in uniform, being the one that controls
8 their power is, for many people, not a way
9 forward.

10 For others, it is just a lack of
11 availability of their victims' counsel. Despite
12 the many efforts of the people who sat before us
13 on this panel, and the efforts to try to reduce,
14 the fact is that too many VLCs and SVCs are
15 overwhelmed and can't give adequate attention.
16 So, you'll often see survivors reach out for that
17 way.

18 There is sometimes a rank issue.
19 Sometimes junior enlisted folks have a hard time
20 envisioning an officer as someone who works for
21 them, as opposed to they're working for the
22 officer.

1 And then, candidly, there are some
2 cases that require representation outside of what
3 the SVCs and the VLCs can provide. Those are
4 rare circumstances, typically involving the media
5 or congressional inquiries. Those can be
6 circumstances as well.

7 So, I just wanted to be responsive to
8 that in terms of why we, why Protect Our
9 Defenders, and why I personally, continue to see
10 cases, even from those who are entitled to SVC
11 services.

12 MG ANDERSON: This is Marcia Anderson.

13 This is for Ms. Elmore, or anyone else
14 can chime in, if they want to after she gives her
15 comments.

16 But I was interested in your thoughts
17 on the adequacy of the current Article 25
18 criteria, if there should be any changes;
19 diversity of the panel members in general. And
20 also, we discussed yesterday, or had panel
21 members talk about, randomization of panel member
22 selection.

1 So, if you feel confident to comment
2 on those, I would appreciate it. Thank you.

3 MS. ELMORE: I think maybe a way to
4 comment is to revisit a court-martial that I
5 served as an advocate for at -- where were we?
6 We can't keep the bases straight. And sat with a
7 victim as she went to the panel selection
8 process.

9 And as the marines were marched in
10 that were up for potential seating, eventually,
11 she knew that every seat was going to be filled
12 by a middle-aged male. And you knew instantly,
13 in her body language and her ability to proceed
14 in that process, how impactful that happening was
15 to her.

16 And so, just anecdotally, it has a
17 significant impact on victims in that process.
18 When she first took the stand after that, she had
19 a hard time proceeding through the process and,
20 ultimately, the case was -- he was acquitted.

21 So, I don't know if there's something
22 you want to add to the panel.

1 MR. GUILDS: Elimination of the
2 liberal grant mandate would be, I think, the No.
3 1 thing from our perspective. We don't believe
4 it's necessary. We think it unnecessarily
5 results in the exclusion of women from panels and
6 those that have a victim perspective.

7 And while I continue to share globally
8 the concern about innocent individuals being
9 convicted, I don't think that this type of panel
10 change is going to materially change the outcome
11 of particular courts-martials. I think it will
12 increase trust in the process for both minority
13 defendants as well as female victims, if we have
14 a better process that ensures greater diversity.

15 Now, the brass tacks of how to
16 accomplish that are above my pay grade in terms
17 of how to deal with it specifically in each
18 instance, other than I think the venires are too
19 small.

20 I think that having 12 or 16 to pick
21 eight does not create the type of diversity that
22 you're looking for, particularly in some of the

1 smaller commands. So, there are smart people I
2 know who are looking at this issue. So, I don't
3 have the specifics, but I would increase the size
4 of the venire. I would eliminate the liberal
5 grant mandate, and I would reaffirm the value to
6 both the accused and survivors to have
7 representative member panels.

8 MS. GOLDBERG: On the liberal grant
9 mandate question, and your point that it results
10 in the disproportionate exclusion of women and
11 sexual assault survivors, do you say that based
12 on experience or from some other source?

13 And, Ms. Elmore, you mentioned in your
14 opening statement that an SVC in your case was
15 called to testify, and that you were not informed
16 of that. I don't know if that's a unique
17 situation and warrants our exploration here. But
18 if there is anything about that that you think
19 the Committee should be aware of from a policy
20 perspective, I would appreciate your saying a
21 little bit more.

22 MR. GUILDS: It's based on my

1 experience. So, what we see -- and I think the
2 Committee has heard a little bit about this --
3 but what you'll see is, during voir dire -- or
4 voir dire, depending I guess on where you live --
5 you'll see questions that regarding "Were you a
6 uniformed victim advocate?" "Were you a sexual
7 assault survivor? Do you know a sexual assault
8 survivor? Did you have some connection with the
9 process? Do you have some SAPR training beyond
10 the ordinary SAPR training?"

11 Women are more likely to answer that,
12 those questions, with a yes. And that results in
13 continued questioning that frequently results
14 from them being excluded from the panel, not for
15 cause, but for implied bias, based upon the
16 liberal grant mandates.

17 So, it's that disproportionate outcome
18 of that type of questioning and the fact that
19 women are more likely to fill those roles --
20 something I think I've heard members of this
21 Committee comment on in the past -- that results
22 in the exclusion of women from panels.

1 So, I have seen my last court-martial,
2 both of the women were excluded. The court-
3 martial that Jennifer is talking about, I think
4 there was one woman. I think there was one woman
5 who was a uniformed victim advocate, and she was
6 excluded.

7 So, yes, I think it's real. I think
8 it's worse in certain branches because there are
9 less women just generally, which is why I think
10 that there should be an expansion of the venire
11 even beyond the command to increase that level of
12 diversity.

13 But, yes, the liberal grant mandate is
14 an historic phenomenon that's not necessary to
15 ensure the defendant's rights, and I think is
16 resulting in unnecessarily skewed panels.

17 And I'm not sure why I'm so close to
18 the mic.

19 (Laughter.)

20 MS. TOKASH: This is Meghan Tokash
21 speaking again.

22 Ms. Elmore, your organization released

1 a public statement last week saying that you
2 encourage the DAC-IPAD to investigate the use of
3 military magistrates and judges for the Article
4 32 preliminary hearing process and recommend
5 establishing standing courts with judges and
6 magistrates.

7 I'm interested in hearing a little bit
8 more about this and, in particular, Mr. Guilds,
9 because of your comparative experience in other
10 court systems that have standing courts where
11 counsel, prosecutors and victims' counsel, have
12 the opportunity to be present and heard at things
13 like a detention hearing --

14 MR. GUILDS: Yes.

15 MS. TOKASH: -- or even pretrial
16 motions hearings.

17 MR. GUILDS: Yes. I think it
18 increases trust in the process. I think if
19 you're going to have a preliminary hearing that's
20 going to be binding, you want that to be a
21 magistrate or a judge. You don't want that --
22 you don't want to receive a letter from me that

1 says, as has happened recently, down the street
2 in the military District of Washington, to have
3 the preliminary hearing officer be someone who
4 admits openly that this is his first criminal
5 case, and that he's largely a civil expert.
6 Those are not the types of decisionmakers that
7 you want.

8 Having professionalized magistrates
9 will increase trust in the process, ensure the
10 military protective orders, if that's in the case
11 -- if, in fact, we go that far -- if the military
12 protective orders are granted in a timely, open
13 way with fairness for all, but also trust in the
14 process, I think those can only improve the
15 environment -- not just for the survivor, but,
16 candidly, also for the accused.

17 MS. TOKASH: Thank you.

18 HON. SMITH: I don't think we heard
19 your wishlist. Did you --

20 MR. GUILDS: Okay, great, but I'm not
21 calling it a wishlist --

22 HON. SMITH: Okay. I got it.

1 MR. GUILDS: -- because I don't want
2 to get in trouble.

3 Okay. Here's my wishlist.

4 (Laughter.)

5 Just kidding. It's not that long, and
6 it's consistent with what we've heard.

7 The Article 6b appeal rights, that's
8 a real problem. The standard of review is too
9 stringent. It doesn't give us immediate access.
10 It doesn't allow me to effectively advocate for
11 my client's rights in a timely way. If I'm a
12 week before trial, it's too late. Most victims
13 are not going to want to delay the proceeding to
14 proceed. But if I can give them a little bit of
15 assurance that it's going to be a slight delay
16 with a real meaningful, fair standard, that's
17 real.

18 There are some limitations in some
19 branched on the Article 6b right to be heard with
20 respect to privacy. There's this reading of 6b
21 in some courts that limit the right to be heard
22 with respect to dignity and privacy. I think

1 that's a real problem, and I agree with those on
2 the prior panel that we should mirror what's in
3 the Crime Victims Rights Act.

4 The No. 1 concern I have right now is
5 the erosion of 513. That's my No. 1 concern.
6 The Mellette decision has resulted in a serious
7 curtailing of my ability to assure my client that
8 her psychotherapy rights are being protected, and
9 it needs to change as soon as possible, so that I
10 can go back to telling my clients that their
11 therapy records are likely going to remain
12 private.

13 Those would be the big three. I don't
14 know -- Ms. Elmore? Those are the three, I'm
15 told.

16 And thank you for the question for
17 everyone.

18 HON. SMITH: All right. Thank you
19 very much.

20 I don't see that we have any more
21 questions.

22 MR. GUILDS: Thank you for the time,

1 as always.

2 MS. BOYD: Thank you.

3 COLONEL BOVARNICK: We have one more
4 panel. So, we'll kind of take our five-minute
5 break here, switch out the panels, and then, that
6 will be the last panel before the lunch break.

7 (Whereupon, the above-entitled matter
8 went off the record at 11:04 a.m. and resumed at
9 11:12 a.m.)

10 COLONEL BOVARNICK: Okay. This last
11 panel is going to take us up to the noon hour.

12 And we have representatives from the
13 Service Women's Action Network, Colonel, retired,
14 U.S. Air Force Lorry Fenner and Ms. Elisa
15 Cardnell. And then, for the League of United
16 Latin American Citizens, LULAC, we have Ms.
17 Schwan. And the SWAN organization is going to
18 provide opening comments for about five minutes,
19 and then, LULAC for about five minutes, and then,
20 we'll open it up to the panel for questions.

21 So, Colonel Fenner, over to you.

22 MS. FENNER: Thank you very much. We

1 appreciate you being here.

2 Service Women's Action Network, I
3 wanted to give a little bit of context because
4 we're about diversity, but I wanted you to know
5 our larger mission and how that kind of fits in,
6 and then, open to your questions about specifics.

7 So, we advocate for the collective
8 needs of service women, past, present, and
9 future. And most of you know that today there's
10 over 350,000 women serving on active duty and 2
11 million women veterans, which is the largest
12 number ever in history. And we believe their
13 voices must be heard.

14 We're a 501(c)(3), nonprofit,
15 nonpartisan organization, founded in 2009. We
16 came out of another organization that was focused
17 on making sure that women veterans' disability
18 claims were more successful, more valued, because
19 we have a high rate of not having those claims
20 approved.

21 So, SWAN, then, focused on trying to
22 do something a little bit different, realizing

1 that a lot of those veterans' claims were coming
2 out of women being assaulted or harassed while in
3 service. MST wasn't recognized like PTSD was for
4 combat stress. So, these women needed advocates
5 as well. So, SWAN has worked to support victims
6 of military sexual assault, to hold perpetrators
7 accountable in the military justice system, and
8 to have MST recognized at the VA.

9 We also started to advocate and
10 support the needs of both service women and women
11 veterans, regardless of rank, military branch, or
12 years of service. While service women and women
13 veterans have benefitted from all the other
14 veterans' organizations' efforts in the MSOs, we
15 call them, they still tend to focus on men. So,
16 we know that there's a need. And today, this is
17 different. You've invited women and minorities
18 to speak to you about this, and that's really
19 important.

20 In 2012, SWAN started advocating for
21 equality within the military assignments that
22 women were excluded from. These are very

1 prestigious combat positions. A quarter of a
2 million jobs were closed to women. And excluding
3 women from key military positions contributes to
4 a military culture that devalues women, prevents
5 advancement opportunities, and causes women to be
6 more vulnerable to harassment and assault.

7 Due to dedicated legislators, military
8 officials, and SWAN and other organizations'
9 efforts on Capitol Hill, in the face of
10 considerable opposition, the policy preventing
11 women from serving in key positions was
12 eliminated in 2013.

13 The services began implementing the
14 new policy in 2016, but it was never fully
15 implemented. SWAN fought a 10-year legal battle
16 -- it's now called SWAN v. Austin because that's
17 who the Secretary is now -- on the Army's Leaders
18 First Policy, which was about the lack of
19 implementation fully of that 2016 policy.

20 So, that case has been resolved, but
21 there are still challenges on the full
22 implementation of qualified women being able to

1 serve to their full potential, and that keeps
2 them in second-class status.

3 Today, the new policy, in order to
4 move forward in that "last tactical mile," we
5 call it, a whole-of-DoD approach, the
6 continuation of DACOWITS's historic efforts, and
7 vigorous congressional oversight will be
8 required.

9 Now today, SWAN has over 10,000
10 members and we advocate for many more women than
11 that. Knowing that women have served in every
12 conflict since the American Revolution, that
13 despite that, their critical contributions to
14 national security, women continue to face
15 barriers. These barriers exist both in the
16 military and when women transition to the VA,
17 where they're still not getting the earned
18 benefits and services.

19 We continue to fight for law and
20 policy change; for the equal treatment of women
21 in the military; to hold sex offenders
22 accountable in the military justice system; to

1 ensure full healthcare services for service women
2 and women veterans, and to eliminate barriers to
3 disability claims by women veterans.

4 But the bottom line for us is a
5 problematic culture that has not completely
6 bought into diversity and inclusion. That's the
7 root cause of many problems, chief of which is
8 assault and harassment.

9 Holding perpetrators and leaders
10 publicly accountable is one of the ways that
11 culture can be changed and trust in the system
12 increased. This absolutely affects recruiting,
13 retention, readiness, and therefore, the defense
14 of our Nation.

15 So, more must be done. That's why we
16 at SWAN will continue to work hard on this, while
17 we partner with other organizations who do the
18 same, and why we respect your work so much. And
19 we hope you can continue.

20 So, thank you for the work we do --
21 you do; we, too -- and I'm happy to hear your
22 questions.

1 I do want to say that Elisa Cardnell
2 is a Navy surface warfare officer, 100 percent
3 disabled, and she is our deputy at SWAN.

4 Thank you.

5 MS. SCHWAN: Thank you. Good morning.
6 Thank you for the invitation to be here.

7 My name is Rafaela Schwan, and I
8 joined LULAC as a staff member about a year ago,
9 but I have been with the organization for over 20
10 years. And most of my capacity has been in
11 education and in military issues in the veterans'
12 committee. I was the co-chair prior to my
13 position as a staff member, now the COO of the
14 organization.

15 And thank you for inviting us. But,
16 for us, you know, diversity in LULAC means a lot
17 more than the military. I mean, by being here, I
18 can address some of the issues that are very
19 important to us having to do with the military.

20 The organization is 94 years old. It
21 is the largest Latinos' civil rights
22 organization. And so, we work in just about

1 anything. When people ask me, "What does LULAC
2 represent?" I tell them "Just about anything. If
3 you think that issue is a Latino issue, we're
4 going to talk about it and we're going to
5 represent on it."

6 We're a little bit unique in the sense
7 also, that in some cases we're going to be
8 working with the accused; in some cases we're
9 going to be working with the defendant. So, you
10 know, we represent both of the entities in some
11 of the issues, depending on what they bring to
12 our table.

13 One of the issues that we worked on,
14 just so you have a little bit of idea, one of the
15 veterans' issues that we have worked on, Teri and
16 Patrick Caserta called us when they were talking
17 about their son, which some of you may be aware
18 of. He committed suicide, you know, in Virginia.
19 And unfortunately, they felt like they weren't
20 being answered to, their questions and concerns.

21 So, they reached out to LULAC. They
22 don't happen to be Hispanic, but they felt that

1 we would be able to help them in their concerns.
2 So, we were able to work with them and help them
3 with the Brandon Act, which was just implemented
4 on May 5th. So, we're very excited. A long
5 process, not fast enough for them, but we are
6 happy that now it's an opportunity and a recourse
7 for members to be able to report that and no
8 retributions, hopefully, in the future.

9 The other one that was also very much
10 in the media was Vanessa Guillen, and we continue
11 to work on that to make sure that we get the
12 Vanessa Guillen bill implemented.

13 One of the most important for us
14 Latinos has been, also, the deported veterans.
15 One of the issues that we work, we feel that the
16 military in so many of the cases, including
17 myself -- I joined the military as a resident in
18 the United States, and I was fortunate enough, by
19 the grace of God, that I think, you know, I just
20 kept on being lucky and in the right places every
21 time. So, I was able to become a citizen right
22 after I joined the military.

1 But that doesn't happen to all of our
2 members. They don't always know what they do or
3 how they have to do it. In some cases, they
4 think it's an automatic and they're waiting for
5 it to happen. They get out of the military and
6 they find out it never happened.

7 We do recognize that the Air Force
8 just recently implemented that they will become
9 naturalized citizens in basic training. We're
10 hoping all of the services will do the same
11 moving forward. And I think that will be
12 especially important for the military right now,
13 because it would be, hopefully, a way to recruit
14 more Hispanics in the military. Because they
15 feel that's a huge benefit for them and their
16 families.

17 However, what we don't want to see is
18 that, when the military meets their numbers, that
19 that goes away. We want to make sure that it's
20 implemented and it's something that stays there
21 for future members of our community.

22 And so, those are some of the things

1 that we work. If I tell you everything that we
2 do on everything else, it would take us a long
3 time, but it definitely is anything that is an
4 issue for Hispanics. They often come to us.

5 And I would venture to say now,
6 because some of the other ethnic groups see the
7 action and things that we have been able to do,
8 they are coming to us. So, we have the African
9 American community. The Casertas are Italian.
10 They're not Hispanic, but they came to us to see,
11 as a recourse for us to be able to work with
12 them.

13 Thank you.

14 MS. GOLDBERG: Sure. Thank you very
15 much for being here and for your opening
16 comments.

17 I don't know if you were in the room
18 for the discussion prior to this, but you may
19 have heard that we are thinking, as a Committee,
20 a lot about the question of how panels, the
21 military juries, are composed and the extent to
22 which it matters; the composition of those panels

1 matters to the perception of fairness and
2 legitimacy of the military justice system.

3 To the extent you're familiar with the
4 Article 25 criteria and the panel selection
5 process, we would be interested in your comments
6 on that. And if you are not involved with this
7 at that level of detail, we'd still be interested
8 in your views on the relevance of panel
9 composition to a sense of service members -- a
10 sense of legitimacy of the military justice
11 process.

12 MS. FENNER: Thank you. We're
13 gratified that that got asked us, the Article 25
14 question. So, we did submit those. You probably
15 have them for the record.

16 MS. GOLDBERG: Can you move your mic
17 closer?

18 MS. FENNER: Yes. So, DAC-IPAD had
19 asked us for a response to the Article 25
20 questions, and we very much are grateful that you
21 asked for our voice as well.

22 So, I gathered from -- I was here

1 yesterday and today -- I gathered from what
2 you're learning, the two main inputs that we can
3 make, along with all the others that were asked,
4 is that diversity on panels is really important.
5 I've done a lot of things in my career, but, as a
6 first lieutenant, I served on a panel, and then,
7 as a commander at various levels, I had to do
8 Article 32 hearings and such. So, I have a
9 varied experience with this.

10 But diversity matters on panels, for
11 all the reasons everybody has said. That will
12 have to be navigated very carefully because let's
13 say there's a trial of a White supremacist and he
14 wants a panel of all White supremacists. I
15 called him "he". That may be problematic.

16 So, it does have to be worked through.
17 We do believe that randomization of the jury
18 would be very important. Are these things hard?
19 We recognize that they're hard, but I don't
20 believe they're as hard as some of the panel
21 members on the other panels have articulated.

22 The military knows how to do a lot of

1 stuff. When the rubber meets the road, when
2 they're directed to do it, they can do it. Do
3 they need oversight as they implement?

4 Absolutely. But this doesn't have to be that
5 hard.

6 There are small bases. You can draw
7 from geographic areas. You don't have to
8 overreact and say, "Well, if we get people from
9 all over the globe" -- yes, some places are so
10 small that you won't get much of that. Some
11 combat units are legitimately 95 percent White
12 men or men in general. That doesn't mean you
13 can't go outside that unit to get that diversity.
14 It is so important.

15 And again, we would have much longer
16 answers, but we can leave it at that.

17 Randomization is important. You can achieve it.
18 And, yes, different people call their alpha
19 roster different things. We can get there from
20 here.

21 And even if you drew people from other
22 services, we're so joint these days -- my folder

1 for today is purple. All the bases have changed
2 into joint bases -- Andrews-Bolling, and so on
3 and so on. It wouldn't be bad to have joint
4 panels if that's what it comes down to.

5 So, we believe in it, and I thank you
6 for your question.

7 HON. SMITH: Can you just define --

8 MS. GOLDBERG: Thank you.

9 HON. SMITH: I'm sorry, I didn't mean
10 to interrupt.

11 Can you define your organization's
12 thought on what diversity is? I think people use
13 the word, but we have a tendency to mean
14 different things.

15 MS. FENNER: We agree completely, and
16 Elisa is going to respond.

17 MS. CARDNELL: Yes, thank you. Elisa
18 Cardnell, and thank you for the opportunity to be
19 here today.

20 So, SWAN overall agrees with the DoD
21 definitions for diversity and inclusion. I think
22 our biggest difference is that we like to

1 highlight that it's the overall experience of the
2 service members and their unique pass through the
3 military.

4 So, both, in general, the culture they
5 experience and what they specifically experience,
6 when we consider whether they feel to be part of
7 that DoD team. And that's something we hear from
8 our veterans and from our service members that
9 contributes to the feelings of trust and
10 transparency in the overall process, including
11 the military justice system.

12 MS. GOLDBERG: And just a quick
13 followup question that I'll ask you to address as
14 well, which is: what is that basis for SWAN's
15 view that the various types of diversity you just
16 mentioned mattered? Is that based on sort of
17 experience, interviews, research? It would be
18 helpful for the Committee to know.

19 MS. SCHWAN: You know, well, for me,
20 I was going to add to the comments, the way that
21 we, I guess, a detail diversity, I would add the
22 word equity.

1 Because a lot of the times, when you
2 have diversity, especially for me in the military
3 when I was in the military over 20 years, now
4 that I'm advocating in so many of the cases and I
5 go to a lot of events and talk about it, I see
6 myself as the Latina, the female being
7 represented, but it's not equity.

8 When you look at everybody else,
9 especially in the population of the military, the
10 only location where Hispanics are over-
11 represented is in the military.

12 If you look at in the government, if
13 you look in the corporation, we're still under-
14 represented today.

15 So, if in the military, we're over-
16 represented, and then, when you go to a court
17 martial or a committee or the field, and you're
18 under-represented, then there's an issue.

19 So, equity, for us, is as important as
20 saying is, you know, diversity.

21 MS. FENNER: And if you could just
22 remind me of the question because I'm on track.

1 MS. GOLDBERG: Sure, thank you both.

2 And the question is about the basis
3 for your statement that diversity in the ways you
4 described matters in these processes. Is it
5 based on interviews, research, anecdotal data, or
6 something else?

7 MS. FENNER: Yes, yes, yes.

8 So, there's a lot of research. One
9 doesn't do independent research anymore because
10 we're very, very small. But we capitalize on the
11 research.

12 The same things that DACOWITS uses is
13 Rand universities, Congressional Research
14 Service, GAO, most of those -- most of that body
15 of research will tell you that you have different
16 outcomes.

17 Part of this, too, is something that
18 people have talked about on the various panels,
19 trust. You walk in and the Judge, both lawyers,
20 the panel is all different from you. It's pretty
21 deflating.

22 Then, when you see the outcomes of not

1 very many cases are going to trial, and then,
2 once they go to trial, the outcomes are really
3 minuscule for most victims. People don't trust
4 the system.

5 So, that diversity, we believe, would
6 -- so, research, yes.

7 I'm a historian, so I use a lot of
8 world histories. But we also have a case
9 manager. The intake of cases that we have and
10 then, we don't have lawyers either. We refer
11 them out to people like Protect Our Defenders and
12 others.

13 That evidence from our case manager,
14 people calling in and asking what can be done
15 because my trial was flawed in this way.

16 And then, anecdotally, again, I sat on
17 a panel. I was -- now, this is a long time ago,
18 you can tell from my age, but there were five us.
19 I was the only woman.

20 The accused was a young man who had
21 gotten into substance abuse in Japan and he was
22 wreaking havoc, not only on his unit, but on the

1 local population, small town in Japan, Musella,
2 up north.

3 And two other panel members, I was a
4 First Lieutenant, two Captains, both male, prior
5 service individuals, they had been enlisted
6 before and then, two Lieutenant Colonels. So,
7 almost everybody else was white male.

8 When it came to making decisions, the
9 two Captains who were prior service NCOs were the
10 harshest of the five of us when it came to
11 deliberations.

12 So, that diversity looked like all
13 officers, but you, effectively, had two NCOs
14 sitting there.

15 And for the young enlisted man, he
16 probably didn't want those two senior NCOs on
17 that panel.

18 So, it's not just about women. It's
19 not just about race. It is partly about
20 experience. And it is a mix.

21 We're in favor of a mixed panel with
22 enlisted and officers. We know that the panel --

1 we agree that the panel should be senior to the
2 people sitting in the witness tables or the
3 accused.

4 But that diversity, the reason it's
5 more complicated is because we all know, we have
6 more than one identity, each of us. So, trying
7 to get at that, yes, hard. Doable? Absolutely.

8 MS. SCHWAN: Yes, and I would say, you
9 know, the reason why it's also important, because
10 any one of that is being accused or represented,
11 I think a lot of the times, when you see someone
12 that looks like you in that panel, you have a
13 little bit of being able to feel more comfortable
14 of saying what happened or how it happened or
15 why.

16 I will tell you, from our experience,
17 for example, we had a Marine that was going
18 through some problems and he was being told he
19 was going to go to court martial.

20 He was being harassed prior and all
21 that. And he felt that it was as a result of him
22 coming forward and telling what was going on with

1 him.

2 He called us, and we actually didn't
3 have to go to anything, we just told them,
4 please, tell your lawyer that LULAC is with you,
5 that if anything happens or we need to be there,
6 we will be with you to help in anything that we
7 can.

8 Can I tell you that we did anything or
9 that what we said had an impact? No, I cannot.

10 I can tell you that he was more
11 comfortable knowing that we were with him and
12 beside him.

13 Luckily, they dropped the charges.
14 He's home now. So, both him and his mother are
15 comfortable.

16 I don't know that we had anything to
17 do with that. It's just that implication that
18 they have that, that they have that faith, that
19 trust.

20 And so, when you do that, when you
21 have a diverse, you know, group of people to be
22 able to look at, they feel more comfortable and

1 like they're going to be able to have a better
2 representation and a better outcome.

3 MS. CARDNELL: Yes, and to continue on
4 those lines, our case manager a lot of times will
5 get calls from Veterans who, whether or not their
6 case went through the military justice system,
7 when they're now Veterans and looking to use
8 their VA benefits or file a VA claim, there's a
9 large distrust a lot of times of women to go to
10 the VA for resources.

11 So, it's not always the immediate
12 military justice system and the repercussions of
13 that, but it's also the second order effects of
14 making sure that our Veterans are taken care of
15 after their service as well.

16 DR. SPOHN: Thank you for your
17 comments.

18 Cassia Spohn, I want to ask a more
19 general question about DEI.

20 As I'm sure you know, efforts to
21 ensure diversity, inclusion -- diversity, equity,
22 and inclusion are attacked -- are being attacked

1 in the United States across many, many domains,
2 including academia where I'm from.

3 And we're seeing DEI offices shut down
4 and vice presidents for DEI in academic
5 institutions being reassigned.

6 And I'm wondering if you're seeing any
7 evidence of this kind of backlash in the
8 military? If you anticipate it? And if so, do
9 you have any strategies as to how to respond to
10 these very negative attacks on what many people
11 regard as a very positive movement?

12 MS. SCHWAN: Well, I will tell us, for
13 us, because I mentioned we worked on every issue,
14 education and what they're doing to the education
15 system is unbelievable.

16 We've had faculty asking and calling
17 us letting us know that they can't even talk
18 diversity or mention it or they feel they could
19 end up getting fired from their employment.

20 You know, as I mentioned earlier, for
21 us, I think at this moment, at least for Latinos,
22 because the military needs our youth to be able

1 to enroll in the military, I don't see it as much
2 of a threat because they need us.

3 That's why it's very important that,
4 if and when, the numbers come to where they need
5 to, a lot of what they're doing right now and
6 putting in place will not go away.

7 So, we need to make sure that, you
8 know, right now, it's a need. It's something
9 that they have to have because they need our
10 population to go in the military.

11 But hopefully, after those numbers get
12 to where they are, it's not something that will
13 become the same thing as everywhere else. We're
14 no longer needing to have diversity, equity, and
15 inclusion.

16 MS. FENNER: I'd like to answer on two
17 different levels.

18 Again, being the historian, we just
19 had the 75th anniversary of the integration of
20 women into the military. And that coincides with
21 Truman signing the racial integration documents.
22 And it didn't all happen when it was supposed to,

1 but it was happening.

2 That's because, in World War II, women
3 went, even in World War I before they could vote,
4 women went.

5 When the military needs us, they need
6 us.

7 After the World War II, they were
8 going to let us leave until Korea came up. And
9 the first need is usually for medical personnel.
10 They were going to let us leave.

11 Well, after the draft when young men,
12 after Vietnam, did not want to join the military,
13 guess what? The 50th anniversary of the All
14 Volunteer Force is happening on July 1st.

15 The All Volunteer Force that was
16 willing to take minorities and women in larger
17 numbers and then, subsequent changes to the law
18 that allowed more women to serve, we could only
19 be 2 percent of the service when we were first
20 integrated. And that cap was taken off later.
21 Rank caps everything.

22 But what that leads to is the idea

1 that, again, oh, when they need us, we can go
2 fight and die and be taken prisoner of war. But
3 when they think they don't need us, they could
4 rapidly mobilize us.

5 Famously, Margaret Chase Smith said
6 during that debate, either you need these women
7 or you don't. They're not all going to go home,
8 have families, which in that case, you wouldn't
9 pick them because they had kids, leave the jobs
10 in the factories.

11 But then, when you need them again,
12 they're all going to show up.

13 So, partly, it's that system of need.
14 But also, if -- I know that you all have been
15 sitting and working very hard, we have a lot of
16 coalition partners.

17 So, the news yesterday is that House
18 Appropriations Committee Defense and MilCon/VA
19 has a whole bunch of riders in it. I won't
20 remember them all off the top of my head, no
21 funds will be used in the military to teach
22 critical race theory.

1 No funds in the military will be used
2 to implement Secretary of Defense's new travel
3 and leave policy.

4 No funds in the Department of Defense
5 will be used to have gay awareness week, Black
6 History Month, I assume Women's History Month.

7 So, there are about ten riders in the
8 Appropriations Bill.

9 It is here. We are fighting a
10 rearguard action. There's growing backlash.

11 They're depending on recruiting for
12 minorities and women, at the same time, they're
13 telling us women are ruining the possibility of
14 recruiting young, virile white men.

15 It's not true, but it's happening and
16 it has real impact as it shows with these new
17 bills in Congress.

18 And again, this is my field, I could
19 go on forever. But for our members in SWAN,
20 we're very aware of this, the coalition, that's
21 what we do on a daily basis.

22 My part-time job is busy, 40 hours, 80

1 hours a week now with congressional action trying
2 to fight these rearguard actions.

3 Thank you.

4 MS. CARDNELL: And to address the part
5 of your question about messaging and how we
6 answer those claims about DEI, it goes back to
7 the three R's in the military, readiness,
8 retention, and recruiting.

9 And so, we have touched on recruiting
10 and retention. But also, it's the readiness. We
11 need the right people in the right jobs. Right?
12 And whoever that person is, you know, they come
13 from a wide variety of backgrounds.

14 We provide them the training and the
15 experience to get to where they need to be in the
16 military.

17 And if we aren't keeping those people
18 and we aren't recruiting their replacements, so
19 then, our national defense is going to suffer.
20 Right?

21 And so, when we go back to that bottom
22 line of what is the military exist for? Why are

1 we here? Right?

2 The purpose is for our national
3 security.

4 And so, if we go back to that basic
5 mission and we talk about recruiting the best
6 people, retaining them, and then, making sure
7 that they are trained, I think that the
8 retention, readiness, and recruiting, that's all
9 we need to say.

10 MS. GOLDBERG: Thank you, again.

11 Do you have specific examples? I know
12 you've described some, but maybe some more
13 specific examples of how disparities related to
14 gender or ethnicity or any other of the factors
15 that you think of as important to DEI have
16 affected members who you work with? That's
17 question one.

18 And then, a small side, unrelated
19 question, but -- well, let me leave that one and
20 then, I'll come back to another question I have
21 that's not on this point.

22 MS. FENNER: Sure.

1 In addition to the SWAN case about
2 combat positions, we've had a couple more.

3 And that included the integration of
4 Marine Basic Training, the other services have
5 been able to more successfully integrate all the
6 way down.

7 Marine Basic Training is still
8 segregated.

9 We think that you have to set a
10 culture at the very beginning. Junior ROTC, huge
11 numbers of reported assaults lately in Junior
12 ROTC, basic training, even in the recruiting
13 offices, we hear of people who go to recruiting
14 office, nobody looks like them.

15 So, from recruiting to Junior ROTC to
16 basic training, these things are real.

17 Special Operations integration,
18 DACOWITS is doing a great job keeping up on how
19 Special Operations in the Navy submarine forces
20 are playing out.

21 And again, the integration of these
22 jobs, when you don't integrate the foundational

1 jobs for the military, in the Air Force, people
2 fly planes. For the longest time, women couldn't
3 fly plane.

4 In the Navy, if you couldn't be on
5 board ship unless you were a nurse or a civilian,
6 they took civilians, you weren't going to get the
7 best jobs.

8 In the Army, if you're not in those
9 battlefield operations --

10 So, there are real effects and we work
11 on exactly those things to, when things have been
12 passed, to make sure Congress does the oversight
13 of DoD to make sure that either, because the
14 military tries to make it too hard when it's
15 really not, because of people who actually are
16 resisting so they're slow-roll stuff, or make it
17 look like they're doing it, but they're really
18 not. So, those things have real impacts.

19 The other thing that happens is, the
20 real impacts.

21 If you get an other than honorable
22 discharge, your Veteran status and benefits have

1 -- take a big hit.

2 Women were given other than honorable
3 discharges when pregnancy or having kids, even if
4 you married a man who had kids, a widower, you
5 were put out of the service.

6 And sometimes, those were other than
7 honorable discharges because you were maladapted
8 or something.

9 Certainly, Don't Ask, Don't Tell,
10 people who were put out of the service, get other
11 than honorable discharges.

12 That kind of impact from the lack of
13 diversity and the lack of consciousness, again,
14 these people are willing to fight and die for
15 you. They can shoot just as straight. They can
16 fly the airplane just as well.

17 And then, even MST and harassment
18 issues, victims of MST have been put out of the
19 service with other than honorable discharges
20 because either people didn't believe them, and
21 again, they got discharges that were labeled as
22 couldn't adapt, maladapted, those kind of

1 characterizations.

2 So, this has real impact on real
3 people that the lack of diversity, lack of
4 inclusion, the lack of consciousness.

5 MS. GOLDBERG: And to what extent do
6 the various issues that you've raised have an
7 impact on the investigation, prosecution, or
8 defense of sexual assault?

9 MS. FENNER: Sure.

10 A lot of it comes up with, you could
11 even boil it down to software systems.

12 Software systems and untrained clerks
13 who can't find what they're looking for about how
14 to characterize you or your problem can impact
15 the military justice system greatly.

16 Again, if there's not diversity within
17 the system, if someone comes in and they're
18 trans, someone comes in and they can't figure
19 out, what color is that person, are they Black?
20 Are they Hispanic? Are they interracial?

21 A lot of these things that we might
22 take for granted, unconscious bias, does impact

1 the military justice system.

2 And I have another really brilliant
3 thought, but it went out while I was talking.
4 So, if I think of it again, I might blurt it out
5 now or I might blurt it out in my sleep tonight.

6 MS. SCHWAN: Yes, I believe it's very
7 important for us to be able to do that. You
8 know, it's important if you look at it the way
9 that -- if you want to have a recruiter to go and
10 talk to the Hispanic community because they're
11 going to have a little bit of trust.

12 You know, if the military works with
13 LULAC so that where we give them that trust so
14 the families allow their children to do in the
15 military, then you have to look at it all the way
16 across when it comes in a trial, when it comes
17 for any kind of representation.

18 The trust is going to be there if the
19 people see themselves in the military. And that
20 doesn't mean just in the lower ranks, that means
21 all the way across. So, that's important and
22 very critical.

1 And that's going to be the only way
2 the military is going to be able to sustain
3 themselves, if you really do have equity and
4 inclusion.

5 MS. FENNER: I know one of my
6 brilliant thoughts, again, on the MST and
7 harassment claims that get into the military
8 justice system now, some of the harassment claims
9 being criminalized, that again, if you don't have
10 that diversity, if you don't have trust.

11 People mentioned yesterday, comfort
12 with the system, then that plays out in the trial
13 courts. And then, there's no trust within the
14 families.

15 You know, right now, the research
16 numbers show that the most number of people being
17 accessed into the services come from Veteran
18 families.

19 When somebody comes to me and asks,
20 should I join, now more than ever, I have to
21 think about MST. I have to think about, can I
22 recommend to this young person, should they

1 report? Will they be heard? Will the trial be
2 fair?

3 The perception -- somebody said
4 yesterday, well, perceptions are just opinions.
5 Perceptions matter. They have real-world
6 consequences.

7 So, that's all the ways that it plays
8 out in the military justice system, to -- from
9 the ground up.

10 If I can't recommend somebody join
11 because I can't -- I still might recommend that
12 they join, but I have to put all these caveats on
13 and I know that many of them might be vulnerable
14 from whatever happens to them through the trial
15 system to the end.

16 Thank you.

17 MG. ANDERSON: Hello, and thank you,
18 again, for coming and sharing your stories.

19 One of the questions that we asked of
20 you to be prepared to respond to was concerning
21 what successful initiatives or best practices
22 your organizations have identified concerning

1 diversity and inclusion issues.

2 And one that comes to mind for me is,
3 in the Army, I was a personnel officer. So, Army
4 all the way. And happy birthday to the Army
5 today, by the way.

6 And one of the things that always
7 irked me when it came to promotion boards was, I
8 felt there -- we required a photograph. And I
9 used to ask, well, what's the point of a
10 photograph? This should be based on their record
11 of service and accomplishments.

12 Well, we need to, you know, make sure
13 they look good in their uniform or they're not
14 overweight.

15 I said, well, you know, their
16 evaluation report indicates whether you passed
17 your PT test and if you're fat. So, that's a
18 false suggestion.

19 So, I was heartened to see discussion
20 and moving away from the photographs to create
21 more, you know, equitable board experiences for
22 those candidates where they were basically,

1 again, they should be just judged on their
2 performance.

3 So, do you have any other suggestions
4 to address those kinds of challenges? Because I
5 think in many cases that did prevent people that
6 I actually know, I think, from achieving their
7 full potential because they were, you know,
8 there's unconscious bias involved.

9 MS. FENNER: I would say I was a
10 victim of the photograph thing. Because first,
11 we had to have our hands like this, not like
12 this, but like this. You could tell if somebody
13 had a wedding ring on. Okay?

14 Then, when I was selected to teach at
15 the Air Force Academy, I was a signals intel
16 officer, tall and thin, I was lucky with my
17 uniform on, they could tell a lot of things from
18 those photographs. So, the Air Force got away
19 from them, too.

20 I would say, again, holding people
21 accountable publically and in as speedy a way as
22 investigators can move, means that victims and

1 accused don't have to stay in the same unit,
2 seeing each other every day, means the accused --
3 well, if they're not guilty, they get to move on
4 with their lives faster.

5 But that holding accountable
6 publically, a lot of people just get to slide
7 under the radar. And you know what? A bunch of
8 those people became Junior ROTC instructors and
9 then, assaulted kids in schools.

10 So, public -- make a real impact on
11 their records.

12 Here's another thing for grading, as
13 a Colonel, I had to sit -- I had to run the
14 boards to promote intelligence -- Ops officers
15 all the way up to Colonels. And I had to raise
16 the red flag when the discusses were talking
17 about things that should not matter in the
18 promotion boards.

19 But so, I'll finish quickly, that
20 accountability is critical from day one. Actions
21 versus words.

22 We've got beautiful, color, glossy

1 posters. We've got commanders' calls I used to
2 give where people stand up and say, we believe in
3 diversity and we believe in military justice.

4 When actions don't match those things,
5 they're all for naught. Have a Gay Pride Week,
6 fantastic. Have a Black History month,
7 fantastic.

8 If the actions don't follow those
9 things, then we're still losing. If people fear
10 their teammates, we've had stories from women in
11 the war zones that they are more afraid to go to
12 the latrines late at night without viable escorts
13 than they are to go outside the wire and fight
14 the enemy.

15 So, that level of trust, that level of
16 confidence in your teammates that you're all
17 supposed to be covering each others' back until
18 you're not, the things that can improve that,
19 again, is to hold everybody accountable.

20 One of my young civilian charges, I
21 said, well, what do you do where you're from?
22 And yes, the military and civilian and different,

1 but some of these things are good, more training
2 with PowerPoint is not the answer.

3 Talk about backlash, you're putting
4 people to sleep or you're making them mad about
5 diversity training. So, more of some of this
6 stuff is not constructive. Don't spend our money
7 that way.

8 Where does the rubber really meet the
9 road? And that is, again, on the front end, you
10 want to do the prevention piece so that we're all
11 out of a job. Right?

12 On the front end, it doesn't happen
13 unless people see on the back end that
14 accountability is working, that the culture is
15 changing, and that some of these things can go
16 the way of the Dark Ages.

17 MS. SCHWAN: You know, thank you.

18 I would say that, accountability and,
19 you know, it's very important -- diversity to be
20 able to do that.

21 For me, I happen to be married now, so
22 my last name is Schwan. But prior to that, it

1 was Rafaela Ornelas.

2 And so, people -- I don't -- they
3 don't need a picture to know what I am. So, you
4 know, the picture just kind of probably tells
5 them what I look like. But the last name was
6 significant enough.

7 Unfortunately, for our parents' names,
8 some of our kids, you know, we're very creative
9 in our -- in the names they gave us.

10 For African-Americans, a lot of the
11 time, if they've named their Lakisha or something
12 else, I would think, maybe they're African-
13 American.

14 So, they were able to identify what we
15 might be. And so, that alone, could take us out
16 of the running for a promotion or for any other
17 opportunities that we had.

18 How can we do that? You know, if
19 there was ever a way that we could look and say,
20 there's not going to be a name or a picture or
21 you just have accomplishments with nothing else
22 to identify the person, maybe it would be an

1 equality promotion or, you know, opportunities
2 for our community.

3 I don't know that that's ever going to
4 happen, but that's why it is important that
5 representation of our communities are across the
6 boards in anything and everything. Because they
7 can at least identify and be able to hold people
8 accountable when they're looking at those records
9 to make sure that they're considering those
10 people in every opportunity available.

11 MS. FENNER: Could I add also, that's
12 so important. Because, again, this issue of
13 unconscious bias, we don't even know we have it.

14 But I wanted to get back to
15 commanders. In the Navy, the Air Force was
16 easier on people than the Navy was.

17 When commanders got judged, the Navy
18 judged them on what they knew or should have
19 known as a commander.

20 So many Air Force commanders, well,
21 they just got there, they didn't have a chance to
22 jump in, so it's not really their responsibility

1 as the guy before them, oh, well, that guy
2 retired.

3 So, if there's a learning environment
4 where commanders anticipate change, anticipate
5 problems, go to the barracks at night, talk to
6 the people going to the units off book, what are
7 they concerned about. Are there rumors in your
8 unit? And take care of that.

9 Anticipation, the commanders should be
10 charged with anticipation. And you know that
11 commanders are held accountable if there's
12 helicopter accidents in their units. And those
13 have to be investigated very quickly to get
14 everybody back on line.

15 If there's a tank rollover, those have
16 to be taken care. Otherwise, my eval is just, do
17 you get along with other people, you know, that
18 kind of thing.

19 If I was graded on how many sexual
20 assault claims came up, how many young people
21 committed suicide, if commanders are graded
22 instead of just those factors, you'd get a lot

1 more compliance and you'd get better commanders
2 graduating to be more senior commanders.

3 And they, too, have to hold people
4 accountable within the system. Because a lot of
5 the people committing offenses are not the new
6 guys. We blame a lot on the 18-year-olds. These
7 are NCOs, these are junior officers, these are
8 senior officers committing these crimes.

9 Thank you.

10 HON. SMITH: All right, thank you very
11 much for your time. We appreciate your comments.

12 COLONEL BOVARNICK: We'll break until
13 1:00.

14 (Whereupon, the above-entitled matter
15 went off the record at 11:59 a.m. and resumed at
16 1:00 p.m.)

17 COLONEL BOVARNICK: If everyone would
18 get settled in, I'll just introduce briefly Dr.
19 Lisa Arfaa.

20 She's the Director of the DoD Office
21 of Diversity, Equity, and Inclusion.

22 With that, Doctor, I'll turn it over

1 to you and you can start.

2 MS. ARFAA: Wonderful, thank you.

3 Good afternoon, everyone. I am Lisa
4 Arfaa and I am the Department of Defense's
5 Director for the Office of Diversity, Equity, and
6 Inclusion.

7 I previously spent the last three
8 years with the Vice Chairman of the Joint Chiefs
9 of Staff. And there, what my primary
10 responsibilities were was to sort of take an
11 approach where we were trying to determine a more
12 holistic, innovative approach to spearheading
13 activities that would really bring in the human
14 element and increase human performance and
15 working to continue what we were trying to build,
16 which was the culture of excellence, to increase
17 our workforce readiness.

18 With that, I wanted to be joined today
19 be my colleague, Dr. Jeanette Haynie, from the
20 Department of Defense's 2040 Task Force.

21 But unfortunately, our scheduling
22 today has led to she and I having to split

1 responsibilities.

2 So, I will give you a brief overview
3 of the 2040 Task Force. She sends her regrets
4 and definitely looks forward to coming here to
5 giving you a deep dive into that arm of the
6 Department in the near future.

7 Before I begin, I also just want to
8 thank all of you for your work and what you do
9 and to appreciate everything that we have been
10 doing together and to let you know that I am
11 grateful to be here.

12 I am grateful for the collaboration.
13 I am grateful for the information exchange. And
14 really believe that that's how all of us can
15 continue to work on these people issues.

16 Because in every one of our
17 portfolios, it really is about taking care of our
18 people.

19 Next slide, please?

20 So, I'll begin with an overview of the
21 Department's diversity, equity, and inclusion
22 environment and accessibility, the DEIA

1 environment.

2 And then, I'll talk about ODEI.

3 Then, I'll discuss the ODEI's
4 strategic priorities and DoD's latest DEIA
5 activities.

6 After that, I -- after we finish all
7 of this, I will try to give you a brief overview
8 of the last three slides which really are about
9 D2T. That will be briefed to you in much more
10 depth in the near future.

11 Next slide?

12 In recent years, DoD has accelerated
13 its efforts to advance diversity and inclusion
14 and, more broadly, we're now calling it
15 diversity, equity, inclusion, and accessibility.

16 DoD established the role of the Chief
17 Diversity and Inclusion Officer. And on April 4,
18 2022, the Secretary of Defense named our
19 Undersecretary for Personnel and Readiness, Mr.
20 Gil Cisneros, as our Chief Diversity and
21 Inclusion Officer.

22 That job is really -- it is all

1 encompassing and that part of his job is to
2 further the Department's goals of ensuring the
3 workforce is representative and inclusive.

4 DoD also launched what we're calling
5 the 2040 Task Force. And you'll hear me refer to
6 it as D2T.

7 That really is the entity parallel to
8 ODEI that is bridging the gap between DEIA and
9 DEI activities and DoD's mission.

10 Diversity, equity, inclusion, and
11 accessibility shape how we execute our national
12 security mission and it really does ensure that
13 the approach we take is comprehensive and
14 multidimensional.

15 The well-executed DEIA strengthens our
16 Armed Forces and it enables us to preserve our
17 war fighting advantages, both here at home and,
18 obviously, abroad.

19 A diverse and inclusive total force is
20 more sustainable, develops more innovative
21 solutions, and is more agile and responsive to
22 the diverse range of conventional and asymmetric

1 threats that are present in today's complex
2 global environment.

3 To ensure we are the most intelligent,
4 the most capable, and the most effective fighting
5 force, we need to be -- we definitely have to
6 consider leveraging all of the talents of our
7 nation.

8 That's why we're making sure that
9 everything from how we recruit people to how we
10 promote them is representative of the country we
11 serve.

12 To that end, our commitment to DEIA
13 plays a critical role in enhancing our
14 operational readiness.

15 Here on this slide, you'll see, we've
16 mapped out DoD's DEIA environment. And I think
17 what -- I'm hoping jumps out at you is, DoD's
18 DEIA really does extend well beyond the
19 Department of Diversity, Equity, and Inclusion.

20 It serves as the connective tissue
21 through all of our departments and throughout the
22 entire organization.

1 Though ODEI, the Office of Diversity,
2 Equity, and Inclusion oversees and implements
3 DoD's policies and programs to ensure a diverse,
4 equitable, inclusive, and accessible department
5 for all who serve, DoD's DEIA environment is much
6 broader as we strive to integrate DEIA across DoD
7 and better leverage DEIA as a strategic
8 advantage.

9 The way I like to talk about it, and
10 the way my team likes to talk about it, and the
11 energy we are trying to bring to it, is we talk
12 about DEIA as deterring, enduring, and innovative
13 advantages.

14 These are capabilities that allows us
15 to deter, to endure, and to innovate.

16 So, when we speak of DEIA, it is
17 broader and systemic to the entire Department.

18 We also recognize that our external
19 collaborators and influencers, such as all of you
20 here on this federal agency committee, help to
21 guide the direction of our efforts and enable DoD
22 to leverage government-wide and industry best

1 practices.

2 The military departments and the
3 Office of the Secretary of Defense work closely
4 together to advance policy and programs that
5 benefit members across the force.

6 And while ODEI, our office maintains
7 the policy development and oversight
8 responsibilities, we work with the Diversity
9 Management Operations Center, DMOC, you'll hear
10 me say DMOC, and we rely on their operational
11 capabilities to jointly advance diversity,
12 equity, inclusion, and accessibility across all
13 of DoD.

14 So, they operationalize the policies
15 that we put into place.

16 To effectively advance the DEIA, ODEI
17 collaborates closely with the offices under the
18 Undersecretary for Personnel and Readiness whose
19 mission is to meet national defense strategy
20 imperatives through the effective policy,
21 guidance, and oversight to enhance the readiness
22 of the Department of Defense and optimize our

1 talent management and personnel programs.

2 We do that through relevant training
3 and education. We try to work with our
4 components so we can have world class healthcare
5 and quality family support as well as force
6 resilience through what we consider to be the
7 backbone over that, which is the diversity,
8 equity, and inclusion policy.

9 We work with our counterparts in the
10 DoD 2040 Task Force, the entity that Dr. Haynie
11 leads, to produce and implement near, mid, and
12 long term DEIA strategies for DoD.

13 As we say about ODEI and D2T, we have
14 the same mission, but we have different lines of
15 attack.

16 Next slide, please? I'm going to keep
17 going, so, Chuck, if you can do next slide,
18 please?

19 I'm going to show you the org -- this
20 -- what's going to come up is the org chart. And
21 really, what you're going to see briefly, which I
22 think you have, potentially, in front of you, is

1 we have directors who lead our four major efforts
2 and our major portfolio areas.

3 These include our Military Equal
4 Opportunity, our Equal Employment Opportunity and
5 Civil Rights Policy, and our diversity and
6 inclusion policy, as well as our disability
7 policy.

8 Does everyone have slides in front of
9 them?

10 COLONEL BOVARNICK: The slides are --
11 sorry, they're at Tab 12 of the big binders in
12 front of you.

13 MS. ARFAA: And right now, we are on
14 slide five with that org chart.

15 So, I'll take just ten more seconds to
16 pause and I'll go through that again.

17 So, we have our four primary focus
18 areas, Military Equal Opportunity, Equal
19 Opportunity and Civil Rights, disability, and our
20 diversity and inclusion policy.

21 So, we do have in each of those areas,
22 we have our technical and subject matter experts

1 who support our policy development, our research,
2 analytics, communications, legislative affairs,
3 and public affairs capabilities.

4 Success in our mission space requires
5 engagement in both internal and external
6 stakeholders.

7 I'm going to turn to slide six now for
8 everyone.

9 So, ODEI, this will be -- this is the
10 overview of who we are.

11 We are under the purview of the Office
12 of Force Resiliency and the Office of the
13 Undersecretary of Defense and Personnel
14 Readiness.

15 And we are the office that is at the
16 forefront of developing and promulgating policy
17 and procedural guidance for the Department's
18 Equal Opportunity, Military Equal Opportunity,
19 diversity and inclusion, civil rights, and
20 disability programs.

21 Through policy development, oversight,
22 and compliance, the Department strives to foster

1 a climate of diversity and inclusion that is free
2 from harassment, free from unlawful or prohibited
3 discrimination, and any other problematic
4 behavior that you can think of.

5 ODEI oversees and implements DoD's
6 policies and programs to ensure a diverse total
7 force in an equitable, inclusive, and accessible
8 environment for all who serve.

9 ODEI also serves as the focal point
10 for advancing DEIA across the entire Department.

11 We do that by -- in ways such as we
12 define and implement DEIA in both civilian and
13 the military workforce.

14 We develop and ensure compliance with
15 those policies that we develop.

16 We provide strategic guidance and
17 direction, planning, oversight, messaging,
18 evaluation, coordination, and implementation.

19 And we respond to and ensure
20 compliance with relevant internal and external
21 documents or requirements.

22 So, what I say that, I'm talking about

1 the National Defense Authorization Act, and
2 Executive Orders that are in place, the DoD
3 Inspector General.

4 In addition to all of that, to the
5 developing and implementing of new DEI related
6 policies, we do continue to assess military and
7 civilian policies to identify any potential gaps
8 that we are seeing from year to year.

9 We work with the Office of People
10 Analytics to determine estimated prevalence or
11 problematic behaviors and identify trends and
12 areas for improvement.

13 And then, we respond to our external
14 requirements such as reports due to Congress and
15 our internal requirements by keeping our
16 leadership up to date on challenges in the DEIA
17 space and our new and ongoing efforts.

18 Next slide, please?

19 The Fiscal Year 2024 President's
20 Budget Request demonstrated that DoD's commitment
21 to DEIA includes -- it remains high, but includes
22 \$114.7 million dedicated to diversity and

1 inclusion activities.

2 Although this is just .01 percent of
3 our entire budget of \$842 billion requested for
4 DoD, this resourcing is only a portion of our
5 commitment to advancing DEIA consistent with the
6 National Defense Authorization Act and Executive
7 Orders.

8 The funding across the military
9 departments, across ODEI, and DMOC, that
10 operational arm I was talking about, is the
11 center of this.

12 And in addition, it's used for
13 investing in programs and initiatives that are
14 aimed at furthering DEIA and incorporating DEIA
15 values, objectives, and considerations into how
16 we do business and execute our missions.

17 DoD's investment in our people include
18 our equal opportunity programs. So, that is how
19 we use those programs to comply with existing
20 laws and regulations, to prevent and respond to
21 discriminatory behaviors, and ensure service
22 members and civilian employees can serve in

1 climates of dignity and respect whereby merit,
2 fitness, and capability are the depending and
3 deciding factors in career progression.

4 We invest in our people by our
5 diversity and inclusion programs. They promote a
6 diverse DoD workforce with an inclusive culture
7 that is built on dignity and respect to further
8 our strategic vision for D&I as a unifying core
9 value and factor of readiness.

10 And then, we also invest in our people
11 through our disability and reasonable
12 accommodations programs. Because those ensure
13 consistent implementation of disability civil
14 rights laws to eliminate technological,
15 architectural, or programmatic barriers and
16 affirmatively advance equal opportunity for
17 individuals with disabilities.

18 With those requested resources, that
19 \$114.7 million, we are striving to strengthen
20 DoD's achievement of a total force that is
21 reflective of the vast diversity that our nation
22 has.

1 We are striving to ensure that the
2 Department is prepared to provide the forces
3 needed to deter war and keep the nation secure.

4 We believe we must continue to invest
5 in human capital initiatives to compete for hire,
6 develop, and retain highly skilled experts in
7 this ever changing talent acquisition landscape.

8 Next slide, please?

9 So, what does ODEI do? Probably from
10 that pretty long introduction of what -- who we
11 are, you can tell that we do policy, we provide
12 guidance, and we oversee compliance to ensure
13 effective and consistent implementation of
14 diversity, equity, and inclusion, and all of
15 those programs throughout all of DoD.

16 We have six cross cutting focus areas
17 you see up there on the slide. These focus areas
18 support the office of the Undersecretary for
19 Defense and Readiness and his vision of a
20 department that is enabled by data dominance,
21 strategically ready, globally relevant, and
22 flexibly sustainable.

1 Focus areas that guide ODEI's
2 portfolio activities include, as you see up
3 there, our policy, guidance, and compliance.

4 So, in this sense, we develop policies
5 and oversee compliance within DoD to promote a
6 diverse, equitable, inclusive, accessible, and
7 mission ready total force.

8 Another way we do this -- one of these
9 focus areas is through reporting. We provide
10 enterprise wide reports on the progress of our
11 policies and initiatives and assessments of
12 effectiveness towards the overarching mission.

13 And we ensure transparency and
14 accountability of our policy compliance.

15 We take an integrated, analytical
16 capability approach.

17 We strive to create a data dominant
18 ODEI organization and provide analytical support
19 through the integration of advanced analytics.

20 We try to be operationally efficient.
21 We strive to mature ODEI's strategic operational
22 framework and leverage relationships with key

1 partner organizations for efficient mission
2 execution.

3 We do research. We work to ensure
4 policies are data driven in development and
5 oversight, leveraging best practices in the
6 field, and comprehensive data analytics to target
7 efforts, determine effectiveness of initiatives,
8 and ensure compliance.

9 And then, finally, one of our focus
10 areas is our strategic communications and
11 collaboration.

12 We implement a robust strategic
13 communications framework to ensure accurate,
14 pertinent information is shared across the
15 organization, and with our key stakeholders and
16 partners.

17 In recent years, ODEI published four
18 new policies to fortify prevention and resolution
19 of problematic behaviors, promote a diverse and
20 inclusive workforce for all who serve, and foster
21 a culture of dignity and respect across the
22 Department.

1 I'm going to quickly go over these
2 policies. I won't go into detail.

3 But so, for example, the Department of
4 Defense Instruction, or you'll hear me call that
5 DoDI. So DoDI 1020.03 is called the Harassment
6 Prevention and Response in the Armed Forces.

7 We published that in February of 2018
8 and we changed it -- the change that we made,
9 Change 2, became effective in December of 2022.

10 The other things we do -- I'm trying
11 to see if I should just -- am I going too deep in
12 the weeds on this for you?

13 HON. SMITH: The Committee is split.

14 MS. ARFAA: Okay, so, why don't I
15 pause and see on the background of ODEI and the
16 Department's DEIA mission, if you have questions
17 or comments.

18 MS. TOKASH: Hi, this is Meghan Tokash
19 speaking.

20 Thank you very much for coming today.

21 My question is, a large part of what
22 we do as a committee involves data. I think the

1 data is not only relevant, but really helps
2 inform some of the recommendations that we make.

3 One of the challenges that we face are
4 the systems that DoD has to capture data and
5 statistics.

6 And so, this is very interesting to me
7 because it would appear, at least, that perhaps,
8 this office within the Pentagon is capturing
9 racial and ethnic data.

10 And if that's the case, can you
11 confirm that and can your system speak to other
12 systems or help this committee and its staff
13 import that racial data to some of these studies
14 that we are doing?

15 MS. ARFAA: Excellent question, thank
16 you.

17 So, we do capture data. We don't have
18 all of it, we are still developing our
19 dashboards.

20 It is through that platform I called
21 advanced analytics. We call it Advana.

22 And so, it literally is a way to

1 capture this data and, right now, my office is
2 working on six or maybe seven -- five to seven
3 dashboards, including things from the demographic
4 breakdown of our forces to our career
5 progressions.

6 Can we integrate with other platforms
7 or how we share that information, I don't know.
8 But I will take that back. I will ask my team
9 and the team who does the analytics how we do
10 that or when we will be ready to do that.

11 MS. TOKASH: So, by way of example, if
12 this would help your discussions, we just
13 completed a report on Friday that had a
14 supplemental data report that looked at cases
15 involving a no probable cause determination, yet
16 still went to trial.

17 One of those queries could be what was
18 the racial makeup of the accused in those cases
19 that -- 89 percent of which ended in either
20 acquittal or dismissal.

21 So, what were the racial makeup of
22 these accused in those cases? And perhaps even,

1 what was the racial makeup of the convening
2 authorities or staff judge advocates who overrode
3 the no probable cause decision, and yet, sent it
4 forward to trial?

5 I don't think that our staff have that
6 -- yes, and the victim as well, if you know.

7 So, we just don't have a system yet to
8 be able to do that. And so, if there could be
9 some sort of a partnership or information
10 sharing, I think that that would be helpful.

11 MS. ARFAA: Agreed, and thank you for
12 that example.

13 I don't know about any dashboards of
14 ours that has yet to military justice data. I do
15 know that's important to the Department and I
16 think I would have to talk to OGC and IG to see
17 who would own that.

18 That is one of the topics where we all
19 are trying to collaborate together.

20 I will take this back to my team and
21 to my partners in OGC and find out, are we
22 planning on developing that? Because I'm not

1 aware of it. And then, what would be our
2 capability of sharing that information.

3 MS. TOKASH: Thank you very much.

4 HON. SMITH: Could you also include
5 when you get back to the committee, what the
6 different dashboards are?

7 MS. ARFAA: Yes.

8 HON. SMITH: And then, also, just
9 looking at the tab, the research tab, what --
10 thus far, what are the analytics that you've used
11 to determine the effectiveness of initiatives and
12 ensure compliance?

13 You know, what's the compliance that
14 you're seeking? And what initiatives have been
15 created using these analytics?

16 MS. ARFAA: Yes, thank you for that
17 question, too.

18 I'm going to -- I think that's slide
19 I would love us to turn to then.

20 Okay, so yes, slide 19 really does
21 give you an overview of the research we've done,
22 the research in progress, the future research we

1 wish to do, things that are underway.

2 And you see on there, the IRT racial
3 disparities and the investigative and military
4 justice system.

5 To more fully answer that question, I
6 would -- I can share those dashboards.

7 But although our current findings have
8 not been released for those, so I would have to
9 wait for our findings to be released to share
10 those with you.

11 But they do talk about what we're
12 researching is examining barriers and
13 opportunities to promotion and retention for
14 enlisted and officer corps members across the
15 military services. That's one.

16 That, also broken down to different
17 demographic groups.

18 So, we are trying to not only seek
19 barriers to diversity, but also what are the --
20 why are people succeeding and how are people
21 succeeding?

22 Once these become -- all of them have

1 been signed out, I will share that -- those
2 findings. I can either do that in an executive
3 summary to you or you can see the whole report.

4 But we're just now in the process of
5 getting that done and figuring out, is there part
6 two needed? And again, I will put that on my
7 list to make sure you have those as well.

8 HON. SMITH: I think we would want to
9 see the report.

10 MS. ARFAA: Okay, the whole report,
11 not an exec sum. Okay. Once they are signed out
12 --

13 HON. SMITH: Well, maybe both, maybe
14 the executive summary, but also then have access
15 to the reports.

16 MS. ARFAA: It would be my pleasure.
17 Absolutely, we'll do that.

18 BGEN SCHWENK: Does anybody on the
19 staff know if we have, on that same slide 19, on
20 the left, completed, the fourth one down, the CNA
21 study which I assume is Center for Naval
22 Analysis?

1 MS. ARFAA: Yes, sir.

2 BGEN SCHWENK: Okay.

3 Exploring racial, ethnic, and gender
4 disparities in the military justice system, and
5 how to use administrative data to measure and
6 interpret.

7 Do you know, does anybody know if we
8 have that?

9 MS. ARFAA: You don't have that, sir,
10 because it has not been signed out. It has been
11 completed and we were waiting for the full sign
12 out of the IRT so they could be given in sort of
13 conjunction or so the congressional requirements
14 in that CNA study could be met with a further
15 study.

16 BGEN SCHWENK: Okay.

17 MS. ARFAA: So, you do not have that
18 yet.

19 BGEN SCHWENK: All right, so we don't
20 have it. So, we'd like to have it when you're --

21 MS. ARFAA: You will have it.

22 BGEN SCHWENK: Whenever somebody --

1 MS. ARFAA: I will send that to you.

2 BGEN SCHWENK: -- wants to release it.

3 MS. ARFAA: With that completed list,
4 those will come to you first as soon as I can
5 sign them out.

6 And then, the ones in progress, you'll
7 get them when they are.

8 So, absolutely.

9 BGEN SCHWENK: Okay.

10 HON. SMITH: So, I'm just curious,
11 that report was completed in July 2022, so how
12 long does it take before those become available?

13 MS. ARFAA: So, it really depends on
14 the coordination and how many offices or
15 components we have to coordinate with.

16 I know it's something that we try to
17 talk to our partners and stakeholders about a
18 lot, including talking to the administration and
19 other agencies.

20 You know, we are the largest
21 organization in the world with over 2.2 million
22 members. So, you can imagine then trying to

1 coordinate through all of our departments just
2 takes a long time.

3 But that's the only reason is our
4 size. It's -- so, I don't -- it depends on the
5 size of the report. It depends on if there are
6 reports in conjunction with it.

7 I don't think we knew this was going
8 to take that long to sign out. That was not
9 intended to take this long.

10 BGEN SCHWENK: Yes, I note that the
11 bottom right hand one, the internal review team
12 on racial disparities and investigative military
13 justice system, that just came out.

14 MS. ARFAA: It just came out on
15 Wednesday the 8th.

16 BGEN SCHWENK: And it was completed
17 last August.

18 MS. ARFAA: Yes, sir.

19 BGEN SCHWENK: So, August to June.

20 MS. ARFAA: Yes, sir.

21 BGEN SCHWENK: But you did a good job
22 putting a silk purse on a sow's ear because DoD's

1 coordination process has been broken for decades
2 and it'll probably remain broken for decades and
3 I hold Dwight responsible for it.

4 MS. ARFAA: Likewise, sir.

5 Thank you, Dwight, thank you, Mr.
6 Sullivan.

7 MR. CASSARA: Ma'am, this is probably
8 the easiest question you'll get all day.

9 But at the very last three letters of
10 that acronym, DSD, what is that?

11 MS. ARFAA: Deputy Secretary of
12 Defense.

13 MR. CASSARA: Well, duh, okay, thank
14 you.

15 MS. ARFAA: So, I know --

16 MR. CASSARA: I've only had eight cups
17 of coffee today, so forgive me.

18 MS. ARFAA: No, I was going to start
19 by doing a whole sentence in acronyms, but I
20 decided that it just too much for me to even try
21 to do.

22 MS. GOLDBERG: Suzanne Goldberg.

1 Good to see you.

2 MS. ARFAA: Nice to see you.

3 MS. GOLDBERG: You mentioned the -- a
4 new Defense Department instruction related to
5 harassment.

6 MS. ARFAA: Yes.

7 MS. GOLDBERG: Can you explain what is
8 different about that new instruction from
9 whatever previous instructions existed and how
10 that interacts with or, I guess, what the scope
11 of that is in terms of changing services members
12 responsibilities or obligations not to harass
13 others?

14 My understanding was that there was
15 anti-harassment policy already in place. So,
16 wondering what has changed?

17 And also noting that you have
18 something, this may be skipping ahead in your
19 presentation on successfully implementing anti-
20 harassment programs? And I'll ask you about that
21 after --

22 MS. ARFAA: When we get there.

1 Okay, so, this was -- the actual
2 policy wasn't new, it was 2018. It was updated
3 in December of 2022. And I think your question
4 was, what was potentially updated?

5 From my understanding, it now was
6 starting to address standardizations in training.

7 So, how can we make sure across all of
8 our services and components we have a
9 standardized process to report and then -- to
10 train to recognize or respond to harassment?

11 So, that is the updated part.

12 MS. GOLDBERG: And does this
13 instruction cover all harassment, including
14 sexual harassment?

15 MS. ARFAA: Yes.

16 MS. GOLDBERG: Was there a policy in
17 place before 2018?

18 MS. ARFAA: I will get -- I assume
19 yes, but I don't know.

20 MS. GOLDBERG: And I guess what I'm
21 trying to -- I appreciate that the effort to
22 strengthen reporting and response.

1 My understanding was that there have
2 been, you know, anti-harassment or prohibitions
3 on harassment for service members in place for a
4 long time.

5 So, I wondered if this was -- if this
6 was focused on a different area from the general
7 prohibitions on harassment or if this is really
8 just part of general policy that applies to all
9 service members?

10 MS. ARFAA: So --

11 MS. GOLDBERG: It's maybe civilians
12 working in the Department as well. It was not
13 clear to me.

14 MS. ARFAA: So, this is service
15 members. So, it's streamlining anti-harassment
16 and it is focusing on sexual harassment.

17 But it's doing all harassment and
18 discriminatory behaviors.

19 But I will find out how this DoDI has
20 changed from the one before 2018.

21 MS. GOLDBERG: Okay, thank you.

22 MS. ARFAA: And I will cite that DoDI

1 for you. I don't know what it is. It should be
2 the same one as well, but I don't know.

3 MS. GOLDBERG: Thank you.

4 MR. CASSARA: Ma'am, while the Coast
5 Guard is not technically a part of DoD, are they
6 part of this as well or is there a separate
7 organization within the Department of
8 Transportation or Homeland Security that covers
9 the Coast Guard?

10 MS. ARFAA: I don't know that, either.
11 I will find out.

12 It would be Homeland Security if they
13 do not come under us. But I assume, because we
14 do have Coast Guard colleagues in our Joint
15 Staff, it should cover them as well, but I will
16 find that out as well.

17 And I need to also say, I am not -- I
18 have a team of experts. So, I apologize for
19 having to take questions back, but I will get
20 those for you.

21 HON. SMITH: Any other questions?

22 Yes, sir?

1 BGEN. SCHWENK: So, it seems to me you
2 there with all these analytics, and you have
3 information, and you want to do something about
4 it, some of the issues you probably own, like an
5 MEO issue, or equal employment opportunity issue.
6 So, you can generate the policy, staff it, wait
7 two years, and then issue the policy. But what
8 happens when you get into somebody else's lane?

9 Like obviously our focus is military
10 justice, so I would imagine that the judge
11 advocates general say something like thank you
12 for your interest in national defense, and
13 military justice, but we got it. And we'll do
14 the policy changes, or whatever, and where does
15 that leave you? How do you -- do you have an
16 interest in influencing that kind of stuff?

17 Same as the promotion on whatever page
18 that was. SAPRO calls the military justice
19 waterfall, you start with a bunch of complaints,
20 and you end up with a few convictions. Well,
21 this is the same thing, you start off with a good
22 number of white officers, and you end up with,

1 when you get to O10, or O9, a gigantic number of
2 white officers.

3 It's a waterfall, I think in many
4 people's opinion, in the wrong direction. But
5 that's not yours either, so my question is when
6 you get into those areas, do you let the office
7 of whoever, OPR, the people that have a
8 responsibility to handle it, or do you talk to
9 them, and try to influence them by pointing out
10 look at the data, something's got to be done
11 here. How does that work?

12 MS. ARFAA: Super great question,
13 thank you. So, I think the first thing is to
14 recognize we know all of these issues are not
15 ours. And what we try to do is really build
16 great relationships, and teams not only within
17 the Department of Defense, but even externally.
18 So, really our job is if we notice a trend, it
19 would be to call our partners, and the example
20 you gave, of promotions, MPP, Military Personnel
21 Policy.

22 And to say hey, just noticed a trend

1 in some data, this might be worth you exploring,
2 and this is how we see it. It doesn't mean we
3 would influence whether they do it, or not, or if
4 there is. If there were something that we really
5 wanted to learn, or study, and we needed to make
6 it more beneficial study, there is a process to
7 go through.

8 And we would then ask the OPR if they
9 wanted to do it, or if we could collaborate with
10 them on it, or would they want us to do it. So,
11 it definitely is -- we do recognize that we are
12 the policy development, the programmatic, and the
13 compliance arm, and we try to supplement, and
14 help our partners who actually oversee the bigger
15 issue areas.

16 And when Dr. Haynie comes to brief
17 before you, when she's invited, she can walk you
18 through things that we did called sprints. And
19 each of those didn't just affect diversity, but
20 let's say one was about promotions, accessions,
21 so we had different ways of identifying a
22 barrier, or how to improve that gap. She then

1 put together working groups, then we do, as we
2 will with the IRT.

3 The working groups aren't us, it's
4 every entity in the Department of Defense that
5 has a stake in whatever the recommendation, or
6 the thought is. So, none of it is singularly
7 done, and I would say most things in the
8 Department of Defense don't just land in one
9 area. Does that answer your question?

10 BGEN. SCHWENK: Yeah, thank you. Is
11 DEOMI still in existence, and is it under MEO, or
12 where is it?

13 MS. ARFAA: So, DEOMI is in DHRA,
14 Defense Human Resources Activity, and since with
15 the DMOC, which is the operational arm I talked
16 about, so they're sort of operations. And so,
17 DEOMI is wonderful, still in existence, and they
18 are creating the Center of Excellence right now,
19 which will really help us with a lot of this kind
20 of identifying, and training in studies.

21 BGEN. SCHWENK: So, do they do
22 research down there?

1 MS. ARFAA: They do, they do research.

2 MG. ANDERSON: For those like me who
3 have forgotten what DEOMI means, I used to know,
4 and those who have never heard of it, can you
5 just define it quickly?

6 MS. ARFAA: Yes, so DEOMI is our
7 school house in a sense, the place where
8 training, and curriculum is developed for our
9 specialists to be able to learn how to be an EEO,
10 an MEO, to understand what harassment is,
11 discrimination, and although we don't have any
12 formalized, or any required DNI training.

13 We are -- I'm probably going to get
14 into what does -- they have done one course for
15 the Marine Corps on unconscious bias, I read that
16 somewhere. So, that's what it is, it is really
17 the school house.

18 MG. ANDERSON: Thank you.

19 BGEN. SCHWENK: On sexual harassment,
20 one of the recommendations that I think is
21 referenced here from the IRC from two years ago
22 had to do with investigating sexual harassment,

1 then Dwight waved a magic wand, and in a matter
2 of only a couple years he actually got an Article
3 134 offense put out on sexual harassment. But my
4 question goes back to the investigation side.

5 Recognizing that we're an open public
6 forum, and you can't reveal internal deliberative
7 processes, are we -- has that been resolved by
8 the services on who is investigating, or is it
9 still under review?

10 MS. ARFAA: Pre-decisional, and due to
11 Congress in December of this year, so that's when
12 we can talk about it, but we have that time line,
13 so it's that time for us to collaborate, and
14 figure that out together.

15 BGEN. SCHWENK: Okay, thank you.

16 MS. ARFAA: Thank you for the
17 question. Anyone else have questions? Would you
18 like me to go back to a particular slide?

19 BGEN. SCHWENK: I have a question,
20 just a broad question. When you're back
21 gathering answers for our different questions,
22 could you talk to your staff about things you

1 might be able to do to support an advisory
2 committee like the DAC-IPAD? Knowing that we're
3 interested in military justice stuff, but we have
4 a pretty broad definition of military justice.

5 For example, we looked at expedited
6 transfers, because it affects military justice,
7 even though it's not part of military justice, so
8 we have a broad definition, and mostly on sexual
9 assault, and similar offenses. But you know, and
10 your folks know what you're doing a lot better
11 than we are.

12 So, rather than us trying to ask, and
13 pull information, if you could go back, and talk
14 to your people, and see if they had any ideas on
15 things that we might be interested in, that would
16 be great. You could get back, and let us know.

17 MS. ARFAA: Absolutely, we'll do that,
18 we'll huddle with our team, and I think we'll
19 bring OGC into that conversation as well, to
20 figure out is there things we can do proactively
21 with you, for you, just know to provide you, but
22 that's a great idea, thank you.

1 BGEN. SCHWENK: Yeah, I'm thinking
2 less about you working for us, and more about
3 products that you have, things that we might look
4 at.

5 MS. ARFAA: For sure, thank you.

6 BGEN. SCHWENK: And please work with
7 anybody but Dwight when -- you're welcome Dwight.

8 MS. GOLDBERG: Suzanne Goldberg, and
9 I will not weigh in on that recommendation. But
10 since you opened up to all sorts of questions, I
11 would be very interested in hearing more about
12 what you have on page 18 in the upper left as a
13 policy achievement. Successfully implemented
14 anti-harassment programs within all DOD
15 components, and contributed to harassment
16 prevention strategy 2.0.

17 BGEN. SCHWENK: Which slide?

18 It's on slide 18 in the upper left,
19 and I would ask that you provide this committee
20 with more information on what that means, and how
21 you gauged success, but can you talk to us a
22 little bit about what those anti-harassment

1 programs covered, and how they addressed the
2 relationship between sexual harassment, and other
3 forms of harassment?

4 MS. ARFAA: Yes, so I will definitely
5 give you detailed points on how that's done, but
6 as, I guess an overview, it would be that we have
7 successfully implemented now new harassment
8 policies, which to your previous question, I will
9 get you details of what the updated ones are.
10 And that has been done within all programs of
11 DOD, and all components.

12 So, I think that vast, overarching
13 reach is one of the successes. We have
14 contributed to the sexual harassment strategy
15 2.0, and that too, I can get you that in detail.
16 We have achieved 100 percent compliance on all of
17 our civilian anti-harassment policies across DOD.
18 So, our EEO worked with the components to update
19 that anti-harassment policy, and bring them into
20 compliance.

21 To now, we have 100 percent of our
22 components are compliant, and they do have their

1 policies published on their websites. It's now
2 publicly faced where it wasn't before, so that's
3 another measure we took to make sure we were not
4 only 100 percent compliant, but allowing other
5 people to see the transparency in that. And then
6 --

7 BGEN. SCHWENK: May I interrupt on
8 that point, Suzanne, is that okay?

9 MS. GOLDBERG: Please.

10 BGEN. SCHWENK: When you say 100
11 percent compliant, my experience is that
12 sometimes you get 100 percent compliance because
13 they've issued the implementing policy. Then
14 when you go read the implementing policy, the
15 things they didn't like that you put in the DOD
16 policy amazingly are missing in the implementing
17 policy. So, I'm wondering when you say 100
18 percent compliant, whether you mean the former.

19 They got an implementing policy out,
20 or you've actually read it, and you believe that
21 all of the important parts of the DOD policy are
22 reflected accurately in that implementing policy.

1 MS. ARFAA: Yes, another good
2 question. Again, I will take that back to my EEO
3 expert. My understanding is 100 percent
4 compliant in the policies were adjudicated with
5 each other. Again, nothing is done in a vacuum.
6 Our EEO team works with the services EEO teams,
7 and the components. So, anything that gets
8 finally published is mostly a joint effort.

9 It doesn't mean everyone concurs all
10 the time, and then once that is rolled out, and
11 for part of this roll out was a public facing
12 version of it. That did get onto the websites,
13 and it is the way it was published. I will
14 confirm all of that, very good question, again,
15 but yes, 100 percent compliant.

16 BGEN. SCHWENK: And I apologize for
17 interrupting, go back to your question.

18 MS. GOLDBERG: Which, to me, one of
19 the questions I wanted to ask is what's meant by
20 program? Because it is, as we all know, one
21 thing to put out policy on a website, and another
22 thing to actually know what that policy is, and

1 abide by it. Does the program piece of this
2 include implementation on the ground in a
3 meaningful way?

4 And how are you assessing its impact
5 in terms of reducing harassment, ultimately to
6 zero, since that would be prevention?

7 MS. ARFAA: Right, so another great
8 question. So, we have the EEOC sort of will
9 oversee this. And then July 2022, we were deemed
10 compliant by them in the training that would
11 happen. So, the way to measure that would be the
12 -- that's why we work with the Office of People
13 Analytics. So, we do our work force surveys
14 every year, and we get our numbers back.

15 So, have we seen zero harassment? We
16 have not. But that's how we would measure are
17 our behaviors improving, and maybe even, I guess
18 the trainings to those behaviors improving? And
19 it would be through our yearly, or every other
20 year surveys.

21 MS. GOLDBERG: Thank you, and sorry,
22 last question, just to help me put the pieces

1 together. Is this the only anti-harassment
2 program? And if it's not, how do the anti-
3 harassment programs get coordinated?

4 MS. ARFAA: So, we have our EEO who
5 does it for our civilians, and we have our MEO
6 who does it for our service members. And our
7 service member ones can be things like command
8 climate. So, that we would work with our
9 violence prevention cell to talk about integrated
10 primary prevention. So, again, it's many
11 entities across PNR we work with.

12 And we work together to collaborate,
13 including SAPRO, or so this is not done in a
14 vacuum, nor is it one anti-harassment policy that
15 could encompass everything, if that makes sense.

16 MS. GOLDBERG: It makes a ton of
17 sense. I think another way of putting my
18 question is who is in charge of it all? Is it
19 your office, is it another office, is it more of
20 a steering committee type of approach trying to
21 understand how the different -- many different
22 units that are working to reduce harassment are

1 working together?

2 MS. ARFAA: Yes, so ultimately, I mean
3 we won't go up to SECDEF, but DEPSECDEF, the
4 Under Secretary for Personnel, and readiness is
5 our big umbrella. Then he has pillars, we are
6 under force resiliency. We then, in that force
7 resiliency, have our components that we work
8 with, and we work with all of the services who
9 have their M&RAs, and there are people in the
10 services who are similar to what we do in policy.

11 So, it is not just ODEI, or even the
12 Office of Force Resiliency, which is our umbrella
13 that would develop, we would do the
14 implementation, or the oversight, but we work
15 together. I know it sounds kind of hokey, but we
16 get in a room, and we hash it out with our EEO
17 specialists across the services. Now, I don't --
18 I haven't worked with the action officer level.

19 But we have tiers, and levels of
20 people who are working on these issues together
21 too. So again, why I was talking about how long
22 it takes to get a study out, or a report, because

1 we do do intense coordination to make sure the
2 words that are on the page are looked at, edited,
3 and agreed to not only by the services, but then
4 we send them to Mr. Sullivan, and his
5 counterparts in OGC.

6 So, it is a lot of coordination. It
7 is not just the ODEI team who is coming up with
8 these, and praying, and hoping it works. Does
9 that answer your question? I don't know if I'm -
10 -

11 MS. GOLDBERG: Great, it does. I'm
12 also very interested in the implementation part,
13 but I wanted to leave space for others to ask
14 their question.

15 MS. ARFAA: And so, I'm going to take
16 a note just in case. So, implementation of any
17 of our anti-harassment programs, and policies,
18 okay, perfect.

19 MG. ANDERSON: Hi, this is Marcia
20 Anderson. IF you could go back to slide 11, I
21 just have a couple of questions about that,
22 that's the diversity, and inclusion slide. And

1 in particular, I'm looking at the graphic there.
2 I don't know what -- it doesn't say what year
3 this is the status from, but I'm assuming it's
4 2022, or recent.

5 But I was just wondering what the
6 trend lines are, particularly for the senior
7 enlisted ranks, and the senior officer ranks
8 there, because it does -- obviously it shows a
9 significant drop off with regard to minority, and
10 women who are represented at those levels. And
11 just wondering if there's been a trend, what the
12 trend is there, is it getting worse, is it
13 staying level, or is it showing signs of
14 improvement?

15 MS. ARFAA: I am going to try to look
16 at this with you. I can't really see it up
17 there, so I'm pulling out mine, if you don't
18 mind. So, this is -- I'm trying to find the year
19 first. It's got to be our most recent. I'm not
20 sure if that's 2020, 2019, 2021. If you want, I
21 can get you that. But we're talking about -- so,
22 your question is what are we doing about what

1 we're seeing on this slide?

2 MG. ANDERSON: Yes, and what the
3 trends are. Because, for example at one point
4 when I was active in service, there were --
5 there's at least one woman of color who was an
6 admiral, a four star. And there were a couple
7 who were at the three, and two star levels. But
8 now I'm seeing that those numbers are either --
9 there's either zero, or they're fairly low.

10 So, I'm just curious, and I know that
11 part of this is a pipeline issue. We have to
12 have lieutenant colonels, and colonels, and
13 captains for the Navy, and Coast Guard who are in
14 the pipeline, and are eligible to be promoted,
15 but I'm just wondering is there any -- or you
16 could provide us with some data explaining what's
17 going on, what the trends are over the last five
18 to ten years, and what programs, or initiatives
19 are being contemplated to address that.

20 MS. ARFAA: So, I could help you with
21 previous numbers, in sending them to you, but our
22 current numbers have not been reported yet. And

1 this is -- so, we have a Talent Management
2 Office, in our military personnel policy, or our
3 civilian personnel policy, we have sessions,
4 people who are experts on that.

5 What we do with this is -- two way
6 question earlier, provide this to our colleagues
7 who can look at this, and say now we need to
8 figure out what to do about a session. So, ODEI
9 doesn't figure out how to bring in -- do we sit
10 in huddles, and talk as colleagues, absolutely,
11 give each other ideas, always ask for help, we
12 do.

13 But ultimately ODEI doesn't know
14 necessarily what is going on, and how are we
15 breaking people into the force that are more
16 diverse? How are we bringing more people into
17 the academies, and ROTC that are more diverse, so
18 it's not just our enlisted, because as you see,
19 our enlisted population is most split. So, our
20 office does not do that, and I would not know how
21 to do that.

22 I could put you in touch with military

1 MPP, or someone who could get you those answers.
2 We don't take the data, and then affect that
3 talent management. And let me just follow up,
4 our D2T, Dr. Haynie's arm of this, they did do an
5 LOE, a line of effort on talent management, and
6 are working with the CTMO on that. But again, we
7 work towards the same thing from two different
8 attack areas.

9 MS. TOKASH: This is Meghan Tokash
10 again. My colleague, Jim Schwenk brought up the
11 IRC from two years ago. Within the report there
12 was one of five cross cutting recommendations by
13 the IRC, and one of them, it's located on page 32
14 for your reference, it's that the DOD needs to
15 improve data collection.

16 Including qualitative research, and
17 quantitative survey tools to better reflect the
18 experiences of service members whose intersecting
19 identities such as race, ethnicity, sexual
20 orientation, gender, and gender identity may
21 place them at higher risk for sexual harassment,
22 and sexual assault. Have you heard about this

1 cross cutting recommendation?

2 Is your office, or other offices that
3 you interface with talking about this particular
4 IRC cross cutting recommendation? And if so, do
5 you have any progress report that you could give
6 us?

7 MS. ARFAA: So, with that one, we
8 would be working with SAPRO, and I do not have a
9 progress report that is publicly available, I'm
10 sorry.

11 MS. TOKASH: Thank you.

12 MS. ARFAA: And page 32 was of the IRC
13 report?

14 MS. TOKASH: Yes.

15 MS. ARFAA: Okay, thank you.

16 MS. TOKASH: And just for
17 clarification, when you say it's not publicly
18 available, is that because it's pre-decisional?

19 MS. ARFAA: And in progress, yes, pre-
20 decisional, and in progress.

21 MS. TOKASH: Okay, but is it your
22 understanding that this is a recommendation that

1 is being worked on currently? We don't need to
2 know the essence of it, but is this something
3 that is still being pursued?

4 MS. ARFAA: Can you give me the cross
5 cutting number?

6 MS. TOKASH: I can, it's number four.
7 It's the only cross cutting recommendation that
8 talks about data collection.

9 MS. ARFAA: So, I don't know if you
10 remember, that was put out in phases, so I just
11 have to now think, I will find out if number four
12 is one of our current phases. So, we had a four
13 tier, or four phase approach, we could only be in
14 phase three. I will find out what phase we're in
15 for you.

16 MS. TOKASH: And I won't hold it to
17 you here, but I will thank you for looking into
18 it.

19 MS. ARFAA: Of course.

20 MS. GOLDBERG: Following up again, on
21 Marcia's question earlier about the slide on page
22 11, and understanding that this is the slide that

1 shows a steady decline in -- or I guess it's not
2 a time elapsed slide, but a pretty small number
3 of women, and zero in certain categories of women
4 of color, and officer ranks.

5 I know this is not exclusively in your
6 domain, and you mentioned some strategies that
7 are in the works to try to address that. What do
8 you think is the explanation for that?

9 MS. ARFAA: So, based on the studies
10 we've done, we've identified some of those
11 barriers. And environmental, simply where a
12 person is from, and what they're used to, and how
13 is the -- what their experience treating them.
14 So, that's why we do climate, and we do our
15 things with our integrated primary prevention.

16 We're trying to help them out, so it
17 could be the environment they're in. It could be
18 the transparency of the promotion criteria, and a
19 board selection process is not transparent. So,
20 it's not helping with the promotion of women, or
21 people of color. Representations of minorities
22 in senior ranks we're focusing on, because

1 there's no modeling then, right?

2 So, what is that modeling? So, we try
3 to take the obvious things. Is there an
4 inclusive culture, is there representation? And
5 then try to figure out what are the reasons that
6 that could contribute to the lack of these
7 numbers? And then we would go to our
8 counterparts, and say hey, you see these numbers,
9 we're thinking about it from this way.

10 What is the infrastructure for
11 diversity inclusion? Again, what does it look
12 like in the wiring diagrams, that way to how is
13 it talked about? So, that's what we do. Sort of
14 the thinking through how can the department that
15 is responsible for this, how can we help them
16 think through a better policy, or use these
17 numbers to improve how they do what they do?

18 So, I think by understanding our
19 studies through the barrier perspective, and then
20 in gaps, we're able to potentially use these
21 numbers to help us tell a different story, a
22 better story -- not a better story, a story to

1 better help promote that diversity, what these
2 numbers look like.

3 HON. SMITH: On page 19 of your
4 slides, one of the things that you indicate is in
5 the future is a look at root causes, and
6 solutions to military justice disparities. Can
7 you kind of, if possible expand on what that
8 looks like in terms of that research, what is it
9 that you would be looking at, sentencing, or who
10 the lawyers are, and the lawyer makeup, or the
11 juror pool makeup, etcetera.

12 MS. ARFAA: We haven't actually -- we
13 will propose that study. It has not been
14 proposed, so I don't know what parameters we're
15 going to look at. Happy to take any suggestions,
16 and take it back to the team who will be writing
17 that up. But what that will be probably, and I
18 don't know this yet, would be a follow up,
19 because this IRT study addressed some of those,
20 or looked at, as you read, causes.

21 So, what can we expand upon, and what,
22 after reading that report, what do we think might

1 be missing? So, we don't know yet, it's not
2 written up. We don't have a proposal for that
3 study. It is sort of being formulated now.

4 HON. SMITH: Any idea when it will
5 begin?

6 MS. ARFAA: I don't know.

7 HON. SMITH: Does anyone have any more
8 questions? If not --

9 BGEN. SCHWENK: Yeah, I do. I saw
10 command climate surveys listed, is that something
11 that's generated? That's one lots of
12 collaboration on, but who generates that, does
13 your office generate that?

14 MS. ARFAA: No, so the Office of
15 People Analytics. So, they work with us, and the
16 other P&R entities, and the shared P&R DHR
17 entities like SAPRO, and DSPO, the sexual
18 assault, and suicide prevention, the Defense
19 Suicide Prevention Office. So, they come up with
20 it, they share it with us, we give them feedback,
21 and then they edit. Again, concur, or non-
22 concur, and ultimately OPA is responsible for

1 that.

2 BGEN. SCHWENK: Okay. I guess my
3 thought is after the Fort Hood study on that
4 situation down there, and then the IRC study, the
5 lack of trust by the junior enlisted in their
6 commanders, especially at the lower levels is
7 stark. And I hope that the OPA people are
8 getting a series of questions to try to delve
9 into what is the level of trust that the junior
10 enlisted have in the senior staff NCOs, and
11 officers above them.

12 MS. ARFAA: Yes, sir. I will take
13 that -- I'm sure they must be, they are
14 professional researchers, but I will absolutely
15 take that suggestion back.

16 HON. SMITH: Okay, I don't see any
17 other questions. Thank you very much Dr. Arfaa,
18 we appreciate your time. WE know we hit you with
19 a lot of questions.

20 MS. ARFAA: I have them all written
21 down, I will go back, and organize those, and get
22 answers for you. If you can just give me until

1 the end of next week, I would be grateful.

2 HON. SMITH: All right, thank you so
3 much.

4 BGEN. SCHWENK: Feel free to
5 coordinate them, and we'll get them in -- no,
6 that's a joke.

7 MS. ARFAA: And you'll get them in
8 2027. Thank you all for your time.

9 COLONEL BOVARNICK: Judge Smith, the
10 next sessions are all internal, and so I'll defer
11 to you if you want to take a break now, but the
12 next session will be the feedback from those
13 members that visited, or observed the special
14 trial counsel training, and we can go into those
15 other updates that are listed on the agenda. But
16 there's no more outside presenters, I guess was
17 my point.

18 BGEN. SCHWENK: Five minutes? All
19 right, very good.

20 (Whereupon, the above-entitled matter
21 went off the record at 2:02 p.m. and resumed at
22 2:17 p.m.)

1 MS. BASHFORD: A number of us went for
2 either four days, or a couple days as they could
3 fit in. Staff members Eleanor Vuono, Suzanne
4 Goldberg was there for a few days, Jim Schwenk
5 was there for a few days, and Meghan Tokash, and
6 I. General Wells was incredibly gracious, and
7 welcoming, and hosted a small dinner that three
8 of us were able to attend.

9 It was in some ways not what I had
10 thought. It was not OSTC policy, how are they
11 going to accept cases, what are the standards
12 going to be for rejecting cases. It was more of
13 a truly to get everybody up at a competency
14 level. So, for example there was eight hours of
15 evidence, including hearsay, and exceptions to
16 the hearsay rule.

17 But I thought that the outside of the
18 classroom interactions were incredibly valuable,
19 and since it was coming home week pretty much for
20 Meghan Tokash, I'm going to turn it over to her
21 about some of those interactions.

22 MS. TOKASH: Thank you. I think I had

1 the same take-away as Martha. The actual meat,
2 and potatoes of at least the Army's OSTC is
3 happening this week while we're in public
4 meeting. Last week's certification course was
5 more of a primer, or a deeper dive into the
6 substantive areas of law such as evidence,
7 ethics, some sexual assault breakout components.

8 Oddly enough we were invited to
9 participate in the ice breaker that was part of
10 the program, which was, I think the initial
11 reason why we were at first not allowed to attend
12 the first day. We were told by the staff on the
13 ground that the reason for the exclusion of
14 committee members on the first day was just to
15 make sure that they had their tech equipment up,
16 and running so that there were no hiccups.

17 Because at the end we were invited to
18 participate in the ice breaker, which was very
19 nice. I share Martha's sentiments about the
20 graciousness of General Wells, and the senior
21 teams of all the services who were participating,
22 because it wasn't just the Army. The Marines

1 were there, and the Air Force as well, at least
2 components from their OSTC offices.

3 This was also a training that was not
4 conducted by, but their participants were from
5 the trial defense services as well. So, it was a
6 training for both sides. Our understanding is
7 this week's training is just the OSTC's. I
8 thought the conversations with individual counsel
9 were really, really helpful. They had some
10 excellent suggestions, a couple of which I'd like
11 to be able to put on the record here.

12 Because I think they're worth
13 following, at least more than one of the
14 participants had concerns about Article 66,
15 that's the factual sufficiency review that is
16 conducted by the appellate level courts above the
17 trial courts. And there were concerns from both
18 sides of the V, if you will.

19 There were concerns by the defense
20 community, there were also concerns by the
21 prosecution community. Concerns that factual
22 sufficiency reviews are either getting it right,

1 or getting it wrong. Either way, it seemed like
2 there were concerns about intermeddling with the
3 trial verdict, or the trial result.

4 Another concern that came up, or
5 actually solution that at least one counsel
6 wanted this committee to look into was the use of
7 closed circuit TV cameras as widely as possible,
8 especially in the barracks. This particular
9 individual was on the prosecution side, and they
10 said that this would be very helpful for
11 prosecution cases to be able to corroborate
12 reports of rape, and sexual assault, and sexual
13 harassment.

14 If some of these incidents were either
15 caught on camera, maybe not the rape, or the
16 sexual assault itself, but certainly certain
17 events that could help corroborate those
18 statements. And then I also thought one of the
19 interesting take-aways surrounded the ethics
20 course with respect to the preferral, and
21 referral standard.

22 Of course it was instructed that the

1 standard for both is probable cause. I could see
2 that there could be concerns amongst the OSTC
3 community with respect to what the standard will
4 actually be within their individual circuits.
5 And I think that that's probably why we as a
6 committee made the findings, and recommendations
7 that we did last week.

8 I also found a lot of counsel were
9 very interested in the report that we were
10 releasing last week, and they were also
11 interested in collaborative training. I was
12 talking with some of the HQEs, who are civilians,
13 who work with the services. At least
14 anecdotally, some of them expressed a desire to
15 have more outside trainers so the training isn't
16 so myopic.

17 There are other voices, other views
18 from other agencies that could help train their
19 offices, and train their counsel, so I thought
20 that that was interesting too. So, those were my
21 initial take-aways. I know Suzanne, and Jim
22 Schwenk were there as well.

1 BGEN. SCHWENK: So, I agree with all
2 that. I was really disappointed when I got there,
3 and found out we were at trial advocacy instead
4 of policies, and procedures of the OSTC, and any
5 changes that the defense world has. So,
6 therefore I think at some point we're going to
7 have to ask for, and receive briefings on what
8 are the OSTC's policies, and procedures in each
9 of the services.

10 And what about any changes that the
11 defense counsel have come up with, or the people
12 that were here this morning, the SVCs, and VLCs.
13 So that was my first thought on that. The second
14 thing is it dawned on us, at least it dawned on
15 me while I was there, that's a target rich
16 environment for when we go out, and do our site
17 visits.

18 There are, I guess it's now called the
19 graduate course, whatever it's now called, that
20 course, there's a bunch of majors in there who
21 are coming straight in from the field. They're
22 all there, and when I was in we used to say the

1 iron majors run everything. They don't have the
2 experience yet, but they work hard, and they know
3 enough to get things done.

4 And there they all are at these
5 schools, so I think that we should consider going
6 into schools when we do our site visits. Also,
7 for whatever it would be worth, the basic courses
8 are there at the same time, and you get to talk
9 to young people about what do they think of their
10 training, and etcetera. So, I think that was
11 another issue.

12 And beyond that, they were as gracious
13 as you could be. The amount of stuff you learn
14 talking to people offline as opposed to when
15 they're sitting with a microphone in front of
16 them in here is really -- you learn a lot more
17 when the microphone is off, and you're somewhere
18 else. That's why the site visits are so
19 important, and I'll say more about that when I do
20 the PSC update. Thank you.

21 MS. GOLDBERG: This is Suzanne
22 Goldberg. I agree with what our colleagues have

1 said, and I've now been to three trainings, and
2 I'll talk just briefly about a training I
3 attended in Newport for Navy, and Marine Corps
4 SVCs in addition to a couple of comments on the
5 OSTC training that we observed, but I can't
6 emphasize enough the value of going, and hearing
7 just in casual conversation about what it is that
8 people are concerned about.

9 And also what's going well, and I will
10 say in all three trainings that I have observed
11 since serving on this committee, overwhelmingly
12 the presenters have been very good to excellent,
13 with almost no exceptions. Really terrific,
14 great at engaging the room, and the students
15 generally seem to be paying a lot of attention.

16 And more attention than I would say
17 some comparably aged students might be paying in
18 their civilian settings, so that was encouraging
19 to me. One of the things that has struck me in
20 talking to victim's counsel, special victim's
21 counsel in the three different trainings I
22 observed, is that their perspective on the

1 challenges they face with trial counsel are very
2 different from the perspectives of trial counsel
3 on how well it's all going in terms of those
4 relationships.

5 And I think we heard a little bit of
6 that today. In particular, what I've heard, and
7 I think what we've heard reflected is that, as we
8 would expect, relationships are very important to
9 getting things done. And when a victim's counsel
10 has a good relationship with the trial counsel,
11 that goes well.

12 As other colleagues here have pointed
13 out, it also works better when the victim's
14 counsel is working well with the defense counsel.
15 But one of the reasons that I have increasingly
16 come to believe in the importance of having clear
17 policy, formal policy around the sharing of
18 information, and the role of victim's counsel,
19 the standing, or lack of standing to present in
20 court.

21 Is that what victim's counsel actually
22 gets to do, and what they receive is variable

1 depending on who they're working with, and which
2 base, which commander, how new is the person,
3 have they developed the relationship yet. And
4 while of course, relationships are always going
5 to be important to facilitating information
6 sharing, and getting things done, I think it is
7 concerning to me that so much seems to depend on
8 individual relationship rather than on we have a
9 right to X, or Y.

10 And I think the other benefit of
11 formal policy as I see it from these observations
12 is that it will help bring clarity to trial
13 counsel, who don't always understand what they
14 are supposed to do. And related to that, in both
15 of the Newport training, and the OSTC training in
16 Charlottesville, it seemed to me that the
17 trainings for non-victims counsel, so trial
18 counsel, or defense counsel.

19 There would be room to do more to
20 train regarding the role of victim's counsel.
21 Because although it's not a brand new role
22 anymore, it is still evolving, and there is

1 variability in other units understanding of that
2 role unless they've served in that role, or know
3 somebody who has. A couple of other more
4 specific points, and these are ones that were
5 made to me, so I don't offer them as definitive.

6 But I think I should share them with
7 the group in case it's of interest. One relates
8 to a question that I asked earlier, which is
9 around the consistency of investigator presence
10 in a case. A number of people mentioned to me
11 that one of the biggest challenges they face as
12 trial counsel is when investigators kind of drop
13 in, and out.

14 They're pulled out for a course, or
15 they're pulled out for any number of reasons that
16 people get pulled out to do some other work. But
17 that has a disruptive effect -- can have a
18 disruptive effect on the quality of the
19 investigation, it can also lengthen the time for
20 a case to get from start to finish.

21 And that, as we know, is a huge
22 problem, or can be for both the accused, and the

1 victim. I know there's some work going on around
2 that, and that the increasing role of civilians
3 as investigators may change some of that, may
4 address some of that challenge, but that was a
5 serious one, or seemed to me to be serious.

6 On the issue of domestic violence, I
7 asked a colleague of Jim's about where he saw the
8 greatest challenges in terms of reporting, and
9 what the barriers were. And he mentioned
10 domestic violence is where they see the least
11 reporting. And when I asked why, in addition to
12 all of the reasons that we would expect that are
13 particular to domestic violence, he also noted
14 that they get less victim cooperation because
15 structural impediments to getting resources for
16 the victim.

17 And the structural impediment in
18 particular he noted is that the ask for
19 resources, or support for the victim has to go
20 through the spouse's command. So, if the
21 spouse's command has to be alerted to, and then
22 approve of the resources for the domestic

1 violence victim, the DV victim is much -- for
2 obvious reasons, less likely to go forward.

3 So, I note that. I also note that
4 victim's counsel mentioned that they serve,
5 obviously a lot of victims, but they also don't
6 serve a lot, because many are ineligible for
7 their services. And so, there's a real --
8 because they're not service members, or for other
9 reasons. So, we are seeing part of a picture
10 when we talk to some of the challenges they're
11 facing.

12 But we are not, by hearing them,
13 seeing the whole picture of the victim experience
14 in sexual assault cases. And I think it would be
15 interesting to learn more about what the
16 percentage of sexual assault cases there are in
17 which the victim is not a service member. Maybe
18 the committee has studied that before, but that
19 seems important as we think about this.

20 I promise I'm almost done, but a
21 couple of other quick, quick points for the
22 record. I have less information about this, so I

1 may -- I'm on my thinnest ice, other than to say
2 this was shared with me, so I am sharing with
3 you, it may be more meaningful to some of you.
4 Article 43 on the statute for limitations does
5 not clearly include 128B, child abuse offenses.

6 Probably because those offenses were
7 created prior to 120B. Someone else here will
8 know more about this than I do, and there's, I'm
9 sure many more sentences I could add to give that
10 meaning, but I flag it for those who know more as
11 an issue. A question was asked about child
12 pornography, why is that a 134 offense, why
13 should the trial counsel have to prove prejudice
14 to good order, it's a terminal, so.

15 And some younger trial attorneys
16 raised to me when I asked them what they thought
17 was missing, or an issue, they noted that there
18 is not -- that ejaculation on another person is
19 not necessarily a covered offense if there's not
20 physical touching from one person to another.
21 That was their characterization, I don't know.

22 I talked to another person about this,

1 who said that maybe this could fall within
2 abusive sexual contact, but that depends on the
3 definition of contact, and maybe it doesn't.
4 Maybe it's in assault without a sexual contact,
5 but I note it for our committee, just to say that
6 if it is not actually covered, that may be
7 something that we want to spotlight at some
8 point.

9 MS. TOKASH: I had two other notes
10 that I didn't share with the group yet, the first
11 was that because there were other services
12 present, it was interesting to be able to get the
13 different viewpoints from those services. And
14 one of those viewpoints was with respect to the
15 referral standard.

16 And while I'm glad that at least one
17 particular service seems to be leaning towards
18 the recommendations that we made with respect to
19 a heightened referral standard, my concern is a
20 disparity amongst the services. So, I think that
21 that's something that we should keep an eye on as
22 these offices roll out.

1 That was one, and then the second
2 thing was my overall impression of the will, and
3 the desire of these individual counsel on the
4 government's side to get this right, I thought
5 could not be overstated. They were very
6 enthusiastic, and very earnest in their new
7 mission. And so, I walked away from the
8 experience of interacting with them offline.

9 Last week was not about the course
10 content. I mean, yes, we sat through all of the
11 courses, but the real take-aways came from those
12 conversations with the individual soon to be
13 special trial counsel, and opposing counsel. And
14 my take-away from talking with those who were
15 going to be charged with special trial counsel
16 duties have a great desire to get this right.

17 And I felt very good about that
18 walking away. It seemed like, at least for the
19 Army, they are choosing the right people for this
20 job, and many of them expressed to me that they
21 are upset about a narrative that trial counsel in
22 the military are somehow incompetent, and that

1 there's some type of a narrative out there about
2 that.

3 At least from what my experience was
4 last week, I think that the OSTCs are going to be
5 in good hands, and I had a really hopeful feeling
6 for these new offices as they embark on their new
7 adventure.

8 HON. SMITH: Thank you for that.
9 Should we just move into the collateral
10 misconduct report update?

11 COLONEL BOVARNICK: Yes, ma'am, and I
12 can do that quickly. So, just as a reminder,
13 because many of the panel members were here the
14 prior iteration of the panel. So, first thing is
15 I provided -- there's a black folder, I think
16 it's at the back of your big books, because it
17 was kind of an add on. And just direct your
18 attention to, if it's at the top, the DOD OGC
19 memo dated June something.

20 I'm not sure what that second, and
21 third, it's a zero something. Anyway, it's a
22 June 2023 memo, and that first paragraph for the

1 new members just lays out the requirement for
2 this biennial collateral misconduct report that
3 the secretary of defense owes to the House, and
4 Senate Armed Services Committee through acting
5 through the DAC-IPAD.

6 And so, for this collateral misconduct
7 report, I'm just going to give a quick little
8 chronology of the past, and then where we're at
9 for the one that's due on September 30th. So, in
10 2019, as stated there, Section 547 of the FY '19
11 NDAA put out the requirement for the services to
12 report certain numbers.

13 You'll see in paragraphs one, two, and
14 three there on the first page of that memo. So,
15 the DAC-IPAD undertook that in 2019, and based on
16 recommendations from the DAC-IPAD, the amendment
17 that came out in the FY '21 NDAA, Section 536
18 basically made the amendments recommended by the
19 DAC-IPAD, and the bottom line here is they're
20 reflected in the definitions you see on page two
21 of that memo, and then the methodology.

22 So, the work of the DAC-IPAD resulted

1 in changes to the statute that have essentially
2 streamlined the process for these biennial
3 reports. Also I should note in the FY '21 NDAA
4 Section 539A was also a Safe to Report Act it's
5 called, where the secretary of defense gave
6 guidance to the -- well, the statute is that the
7 Army -- excuse me, the military, the DOD should
8 have the Safe to Report Act.

9 Where victims of alleged sexual
10 assault, if they commit minor collateral
11 misconduct, the command should take into
12 consideration whether they're going to take
13 adverse action. Okay, so now in FY '21, when the
14 DAC-IPAD was yet to be reconstituted, the Defense
15 Legal Services Agency, essentially our staff,
16 working through the services, put together that
17 report.

18 And so, one of the attachments there,
19 one of that six page document that we provided
20 you was the May '21 memo from the general
21 counsel, the acting general counsel at the time.
22 And I'm going to refer to that and tie it all up

1 with the cover memo is the process was
2 streamlined in the May '21 general counsel's memo
3 to the services to provide their collateral
4 misconduct reports.

5 And when those came back in, they're
6 essentially two to three pages to cover the
7 questions that are asked. And so now, when the
8 DLSA staff put together the report submitted by
9 the secretary of defense through the general
10 counsel to the HASC, and SASC, what I'm telling
11 you is when these reports come in, they're about
12 two to three pages.

13 And so, the deadline that you see now
14 back to the cover memo, which gets to the main
15 point here of these reports that are due by
16 September 30th of this year, is when the DAC-IPAD
17 meets next in September, on September 19th, and
18 20th, we'll have the reports through the general
19 counsel's office, they're due from the services
20 on August 1st.

21 And again, the anticipation is the
22 reports are going to be about two to three pages

1 at most, so we're not talking about these long
2 reports, with three specific data points
3 identified. So, the staff will later compile
4 those when we get them from OGC, provide them to
5 the committee in the read ahead packet with the
6 draft recommendation, and response from the
7 committee.

8 You'll be able to discuss, deliberate,
9 and finalize at the September meeting. And so,
10 that's kind of the proposal, the recommended time
11 line. We'll get the reports from the general
12 counsel's office at some point after they're due
13 to the general counsel on August 1st. Have them
14 provided to the members with the draft response
15 for the members to consider.

16 Obviously looking at the read ahead
17 packet, and then consider, and deliberate. The
18 expectation is, so let me give you an example.
19 The Army's report that came in from 2021 had, we
20 gave an excerpt to some of the members, I don't
21 know how many copies we made, but it had 114
22 cases where there was an instance of suspected

1 collateral misconduct by a victim.

2 One instance of adverse administrative
3 action taken against that victim, so the numbers
4 are very low. And with the Safe to Report Act,
5 the numbers potentially should be zero for all
6 the services. So, I think this report is going
7 to be something that's pretty important. I'm not
8 going to say it's easy, and simple, but it's not
9 going to be that much.

10 It's something that the members will
11 be able to handle, I think at the September
12 meeting. So, subject to any comments, or
13 guidance, or questions -- yes, Ms. Bashford?

14 MS. BASHFORD: One issue that I
15 foresee coming is now that OSTC is going to be
16 handling the prosecution of those cases, who
17 makes the decision on collateral misconduct? It
18 seems like it would still have to be the
19 commander. I don't see how OSTC can make the
20 decision whether there should be a consequence
21 for collateral misconduct.

22 I mean, it doesn't seem like there's

1 consequences very often, but still somebody's
2 making that decision, yea, or nay.

3 COLONEL BOVARNICK: I may have to
4 defer, Mr. Sullivan. I don't know if the
5 collateral misconduct would fall under the OSTC.
6 But I will defer to you, sir.

7 MR. SULLIVAN: So under the statute,
8 you will recall that in addition to having the
9 covered defenses, you also have what are called
10 known offenses and related offenses. So a known
11 offense is literally anything that the person
12 accused of a covered defense is also suspected
13 of.

14 A related offense is by definition
15 given to the discretion of an STC. So an STC
16 would be free to say that alleged collateral
17 misconduct is a related offense so our office is
18 going to handle it or the STC also has the
19 discretion not to handle a related offense. So
20 that's going to be up to that individual's
21 discretion.

22 But I would add that in addition to

1 the possibility of a form of court martial, there
2 may also be some sort of administrative
3 repercussion that might occur and that's going to
4 be within the control of the commanding officer
5 regardless of whether the STC chooses to treat
6 that as a related offense. Does that respond to
7 the question?

8 MS. BASHFORD: Yes. I just think that
9 the communication back and forth might fall down
10 a little bit.

11 MR. SULLIVAN: In practice, I think
12 that it is probably likely that there will be
13 command deference to the STC until the STC
14 decides what the STC wants to do. But certainly
15 that's one issue that we can look at.

16 As I think you know, the Offices of
17 Special Trial Counsel are coming up with their
18 standard operating procedures. They are due
19 under the SECDEF memorandum by July 1. So very,
20 very soon, we will begin to see those SOPs. So
21 that may be one thing to think about as we look
22 at the SOPs. Does that provide guidance for how

1 to handle that situation?

2 COLONEL BOVARNICK: Judge Smith,
3 that's all I had so again we'll be able to
4 provide those reports to come in to the Committee
5 well in advance of the September meeting for
6 discussion and finalization at the September
7 meeting for the Secretary of Defense to be able
8 to meet the deadline of September 30.

9 HON. SMITH: Can we move on to special
10 projects?

11 MS. TOKASH: This is Meghan Tokash
12 speaking. We held our Special Projects
13 Subcommittee meeting yesterday morning. The
14 Special Projects Subcommittee, our current
15 project is looking at the tasking, which is a
16 congressional tasking, to study the feasibility
17 and advisability of establishing a uniform policy
18 for sharing three types of information with
19 special victim's counsel and victim's legal
20 counsel or other counsel representing a victim.
21 And those include, which are in our materials,
22 those three items, the victim's statement, the

1 record of any forensic examination and the
2 medical record of the victim. I am paraphrasing
3 those for brevity.

4 Based on the discussion that we've had
5 the past two days, initially the subcommittee was
6 looking at calling additional witnesses for the
7 September public meeting. We can discuss in the
8 deliberation time period today if we feel that we
9 have enough information with respect to the
10 limited congressional tasking.

11 I think perhaps there are other issues
12 that were much more robust that were disclosed to
13 us as a committee here, such as public access to
14 information, timely access to information with
15 respect to a PACER-like system and other issues
16 that we may want to flesh out in a report and
17 perhaps make other recommendations. So I'm just
18 flagging that for the full Committee.

19 When we deliberate here this
20 afternoon, one of the things we might want to
21 consider is do we have enough information right
22 now with respect to at least the congressional

1 tasking? Who else do we want to hear from? I
2 for one have reversed myself from what I said in
3 the subcommittee meeting about, you know, other
4 potential panels.

5 I think we have the information that
6 we need right now at least with respect to these
7 three categories. And perhaps a suggestion would
8 be that the subcommittee could, if the full
9 Committee identifies other people we should hear
10 from, we could have a separate virtual meeting in
11 advance of September so that we can get some
12 other work done such as General Schwenk
13 mentioned, the actual business rules of the
14 OSTCs.

15 I think that is something that our
16 Special Projects Subcommittee would like to look
17 at right now. We have not been able to be privy
18 to any of that. And so that may be something
19 where our time as a subcommittee is better spent
20 focusing on for the September public meetings.
21 But I leave that to, you know, my colleagues for
22 us to discuss.

1 Before I turn the baton over, I want to
2 check with Meghan Peters and Eleanor to see if
3 there is anything that I missed with respect to
4 content and our special project.

5 MS. PETERS: No, I think that covers
6 it.

7 MS. TOKASH: Thank you. Madam Chair?

8 BGEN SCHWENK: Can I say one thing?
9 When you start on the OSTC evaluation, I don't
10 know when we are ever going to get around to
11 evaluating the OSTC implementation. But one of
12 the confounding issues in my mind is how? What
13 metrics? Who do we talk to? How do you do it?

14 So since you're stuck with the issue,
15 and I don't mind piling on, that to me is
16 something that, you know, the sooner you guys
17 start discussing it, and I'm sure the services
18 are grappling with the same thing, the OSTCs
19 themselves, that, you know, at some point the
20 bell is going to ring, and they're going to ask
21 what do you think of the implementation.

22 MS. TOKASH: Thank you.

1 COLONEL BOVARNICK: General Schwenk,
2 if I could just add in really briefly. So
3 Section C of -- so Section 547 of the FY21 NDA,
4 Plan C of that, requires the Department to assess
5 the metrics. And so that's going to be an
6 initial, I'm going to call it tasking, but the
7 subcommittee of the Joint Service Committee on
8 Military Justice is going to be looking at that
9 as well. And they owe like a subcommittee
10 charter or plan to the general counsel by June 30
11 on how they are going to assess those metrics.

12 So that will kind of be developed over
13 the next number of months leading up to obviously
14 fully implementation. So there is a plan in
15 place to do that.

16 BGEN SCHWENK: Right. I just think,
17 since we're independent, we need to independently
18 decide whether we're comfortable with what
19 they're doing or want to do something somewhat
20 different. But thank you very much, Jeff.

21 HON. SMITH: All right. Thank you,
22 Meghan. So moving on to Case Review Subcommittee

1 update.

2 MS BASHFORD: We also had a Case
3 Review Subcommittee meeting yesterday morning.
4 And I'm going to let Eleanor and -- I'm sorry,
5 Kate, it's getting late in the day -- Eleanor and
6 Kate update you on where we are on the panel
7 composition data collection, because I always
8 stress the DAC-IPAD makes decisions based on data
9 and not on anecdote, and some very, very
10 preliminary thoughts about our meeting upcoming
11 in September. So take it away, ladies.

12 MS. TAGERT: Good afternoon. So, yes,
13 we don't have the analytics that were described
14 by the last panel presentation, but we do have a
15 lot of data that is going to be appearing before
16 you by the end of the year on what panels look
17 like across the services.

18 So we've been successful in the last
19 six months in working -- and I want to thank the
20 service representatives across the way for
21 working with us in a way that has been very
22 helpful in scoping our project.

1 And just as kind of a background, we
2 decided back in, I think, January we were going
3 to look at the race, gender, ethnicity and age of
4 panel members, prosecutors, the accused and
5 defense counsel. So basically, you will have a
6 snapshot of the fiscal year '21 and '22, what all
7 those players in the courtroom are going to look
8 like.

9 And we worked with Dr. Wells to kind
10 of create a very rudimentary database, which is
11 working great. And so we got -- the cases were
12 recently downloaded to our server so we are in
13 the process of doing data entry. And I have
14 three interns to my left who hopefully are going
15 to help me speed up the process just because it's
16 a lot of entries for even just -- there is not a
17 lot of contested courts martial going on that we
18 are looking at.

19 For instance, we are doing with the
20 Army, and we are looking at 74 cases but that is
21 close to 28 entries of people, sorry 2,800
22 entries for those cases. So we hope to get that

1 data to you by the end of the year. And I say
2 hopefully because sometimes we are going to have
3 to rely on the services for the information back.
4 But I think we are in a good spot.

5 Another issue that the subcommittee is
6 going to start exploring in September in a
7 subcommittee meeting is we've heard a lot about
8 conviction integrity units and potentially the
9 feasibility and just looking at different offices
10 that have set those up and whether or not that
11 may be something that the military services would
12 want to explore.

13 So we are going to have some speakers
14 come and provide testimony, which I am sure Ms.
15 Bashford will share with you at the public
16 meeting. And that is all I have. Eleanor,
17 anything? That's it.

18 MS. BASHFORD: I just want to add that
19 the staff is doing yeoman's work on doing this,
20 and it's only going to be complicated because it
21 does us no good to look at the panels if we don't
22 look at the panels that acquitted.

1 And there are untranscribed
2 audiotapes. So if we can't get those
3 transcribed, the staff has to listen to the
4 audiotapes of the voir dire process and call out
5 the names. So it's a massive work. And I think
6 it's important work, and we're very thankful.
7 And we thank the service representatives as well.

8 MS. TOKASH: Can I ask a question, Ms.
9 Bashford, about a potential collaboration between
10 our subcommittee and yours. Is the Case Review
11 Subcommittee looking at the Article 66 issue?

12 MS. BASHFORD: We have not been.

13 MS. TOKASH: Okay.

14 MS. BASHFORD: Although we were tasked
15 with looking at some of the appellate issues on
16 that. But we have decided that this is more
17 important. And I think our staff is pretty much
18 up to here with this project. So to the extent
19 we would look at it, we are deferring it way
20 downstream.

21 MS. TOKASH: Thank you.

22 BGEN SCHWENK: Meghan, you were

1 talking about sufficiency of the evidence?

2 MS. TOKASH: Yes. Was that your
3 committee, Jim, that's looking at that?

4 BGEN SCHWENK: No.

5 MS. TOKASH: No, okay. I thought --

6 BGEN SCHWENK: I hope not.

7 HON. SMITH: Thank you for that.

8 Moving on to last but not least, Policy
9 Subcommittee.

10 BGEN SCHWENK: Okay. Last and least,
11 I am used to it. Okay. So we have been -- on
12 the Article 25 study, we have obtained input from
13 a whole bunch of stakeholder groups. We actually
14 have a chart that we will make sure all of you
15 get of who we have heard from and in what format.

16 And what we're looking for from you
17 all is if you have a group that you don't see
18 listed that you think we should talk to let us
19 know so that we can make arrangements to hear
20 from them at our subcommittee meeting in
21 September. Okay? So we'll get this around to
22 you, and you can look at that.

1 We have not started formulating any
2 ideas. We are still trying to look at issues and
3 options. But we hope to have, and I would like
4 to request, Jeff, an hour in the DAC-IPAD meeting
5 for the PSC update so it's not just, we're still
6 working on it, but we actually could come forward
7 with something more substantive to share with the
8 group and a generate a discussion and see what
9 everybody's thinking as we go along with it.

10 We have tried to schedule, as you've
11 seen, some of the panels in front of the whole
12 DAC-IPAD so you could not be kept in the dark and
13 hear what people have to say about it.

14 Okay. Another thing that we're trying
15 to do for September is getting former convening
16 authorities. Apparently, the MJRP just recently
17 did that, and we've done it in the past. But
18 we'd like to request 90 minutes because while
19 there are some panels that you can get done in an
20 hour, most panels we still have questions when
21 the hour comes up. And the convening
22 authorities, it's one of the few chances we're

1 going to have to talk to commanders so, you know,
2 I think 90 minutes would be great.

3 Also, we wanted to get the DAC-IPAD
4 member observations of courts martial. A lot of
5 members have gone to the courts. They've seen
6 voir dire. They've seen challenges. We'd like
7 to generate a conversation on that. And since
8 we're talking about looking at courts, we could
9 broaden it up and see about other issues or
10 things you observed that you think we ought to
11 consider. So I'm filling up your schedule, Jeff.
12 So we'd like to ask for 90 minutes on that.

13 I think the CRSE, the Case Review
14 Subcommittee, we were talking, Martha, weren't we
15 about asking for a day for the Case Review
16 Subcommittee meeting?

17 MS. BASHFORD: Yes. For that would be

18 --

19 BGEN SCHWENK: September.

20 MS. BASHFORD: -- the Monday before --
21 if we're still on a Tuesday/Wednesday, public
22 meeting schedule, the full day Monday.

1 BGEN SCHWENK: Right. So if that
2 holds, then, Jeff, the Policy Subcommittee would
3 like to ask for an entire morning, 9:00 to 12:00,
4 on that first day of the DAC-IPAD meeting when we
5 do the subcommittee meetings because I wouldn't
6 be conflicted. So we could take the whole three
7 hours and get some good work done before the
8 meeting.

9 Okay. And the last thing on
10 scheduling that has nothing to do with the Policy
11 Subcommittee, just me, is our field trips. I
12 think we should schedule a good amount of time to
13 talk about when we want to start, where we want
14 to go and when we want to finish the trips so
15 that we have plenty of time for the staff to go
16 through the transcripts, see what everybody had
17 to say, identify issues and then the members,
18 armed with that, will decide which issues to take
19 on and in what order. And we got to get it all
20 done by early 2026 and next year, if I'm right,
21 is 2024. So we don't want to be like the JPP and
22 leave it unaccomplished. Thank you.

1 HON. SMITH: Thank you. All right.

2 Moving on to deliberations, is --

3 COLONEL BOVARNICK: We had no set
4 structure for this because it was going to --

5 HON. SMITH: Okay.

6 COLONEL BOVARNICK: -- be dependent on
7 what came up today. So I will defer to obviously
8 the Special Projects Subcommittee on anything on
9 the 549(b) topic and then the Policy Subcommittee
10 for anything on Article 25 as far as what was to
11 be discussed. So, ma'am, back over to you.

12 MS. TOKASH: May I, Chair Smith?

13 HON. SMITH: Mm-hmm.

14 MS. TOKASH: Thank you. This is
15 Meghan Tokash speaking. Colonel Bovarnick, can
16 you confirm that we have -- is there anybody else
17 joining us virtually like Meg Garvin or --

18 COLONEL BOVARNICK: We're checking
19 now.

20 MS. TOKASH: Okay. Thank you. I just
21 want to make sure. Oh, good. I see, and Jenn
22 Long, great. I didn't want to forget our

1 colleagues in virtual land.

2 Here is what I propose as a starting
3 point -- oh, good, and Meg Garvin is joining as
4 well -- I propose as a starting point for our
5 conversation. Maybe we could first start off by
6 talking about the statutory directive with
7 respect to the three categories of information.

8 What is everyone's comfort level with
9 respect to the information that we have received
10 from witnesses so far with respect to those three
11 categories of information and then we could next
12 talk about potentially hearing from other
13 witnesses or what more do we need to talk about
14 to supplement these three categories of
15 information regarding concerns that we've heard?

16 BGEN SCHWENK: Okay. I'll start. My
17 first thought is let's just answer the mail
18 because they got a timeline, and they want an
19 answer. I don't think they particularly wrote
20 what they meant. But they wrote what they wrote.

21 And all they want us to do if you read
22 it is submit a report on the feasibility and

1 advisability of establishing a uniform policy for
2 the sharing of this information, not what the
3 policy ought to be or not be, just should there
4 be a uniform policy or should we let the services
5 continue to do it on their own. So if that's the
6 question -- and also it's limited to only victims
7 that have counsel. It doesn't even say or the
8 victims themselves.

9 So my approach, which may be the
10 wrong, would be let's answer the mail on the
11 narrow question and answer and then on our own
12 decide, on our own timeline, does this pique our
13 interest and if it does, how broad or how narrow
14 do we want to go?

15 It bothers me that we're limited to
16 victim's counsel and not victims by themselves.
17 So if we picked it up, my preference would be the
18 broader rather than the narrower. But anyway,
19 that's my idea.

20 HON. SMITH: Don't they go on and ask
21 if the advisory committee determines the
22 establishment of such policies, feasible and

1 advisable, a description of the stages and then
2 it goes on A, B and --

3 BGEN SCHWENK: Oh, yeah, you're right.
4 Darn.

5 HON. SMITH: Do you want to revise
6 your comments?

7 BGEN SCHWENK: No. I'm still a
8 minimalist.

9 MS. TOKASH: Ms. Bashford.

10 MS. BASHFORD: It seemed pretty clear
11 to me that the vast majority of these three
12 categories are getting turned over. The heads of
13 the Victim Counsel Services we had in today said
14 they saw some isolated problems which were more
15 of inadvertence. Trial counsel seemed to think
16 they were getting turned over. There was one
17 outlier, but it seemed as though those three
18 categories are getting turned over in some cases
19 earlier and in some cases later. But I think
20 that part we can answer.

21 HON. SMITH: So what I heard was yes,
22 it's being turned over but having to go through

1 FOIA, one, was a big problem with respect to
2 timing. Two, kind of not having a standard by
3 which this occurs, you know, the Army does it one
4 way. Air Force does it another way. And so the
5 timing issue, the FOIA issue and having to ask
6 for it versus having it be provided without
7 making a request. So those seem to be some of
8 the issues that we should be addressing, I would
9 think.

10 MS. TOKASH: I just see Ms. Garvin
11 first and then Mr. Kramer, you will be next and
12 then Ms. Goldberg and I'm sorry, and then Judge.
13 Go ahead, Ms. Garvin.

14 MS. GARVIN: Thank you, Ms. Tokash.
15 Chair, I actually would echo what you said.
16 Those were my notes. It does sound like there is
17 some consistency of information making its way to
18 counsel. And I just also want to also echo that
19 the tasking of only having it be about counsel
20 does leave out a whole group of unrepresented
21 persons.

22 But the methodology by which it is

1 going seems very disparate be it upon request
2 versus not versus what the device of request is
3 and the timeliness of getting it through those
4 different devices, which I think lends itself to
5 the ultimate question we were tasked with, which
6 is the feasibility of a uniform policy.

7 And I do think they heard a little bit
8 of difference of opinion about what ultimately
9 would be in a uniform policy. I think we even
10 hear from SVC/VLC panel some disagreement about
11 content of a uniform policy. But I don't think
12 we heard disagreement, and I could be wrong and
13 I'll have to look at the transcript, about the
14 feasibility of a uniform policy.

15 And so I think we heard some testimony
16 actually about fairness across the branches where
17 the uniform policy could be beneficial. So to
18 the first part of the tasking on the feasibility
19 of a uniform policy or desirability of a uniform
20 policy, I feel like we have a lot of that
21 information, and it seems, in my mind, to be
22 tending towards uniformity.

1 The specifics of uniformity, I feel
2 like we might need to dig into a little bit more
3 in order to particularly answer some of the
4 questions around (b), 2(b), in the tasking, any
5 circumstances under which some or all of the
6 information should not be shared because I think
7 we might have heard some conflicting information
8 around that.

9 MS. TOKASH: Thank you. Mr. Kramer.

10 MR. KRAMER: So the answer to the
11 actual question that was asked seems pretty
12 simple to me. It is clearly feasible they are
13 doing it, although that whether there is a
14 request or they do it as a matter of course, they
15 are doing it now so it seems to me it is clearly
16 feasible. And I get the impression that the Army
17 seems to be somewhat of an outlier. But the
18 other services seem to say it doesn't matter
19 which uniform you are wearing, it ought to be a
20 uniform policy, and you ought to get the
21 material.

22 So I think it's both feasible and

1 advisable that there be a uniform policy for
2 these three categories of information although
3 I'm still not certain about this third category
4 because there was quite -- it was explained that
5 the victim would have that information.

6 And now whether the government has
7 other -- it did seem to be an important point
8 that the government might have different
9 information. And that would be important for the
10 victim to know to correct it or to explain it.
11 So I think it's both feasible and advisable that
12 there be a uniform policy.

13 Now if we do that then we have to into
14 B1 and 2 also. But the privacy of individuals
15 doesn't seem to me to be an issue here because it
16 is all the victim's statements and information.
17 So there is no privacy interest of other
18 individuals it seems to me and the victim, the
19 criminal investigative process, I mean, we heard
20 some differing opinions about the victim's
21 statement, what the effects of giving them that
22 are, but it seemed to me again the majority

1 thought that it was beneficial. And on this
2 military system generally, I don't really see
3 much effect frankly.

4 And then we have to go to B2, which is
5 the stages of the process should be made
6 available to counsel representing a victim. I
7 mean, I think it should be at least a referral of
8 charges if not earlier.

9 Circumstances should not be shared.
10 I'm not clear that shared with who, with victim's
11 counsel or between victim's counsel and the
12 victim? But if it's victims, I mean, they could
13 also seek a protective order it seems to me from
14 the court. But it's hard for me to imagine why
15 any of these three categories, it's all about the
16 victim so I don't know why a protective order
17 would be needed.

18 And I'm not clear on B2, 3 or maybe
19 that's B3. I guess it's B3. I mean, the
20 legislative action would be to make it uniform
21 amongst the services and require the three
22 categories be produced at whatever stage we

1 decide on the proceedings, it seems to me.

2 I mean, I thought that was the
3 overwhelming sentiment. But that's not -- I also
4 don't see why it shouldn't be provided to
5 victims. Even if there was the overwhelming
6 sentiment, if there was some reason why, but it's
7 all the victim's material. In any event, I don't
8 know why it shouldn't be provided to the victim.

9 MS. TOKASH: Ms. Goldberg and then
10 Judge Walton. Thank you, Mr. Kramer.

11 MS. GOLDBERG: Thank you. And I agree
12 with much of what has been expressed so I won't
13 repeat it. I will add my strong support for a
14 policy because what we heard to some extent from
15 panelists and what I have heard significantly in
16 conversations in less formal settings is that
17 there is a tremendous amount of variability.

18 There are several categories of
19 information. We were asked just about one narrow
20 category. And I think picking up on Jim's point
21 that it is worth thinking about what the other
22 categories of information are and what we might

1 want to advise or at least learn more about.

2 And what I would put into the other
3 category are other parts of the investigative
4 record, which is their timing considerations, I
5 think, come in especially, but which the victim's
6 counsel, several of them, mentioned, as being
7 very important to have more information about,
8 for the counsel at least to have more information
9 about, when explaining to a victim why a
10 prosecution didn't proceed. If that information
11 is kept from victim's counsel, that may be
12 challenging. So I note that as a category.

13 There is a separate category which is
14 the variability with which trial counsel keep
15 victims' counsel and victims updated on the
16 stages of -- on motions in a proceeding and on
17 when motions are being heard and that struck me
18 as something to be corrected.

19 I think the example that was given by
20 the victim's counsel outside expert who spoke of
21 not being notified with sufficient time ahead of
22 an evidentiary hearing in a way that affected the

1 victim and the prosecution overall, the success
2 of the prosecution overall, seemed quite
3 significant and something that ought to be
4 corrected and something that at a minimum we
5 ought to pay attention to and look into what we
6 might say about it.

7 Over to you, Judge Walton.

8 HON. WALTON: I think I'm in favor of
9 a uniform policy. It seems to make sense unless
10 -- and maybe we need to hear more from the Army
11 which seems to be at odds as to why they believe
12 that there should not be a uniform policy and why
13 their particular perspective would counter
14 against that. But it seems to be a uniform
15 policy would be appropriate.

16 One of the concerns I have, I guess I
17 have less concerns if you're talking about it
18 being provided to counsel who's representing the
19 victim. I think I have more concerns about an
20 unrepresented victim based upon my concern if
21 you're talking about a situation where the victim
22 is known to the alleged perpetrator where they

1 had some type of relationship. Because of my
2 concern that she -- usually it's going to be a
3 she.

4 It's going to be maybe forced to
5 provide that information to the perpetrator who
6 may insist that that be provided to him. And
7 I've seen that happen in the context as I
8 indicated. For two years on local court when I
9 serviced on that court, I presided over domestic
10 violence cases.

11 And it wasn't unusual that information
12 would be extracted from a victim by the alleged
13 perpetrator. And I have some concerns about that
14 if you're talking about an unrepresented victim.
15 And as far as sending that to her without her
16 request, now there was some indications that
17 there could be some type of a system in place to
18 protect her from receiving that information if
19 she didn't desire to receive it because of a
20 concern that it may be forced from her.

21 But even under those circumstances,
22 she may at one point feel it would be something

1 that she would want to have. But then once she
2 has it, I could see the perpetrator requiring
3 that she turn that over. And I could see that
4 being detrimental. So I have that concern.

5 MS. TOKASH: This is Meghan Tokash
6 speaking. Thanks, Judge. I was also surprised
7 by the MCIO panel response when I asked about
8 safety concerns because I considered what you
9 just raised as well, potentially especially in
10 intimate partner violence and domestic violence
11 cases. So I was surprised by the response from
12 the criminal investigators. But maybe they had
13 not considered such a scenario.

14 HON. WALTON: And then we didn't hear
15 anything about whether it's a child victim and
16 how that would come into play.

17 MR. CASSARA: Also one of the things
18 that hasn't come up, we live in a world of social
19 media. And I would have some concerns absent a
20 protective order -- I'm trying to wrap my brain
21 around how this might happen. But people share
22 things on social media that I wouldn't never --

1 we would never have thought would be -- that they
2 would want shared.

3 But they do it themselves which is
4 going to impact the ability of an accused to get
5 a fair trial. And again, I'm trying to wrap my
6 brain around how that might happen. But I'm
7 wondering if that's something we need to take
8 into consideration also is the further
9 dissemination of info once turned over.

10 MR. KRAMER: Can I just address that?
11 I understand exactly what you're saying. But the
12 problem is the victim can do that anyhow. The
13 victim can say, I just want -- was just
14 interviewed and said this, this, and this.

15 The victim can put their medical
16 records out there if they want to. And I'm not
17 clear why the SANE report isn't also their
18 medical record. But if they have that, they can
19 put that.

20 So I think that's the problem with
21 that. They can put it out there anyhow. So I
22 know what you're saying. But I don't see it as

1 if a victim wants to do that, they can do it
2 anyhow.

3 MS. TOKASH: Ms. Garvin?

4 MS. GARVIN: I was actually going to
5 note the same thing which is rape survivors
6 already have certain information they can put out
7 and so does an accused person. And so I think if
8 there are standard protective orders in place
9 over what gets disclosed to parties in a case,
10 i.e., what goes to the accused, that same
11 standard protective order should go if
12 information is making its way to the SVC/VLC or
13 in my opinion directly to a pro se victim also.
14 But I don't think it's unique, right?

15 Like, I mean, we have a person whose
16 information is at play in a proceeding. And
17 somebody should be treating the two people who
18 has information at play akin to each other. And
19 so I don't think it's any different for a victim.

20 And with regard to the SANE exam not
21 necessarily being one of their medical records,
22 what I have seen happen in military and civilian

1 cases is sometimes it gets coded as an
2 investigative record as opposed to a medical
3 record. And it becomes a procedural moment. Is
4 it a medical record or is it a procedural record?
5 And it should be a medical record that's being
6 used for investigative purposes.

7 MS. TOKASH: Ms. Bashford?

8 MS. BASHFORD: One thing that occurs
9 to me when they're talking about a forensic
10 examination and we've been talking about the SANE
11 kit, but there could be semen on underwear or
12 bedding. And the release of that forensic
13 information is the release of the accused DNA
14 profile which I think has legal implications. I
15 don't think you can release to somebody other
16 than law enforcement, if I recall correctly.

17 HON. SMITH: So I'm not sure how it's
18 done in the military. But I know our DNA reports
19 would be separate from the SAFE exam.

20 MS. BASHFORD: Right. But it's saying
21 the record of any forensic examination of the
22 property of the victim. So that could just be a

1 single source semen sample.

2 MS. TOKASH: Ms. Goldberg?

3 MS. GOLDBERG: On that issue, it
4 sounded from their descriptions of sharing of
5 other investigative records that the services are
6 capable of redacting information. So that might
7 be something we could consider to the extent
8 there is personally identifying information of
9 the accused that would ordinarily be turned over
10 to a victim if it wasn't redacted. Again, this
11 is a little bit outside of -- or a lot outside of
12 my area. It's just to note that I think there is
13 a question whether in general the materials
14 should be turned over. And then this committee
15 might want to consider whether there are some
16 guardrails that we would also recommend in the
17 way that the information is provided to flag
18 issues like this.

19 MS. BASHFORD: I actually think in New
20 York State, it was called unlawful dissemination
21 which is a terrible word in this context,
22 unlawful dissemination of a DNA profile. And it

1 was a Class E felony.

2 MS. TOKASH: Judge Walton?

3 HON. WALTON: On the timing issue
4 also, I guess have some concern about a uniform
5 policy because I think it has to be flexible
6 because every case has its nuances. And there
7 may be certain circumstances where the timing of
8 production may be different in cases as to when
9 you want to disclose that information or should
10 be required to disclose the information.

11 MS. TOKASH: A couple courses of
12 action, it seems that there's consensus that the
13 -- well, what I'm hearing from the committee is
14 that most believe that this should be a policy
15 change, not a legislative change. If I'm wrong,
16 please raise a hand or just say so now. If so,
17 what I'm also hearing is large concurrence that
18 we may be prepared to dare I say even vote on a
19 following recommendation. And I'll just throw
20 that out there. And if we need more time, we can
21 do that too.

22 So the recommendation would be that

1 the Secretary of Defense should establish a
2 uniform policy for sharing -- excuse me, from the
3 sharing of information described in Subsection C
4 with a special victims counsel, victim's legal
5 counsel, or other counsel representing a victim
6 of an offense under Chapter 47 of Title 10,
7 United States Code. That's the UCMJ. And then
8 we can continue to receive more information and
9 further deliberate on the items that are
10 contained under letter B-1 and 2.

11 MS. GOLDBERG: A question? Susan
12 Goldberg.

13 MS. TOKASH: Yes.

14 MS. GOLDBERG: Given the conversation
15 that we have had about access of unrepresented
16 victims to this information, I raise a question
17 whether we are -- whether by responding so
18 precisely to the question asked we are missing an
19 opportunity to flag that we are attentive to the
20 interests of victims who are not represented as
21 well.

22 MR. KRAMER: I mean, I think that's a

1 very important point. But I think it's
2 encompassed in any other legislative or
3 administrative action. I think that's what we
4 want to talk about the report of investigation.
5 There's several other issues that were raised
6 that I think we ought to address.

7 I think those are more complex,
8 including the unrepresented victim for reasons
9 Judge Walton said and other reasons as well, how
10 it would happen and the public interface which
11 would be especially helpful to unrepresented
12 people. So I mean, I agree with you, Meghan, on
13 the -- where we are on the specific question,
14 narrow question that was asked. I do think
15 there's other issues that we should address,
16 including the unrepresented public interface and
17 various other things.

18 MS. TOKASH: Thank you, Mr. Kramer.
19 And I think, Ms. Goldberg, that we could make
20 that recommendation that this should also cover
21 unrepresented victims because I think number 3
22 gives us that flexibility to make any other

1 recommendations, whether it be legislative or
2 administrative such as we as a committee consider
3 appropriate. So I will put a pin in your
4 suggestion and from what we've heard other people
5 suggestion to craft a potential additional
6 recommendation that expands the initial tasking.
7 Judge Walton?

8 HON. WALTON: What about minors?

9 MS. TOKASH: And I think that's
10 another great subject area as well, for minors
11 too. Thank you, Judge.

12 HON. SMITH: What about the issue with
13 respect to the pleadings that are access to
14 pleadings and knowing all the dates, hearing
15 dates, et cetera?

16 MS. TOKASH: I still think that we
17 probably need further deliberation on those
18 areas. And maybe potentially I'd like to hear
19 from other people if you feel like we need to
20 hear from others. And again, we could do that in
21 a separate subcommittee meeting and report back
22 to the full committee just to flesh out these

1 other good questions that we might not have heard
2 of or thought to ask about before we really drill
3 down into the congressional task in here. Ms.
4 Bashford?

5 MS. BASHFORD: I think access to all
6 of the pleadings and motions is a really big
7 topic because defense moves to suppress a
8 confession. The suppression of that confession
9 would really affect the victim and the strength
10 of the case. Would that give victims counsel a
11 right to then weigh in on the suppression motion
12 and help litigate or be another party to the
13 litigation of the suppression motion? And that's
14 something you can say the same thing with
15 physical evidence as well. I don't feel
16 comfortable making any decision on something like
17 that at this point.

18 MS. TOKASH: Mr. Kramer?

19 MR. KRAMER: Thank you. The Army
20 person said that they have a person who helps
21 with things like the travel arrangements,
22 everything, logistics for victims. And the Army

1 person said they also do that for unrepresented
2 victims as well.

3 They try to help them with everything
4 and alert them to everything. Unfortunately, we
5 didn't get the information from the other
6 services about if they help unrepresented
7 victims. So I think we would want them.

8 It's probably fairly easy, but we
9 would need more information about that. If
10 they're doing that, it shows it's feasible and we
11 ought to, I think, recommend something. But I
12 don't think we have enough information about
13 unrepresented victim, Judge Walton's point on we
14 need to do more digging into the unrepresented
15 victims. Thank you.

16 MS. TOKASH: Thank you. Mr. Cassara
17 and then Ms. Garvin.

18 MR. CASSARA: I think it would be
19 worth looking into who would be responsible for
20 implementing some form of a PACER-like system. I
21 think we all sort of talked about that yesterday.
22 But I don't know that we made a step forward in

1 terms of how that would actually happen. And I
2 think that would be important for us to know.

3 And then I raised a question a couple
4 of different times. When you have a multiple
5 alleged victim case, whether Victim 2 would get
6 all of the records from Victim 1's complaint and
7 vice versa. And I'm not sure I got a clear
8 answer.

9 I think some of them said, well, under
10 no circumstances. Another said, well, that would
11 depend on the case. And as a defense counsel, I
12 have a real concern with whether or not an
13 alleged victim was going to get the data, the
14 statements from a different alleged victim in any
15 given case. And I would at least like to get
16 some clarification as to what those policies are.

17 MS. TOKASH: Ms. Garvin?

18 MS. GARVIN: Yes, thank you. I think
19 I'm always coming after someone said something I
20 agree with. So I'm going to agree about the
21 PACER comment because setting up a system of
22 access to pleadings, I think knowing who would do

1 it and how it could be done is just critical.

2 And that's a separate question than
3 whether access to those pleadings gives to rise
4 to standing to argue about what's in the
5 pleadings. But on the civilian side as victim's
6 counsel, I get notified of all the pleadings
7 unless they're actually filed under seal. So
8 every case I've entered my appearance in the
9 federal system I get notified of.

10 And in most state systems, I get
11 notified if there's an online system, right? Or
12 when there isn't an online system, the court
13 orders the counsel in the case, the party's
14 counsel, prosecutor and defense, to serve me with
15 all pleadings. So I get served as victim counsel
16 on the civilian side with all pleadings in every
17 case that I enter my appearance in.

18 That has no commentary on whether I
19 have standing to do anything. It just helps me
20 know what's happening in the case and whether, in
21 fact, an issue on which I do have standing to
22 argue on behalf of my client's rights is

1 presenting without that being filtered by
2 someone. So I feel like we've heard enough about
3 that there should be access to pleadings, that we
4 could make that recommendation sooner rather than
5 later.

6 But the -- well, it was just talked
7 about, about who would be responsible for
8 establishing a PACER-like system I feel like
9 still needs to be looked into. And then with
10 regard to multiple victim cases, I agree. I'm
11 not sure the folks who presented to us today
12 quite understood some of the questions with
13 regard to multiple victim cases.

14 And I think might've been answering
15 from -- I think we might want it again because I
16 think there's different ways of asking that
17 question. Would Victim A have the ability to
18 assert their privacy rights over Victim B meaning
19 Victim B doesn't get Victim A's information,
20 right? So the victim is asserting their rights,
21 saying keep it apart and/or is there a
22 conversation around cross contamination of

1 statements, right?

2 Those are two issues, and they might
3 result in different ways of answering the
4 question. And so we might want to ask a question
5 again and get some information around that. In
6 the civilian side, I often get both, multiple
7 victims, pieces of information. So just flagging
8 that, that we might want more information.

9 MS. TOKASH: Great. So by way of
10 outstanding questions that we have, I've noted
11 that we would like to seek more information from
12 the Department or the services with respect to
13 PACER and the feasibility of creating such a
14 system to increase victim access and public
15 access to the military docket and pleadings.
16 Potentially hearing from the heads of the
17 services victim witness liaison offices who may
18 be able to provide us with more information
19 regarding unrepresented victims and how they are
20 handled.

21 Perhaps hearing again or asking
22 specific requests for information from the

1 special victim's counsel and victim's legal
2 counsel heads regarding access to other victim
3 statements in multi-victim cases. Querying
4 perhaps those same individuals, what about cases
5 involving children? And then also -- oh, I have
6 access to pleadings again. Am I missing anything
7 else? Yes, Ms. Garvin.

8 MS. GARVIN: Kind of just a compound
9 question around your first one, the PACER system,
10 I would really hate for our questions to be
11 interpreted only around database such that then
12 we kick the can on access to pleadings until
13 someone has capacity and funding to create a
14 PACER-like system. On the civilian side, we had
15 remedied this by standing orders -- standing
16 court orders that say serve victim's counsel and
17 so with filed pleadings. So it's not left to a
18 junior person who doesn't know to serve because
19 they're newer or to copy on an email which is one
20 of the things we've heard today. And so I think
21 in asking that question of would that be an
22 interim solution until there is a PACER that

1 policy is, victim counsel is affirmative served
2 via email with any submissions because I think
3 that could be an interim moment. But I think we
4 should ask the question.

5 MS. TOKASH: Great point. Thank you,
6 Ms. Garvin. Judge Walton?

7 HON. WALTON: I know when we were
8 assessing whether we should make PACER
9 information more widely available and the issue
10 came up about cost and where was the money going
11 to come from if Congress was not going to
12 appropriate it to us to provide that information
13 to individuals free of cost or at some reduced
14 cost? So I mean, if you're going to put in place
15 a PACER system, then you're going to have to
16 think about what the cost is going to be to
17 implement it and to make that information
18 available upon demand.

19 MS. TOKASH: I'm also going to ask Mr.
20 Sullivan -- sorry, Mr. Sullivan, to put you on
21 the spot. But you did raise a point in our
22 subcommittee meeting yesterday which respect to

1 PACER and the tension between Article 1 and
2 Article 3 courts that you believe might be a
3 potential issue for the benefit of the rest of
4 the committee. Would you mind just putting that
5 on the record for us?

6 MR. SULLIVAN: Certainly. So Article
7 140A of the Uniform Code of Military Justice
8 which was enacted as part of the Military Justice
9 Act of 2016 provided a requirement to come up
10 with a system for public access to court martial
11 information. And so after that was enacted and
12 while that was being studied, there was a
13 realization that the Privacy Act has implications
14 for doing that in a military context that don't
15 exist in an administrative office of courts
16 context.

17 So the Privacy Act does not apply to
18 Article 3 entities. It does apply to the
19 executive branch. So PACER doesn't have that
20 Privacy Act implication because the owner of the
21 military justice records or the military
22 departments, they are subject to the Privacy Act.

1 We also know from studies of the PACER
2 system that there are literally hundreds of
3 thousands, probably more, documents available
4 through PACER that have PII in them, that have
5 bank account information, that have birth dates,
6 that have names of minors, that have Social
7 Security numbers. And as most of you probably
8 know in the ECF context, the obligation to make
9 the redactions is on the counsel filing the
10 pleading. And so that is outsourced in the PACER
11 context.

12 It's supposed to be the counsel who
13 redacts any PII. So when we're in the Article
14 140A context -- and my friend, Janet Mansfield,
15 over there who's personally involved in this, she
16 may have some interesting insight into this as
17 well. In the Article 140A context, the concern
18 was we can't rely on the filer to make the
19 redaction and then have the military department
20 make that information available only to discover
21 that it has PII in it.

22 So the military departments in my view

1 quite reasonably said if we're going to make that
2 information public, we need to first scrub it for
3 PII. So there has to be an intervening step that
4 is not present in the ECF PACER context. And so
5 we went back to Congress.

6 The Department of Defense with the
7 permission of OMB went to Congress and said,
8 please amend Article 140A of the UCMJ, 10 USC
9 940A to say that there's a Privacy Act exception.
10 The Privacy Act does not apply to this
11 information being made publicly available. First
12 year that Congress decided this, they didn't do
13 anything.

14 Second year, it got into one of the
15 bills, the Senate bill if I remember correctly.
16 The Senate bill included that provision. But it
17 went to conference. And not only did I come out,
18 but it came out with language in either the
19 conference committee report or the joint
20 explanatory statement, whichever it was that
21 year.

22 It came out with a statement that

1 emphasized that the Privacy Act applies to
2 information made available through Article 140A
3 and that amended Article 140A to actually make a
4 point about how certain PII must not be included
5 in the information made available under 140A.

6 And so we had some discussions with the HASC PSMs
7 who noted that there was a tension between
8 protection of the privacy interest of those
9 involved in courts martial and the public
10 interest in information. There's a tension there
11 and that the HASC PSMs told us that they very
12 deliberately decided that the privacy protect
13 aspect was more important, was more significant
14 than the public information aspect.

15 And that's why the statute was revised
16 in that way. And I'll also note one other factor
17 and that is there is a D.C. Circuit opinion that
18 says in the FOIA context it is inappropriate for
19 an agency to provide information about someone
20 who has been acquitted of an offense. It's
21 inappropriate to provide background information
22 from DOJ in that context about information about

1 why that person was acquitted of an offense was
2 suspected of the offense because that individual
3 has a particular privacy interest,
4 notwithstanding the fact that they were the
5 subject of a public trial.

6 But they still have a privacy interest
7 of the acquitted person in not having the fact
8 that they had been in the eyes of the law wrongly
9 accused being repeatedly subject. I'm wondering
10 if Meghan by now is regretting that she asked me
11 to speak. So those were some factors that we've
12 been dealing with, that DOD has been dealing with
13 in the 140A context. If I may, I would ask Janet
14 if she has anything to add because she was
15 involved in that very deeply.

16 MS. MANSFIELD: This is Janet
17 Mansfield. I'm the Army's service
18 representative. So I would concur that the
19 Privacy Act remains a problem for the services in
20 putting information out in a PACER-like fashion
21 and that Congress has not given us the relief
22 that we requested.

1 And just as a follow up, Article 140A
2 requires us to develop a system in the Army.
3 It's called ACMPRS in which we publish the final
4 record of trial after it's been properly
5 redacted. And we have a civilian watchdog agency
6 who lets us know every time we've had a Privacy
7 Act violation in any of those records. And it
8 does take a certain amount of time to get that
9 done.

10 MS. TOKASH: Thank you, both, Ms.
11 Mansfield and Mr. Sullivan. Ms. Anderson?

12 MG ANDERSON: Yes, just want to
13 address the redaction issue. In the United
14 States Courts when I was there, we found -- you
15 are correct. There were quite a few individuals
16 who filed pleadings that contained PII.

17 A lot of them were pro ses because
18 they don't know anything or in terms of the law.
19 I shouldn't say it that way. But we also found
20 that some of the judges would put it in their
21 scheduling orders to remind counsel that they
22 needed to redact PII.

1 And I may be -- this may be a wild
2 guess. I think some local rules may have also
3 addressed this issue. So overall, the bar that
4 practiced at least in the district I was in was
5 aware of this requirement. And I don't remember
6 any attorneys making that error.

7 MS. TOKASH: Thank you. Okay. So
8 we're being true to the schedule. I just want to
9 make sure because we still have to talk about
10 panel selection criteria in terms of
11 deliberation.

12 So right now, I guess I will float two
13 things. First of all, would the full Committee
14 be open to the idea of the Special Projects
15 Subcommittee having a separate meeting almost as
16 a cleanup of some of these issues to make sure
17 that we are answering these questions. And that
18 if you think of additional matters, that you can
19 funnel those to the subcommittee so that we can
20 ask additional presenters? Anybody oppose that?

21 HON. SMITH: No. That's a good idea.

22 MS. TOKASH: Great. So we will do

1 that as a subcommittee. And then the second
2 thing would be would anybody be inclined today to
3 vote on at least the recommendation with respect
4 to being in agreement that the Secretary of
5 Defense should create a uniform policy or would
6 you like to table that until we have a full suite
7 of recommendations? Anybody have strong feelings
8 one way or the other? Ms. Bashford.

9 MS. BASHFORD: I'm sorry. You just
10 lost me. The uniform, are we talking about the
11 selection criteria or are we back to the
12 disclosures?

13 MS. TOKASH: Back to the disclosures.
14 So, you know, just wondering do we want to just
15 table everything for another day or does everyone
16 feel comfortable voting on a recommendation for
17 the Secretary of Defense to establish a uniform
18 policy?

19 MS. LONG: This is Jenn Long. I mean,
20 I think that's an easy one, that there should be
21 a uniform policy. We don't know what it is, but
22 maybe. But for me it shouldn't be piecemeal.

1 But I don't have a -- I mean, if people are
2 objecting to it, I would be interested in hearing
3 why. Maybe I've missed something.

4 MS. TOKASH: Does anyone object to --
5 I can read it again. Do you want me to read the
6 proposed recommendation and then maybe we could
7 just decide yes or no?

8 So the proposed recommendation for a
9 vote today would be that the Secretary of Defense
10 should establish a uniform policy for the sharing
11 of information described in Subsection C with a
12 special victim's counsel, victim's legal counsel,
13 or other counsel representing a victim of an
14 offense under Chapter 47 of Title 10 United
15 States Code, Uniform Code of Military Justice.
16 And then again, we could make other
17 recommendations and vote on Section 2 and the
18 particulars of those sections another time.

19 MR. KRAMER: Sorry. I'm not
20 understanding. Are you saying that there should
21 be a uniform policy, but we're not saying what it
22 is?

1 MS. TOKASH: Correct. If we're
2 looking at the tasking and being a -- I'm going
3 by the Jim Schwenk model, right, the minimalist
4 nature of this. So we are being tasked by
5 Congress to consider the feasibility and
6 advisability of establishing a -- having either
7 by policy or statute a uniform policy for the
8 sharing of information.

9 So today's vote would just be that we
10 all agree that there should be a uniform policy
11 and then we would table what are those actual
12 recommendations for policies at another time.

13 MR. KRAMER: So I completely agree
14 with respect to the three specific areas we were
15 asked to address. That's why I asked why we are
16 not just saying yes with respect to those three
17 specific areas because I'm not so clear -- like
18 the Army doesn't want to release the ROI and
19 others may or may not. And whether there should
20 be a uniform policy about things like the ROI or
21 minors, I'm much more undecided about that.

22 MS. TOKASH: I see what you're saying.

1 So you would just add to this recommendation the
2 three listed things.

3 MR. KRAMER: That's what I thought.
4 That's what I thought was -- there seemed to be a
5 consensus -- maybe I'm completely wrong, but
6 there seemed to be a consensus on those three
7 things but.

8 MS. TOKASH: Ms. Goldberg.

9 MS. GOLDBERG: Just reflecting for the
10 record that I am nodding in agreement with Mr.
11 Kramer that it seemed to be there was consensus
12 on the very particulars of having a formal policy
13 related to those three and that we were going to
14 broaden the scope of research and possibly
15 recommendation related to the other topics that
16 you have listed.

17 MS. TOKASH: Thank you, Ms. Goldberg
18 and Mr. Kramer. So it would read, the Secretary
19 of Defense should establish a uniform policy for
20 the sharing of the following information, one,
21 any recorded statements of the victim to
22 investigators, two, the record of any forensic

1 examination of the person or property of the
2 victim, including the record of any sexual
3 assault forensic exam of the victim that is in
4 possession of investigators or the government,
5 and three, any medical record of the victim that
6 is in the possession of the investigators or the
7 government as described in Subsection C with a
8 special victim's counsel, victim's legal counsel
9 or other counsel representing a victim of an
10 offense under Chapter 47, United States Code,
11 USMJ. Ms. Bashford.

12 MS. BASHFORD: So we're just not going
13 to answer the part about the assessment of the
14 potential effects of such a policy on privacy,
15 criminal investigative process and military
16 justice system generally and also the other part,
17 the stages at which it should be released? Like,
18 I don't know when it should be released and the
19 circumstances under which. I mean, there is a
20 whole lot of things in here.

21 MS. TOKASH: So what I hear you
22 saying, Ms. Bashford, is you would feel more

1 comfortable with making all of the
2 recommendations at one time, which is fine. And
3 we can --

4 MS. BASHFORD: I would.

5 MS. TOKASH: -- yup. Does everybody
6 agree with that approach?

7 HON. SMITH: I think that's what we
8 should do because now we're at 10 minutes of 4,
9 and we haven't started discussing the other, and
10 we're kind of all over the place.

11 MS. TOKASH: Yeah, we really are all
12 over the place. Okay. So I think we will go
13 back to the subcommittee following up with some
14 cleanup of these issues and see how far we can
15 get. We may have to use some more of the
16 September meeting time if we want to flesh out
17 some of these other issues. But I think we'll
18 have a better of that after the subcommittee
19 meets.

20 HON. SMITH: Perfect.

21 MS. TOKASH: Thank you.

22 HON. SMITH: All right. So let's move

1 on to panel selection criteria.

2 BGEN SCHWENK: Okay. So where the
3 Department is at the moment, we have Article 25.
4 And it has the selection criteria, and it has the
5 requirement that the accused wants, at least one-
6 third enlisted, et cetera.

7 But Congress has also come and said
8 that DoD has got to figure out to the extent
9 practicable how to have randomization at the same
10 time that you are going to have the convening
11 authority applying the Article 25 criteria.

12 So there are obviously two options.
13 One option is do it before the -- do the
14 randomization before so that you somehow
15 randomize through alpha rosters through, you
16 know, personnel systems, and you pluck people
17 out. Now you've randomized. Check the box.
18 Then you send it to the SJA Office.

19 And it's the normal process we have
20 now where they put it all together with the
21 randomized names. They have sheets for each
22 piece of paper. They send it down or they take

1 it to the convening authority, and he applies the
2 criteria and makes his selections, and those are
3 the people that show up at trial.

4 One of the advantages of doing that is
5 that the perception that the convening authority
6 is picking the people, you know, decides there is
7 a trial, decides what the charges are and then
8 decides who the members are is ameliorated a
9 little bit because he is not selecting.

10 The randomization system is selecting
11 and then he's culling from that group. If people
12 get excused and they go under, you got to go back
13 to the beginning of the randomizer to give him
14 new names to pick that way.

15 Okay. The second way that they might
16 do it in the Department is randomize afterwards,
17 which if I remember Martha right, that is sort of
18 the way some of the civilian courts do it.

19 So in that sense, we would have the
20 normal system where there is nominations up to
21 the general court martial or the convening
22 authority. The SJA puts the names together with

1 the sheets, goes to the convening authority. The
2 convening authority picks anybody they want. So
3 you have that problem not taken care of, but
4 picks anybody they want.

5 The people they pick, they probably
6 pick more than they normally would because when
7 they get over to the court, the court is going to
8 have some way to randomize it. And if you get
9 the low number, you go into the courtroom. And
10 if you get a big number, you go back to your unit
11 and hope the phone doesn't ring and tells you
12 that too many people have been challenged often,
13 and they need you to report to the courtroom so
14 it's a before or after.

15 To my knowledge the Department has not
16 made a recommendation one way or the other. So
17 there is an opportunity for us to give input in
18 September if we want to on which one of those two
19 options would be best.

20 But we've heard from people on the
21 selection criteria and the selection process.
22 You talk about we're all over the map. In our

1 input, we have whole groups of people saying the
2 system is terrible. Get rid of it, you know, go
3 to complete randomization on the one extreme.
4 And the other extreme is, this is the best system
5 God has ever created. And we shouldn't mess with
6 any of it and everything in between. So I can't
7 give you any guidance on which way people are
8 drifting.

9 MR. KRAMER: There was also something
10 that I didn't understand in the in between thing.
11 They kept saying that randomization will be much
12 different in the Army than in the Air Force than
13 in the Marines. Everybody kept saying that. I
14 didn't quite understand it. But they said
15 randomization will look much different in each
16 service.

17 BGEN SCHWENK: I think they were
18 talking -- I don't know what they were talking
19 about specifically. But I know in our
20 subcommittee meeting, the Army kept making the
21 point, and the other services seemed to agree,
22 size along makes a difference. And the chief of

1 criminal law was there who had just come from a
2 command where they had 15,000 eligible people
3 that they had to go through in some manner to
4 come up with a pot of people to present to the
5 convening authority to make selections.

6 And the Air Force, you know, laughed
7 and said, well, we might have 1,000 or 500 or
8 whatever. And in trying to figure out how to do
9 that, that's where I think they came up with
10 randomizing out of 15,000 is a lot harder than
11 randomizing out of a smaller number. Because
12 remember, somebody has got to go through
13 availability, you know, deployments, all the rest
14 of that stuff like you normally do to come up
15 with people who might be available when the trial
16 goes.

17 HON. SMITH: Wouldn't the
18 randomization be done through some kind of an
19 algorithm? I mean, right, a computer algorithm,
20 right?

21 BGEN SCHWENK: That's what I would
22 think.

1 HON. SMITH: Yeah, so --

2 BGEN SCHWENK: At least the big one.

3 HON. SMITH: -- right. So it wouldn't
4 be necessarily --

5 BGEN SCHWENK: The court might --

6 HON. SMITH: -- people.

7 BGEN SCHWENK: -- do something up.

8 That's right.

9 HON. SMITH: Right. Yeah, it wouldn't
10 be people. It would be that they would come up
11 with a computer program that would, based on the
12 factors, and then that's how they would get their
13 randomized group.

14 And then we also have the issue of
15 Article 25. Are we talking about that next?

16 BGEN SCHWENK: Yeah, sure. Go ahead.

17 HON. SMITH: Oh, okay. What I thought
18 we heard over and over with respect to Article 25
19 was two questions. One, what is judicial
20 temperament? And, you know, if you're trying to
21 have or create a system that people have trust
22 in, this subjective kind of judicial temperament

1 category would seem to be something that could
2 potentially go to the wayside. That's just my
3 thought.

4 And then the second one Judge Walton
5 talked about was education, right? In terms of,
6 you know, education doesn't necessarily mean that
7 you're a person who is going to make a good
8 juror. There's the length of service, et cetera.
9 So those were the two things about Article 25
10 that I thought that we should discuss.

11 BGEN SCHWENK: When Dwight was in the
12 Marine Corps and was writing the USMJ back in
13 1950, he realized that --

14 MR. CASSARA: In crayon.

15 BGEN SCHWENK: -- there --

16 MR. CASSARA: In crayon.

17 BGEN SCHWENK: -- yeah -- there were
18 no lawyers involved in the process at all. So
19 when you picked the members, the members acted as
20 the judge and the members at the same time and
21 voted on challenges and, you know, that was the
22 system.

1 So in that sense, we have received a
2 number of comments that said judicial temperament
3 meant being like a judge because the members were
4 going to act like a judge because there was
5 nobody else there to be the judge.

6 Now that we have judge advocates
7 everywhere, some people said there is no longer
8 any reason for judicial temperament.

9 To your second point, Karla, a number
10 of people said the two criteria they thought
11 would give you perfectly fine members at a court
12 martial were education and length of service of
13 experience, whichever of the two you want.

14 There was definitely, I thought, a
15 bias among all the many people we have heard from
16 for older, more experienced people rather than
17 younger, less experienced people. There was a
18 number of comments about you don't want a 19 year
19 old that is, you know, just joined the service
20 sitting on the court martial if you can have a 25
21 or 30 year old who has been around longer and has
22 a better understanding of things. So, yes.

1 Suzanne.

2 MS. GOLDBERG: Thank you. And I agree
3 with your characterization that we've heard a lot
4 that points in many different directions. It
5 strikes me as a topic on which, maybe with staff
6 help, we could list the issues that have come up,
7 the issues that have been raised, the challenges
8 we are facing, what are the problems we are
9 solving for as we all understand it. This is
10 one, unlike some others, that has so many
11 different balls in the air that that might be a
12 useful step to getting us to the next point.

13 One of the things that has struck me
14 in all of these conversations, apart from the
15 resistance to change generally and the resistance
16 to change while other things are changing, which
17 since other things will always be changing
18 strikes me as something we need to account for
19 and also not necessarily stop the conversation.

20 But is the duplication of effort, the
21 repeated duplication of effort, in developing the
22 pool that finally turns into a panel that is --

1 and I wondered if some of this is statutory, and
2 I just can't recall. But when the court martial
3 is convened, I'm not using the right word
4 probably.

5 BGEN SCHWENK: That's correct.

6 MS. GOLDBERG: The panel has to be
7 named at that time --

8 BGEN SCHWENK: That's correct.

9 MS. GOLDBERG: -- even though the
10 trial, if it happens, is likely to happen many
11 months afterward, at which point many of the
12 people on the initial list won't be available
13 either because they have been PCS'd or, you know,
14 they've had a change in job or a change in
15 something. And so there is a basic structural
16 issue that might be worth paying attention to in
17 terms of the timing of the development of the
18 panel list as well as what happens when we think
19 about refining the pool that actually winds up in
20 a panel.

21 And when I think about sort of where
22 we want to focus our energy, you know, there are

1 many points of intervention. But there is a lot
2 that happens at the very beginning that bears
3 little relationship to what happens at the end.
4 And I think we heard from some people who said
5 they create multiple lists over time that seem,
6 as we've heard, to take a lot of people's time to
7 go name by name by name down a list of people who
8 will never show up because they will have moved
9 on by the time the panel is pulled. So there are
10 many challenges here is really the bottom line.

11 BGEN SCHWENK: Judge Walton? Thanks,
12 Suzanne.

13 HON. WALTON: I could be mistaken in
14 this, but there seemed to have been a distinction
15 by at least several being made about the question
16 of culpability as it relates to culpability in
17 the military as compared to culpability in the
18 civilian world and if there are different factors
19 that conceivably come into play in making that
20 assessment.

21 If that in fact was being suggested,
22 I would disagree with that. I think that when it

1 comes to the assessment of culpability,
2 regardless of what the circumstances are, the
3 same factors should be in play because maybe
4 there are other factors that come into play in
5 the military, but it seems to me those factors
6 are dealt with in the administrative aspect of
7 punishment as compared to the judicial aspect of
8 punishment. I think the same factors should be
9 in play. And that's when I guess I had a concern
10 because obviously wisdom can't come with age but
11 that's not necessarily true. And therefore, you
12 know, the suggestion --

13 BGEN SCHWENK: Why did you look at me
14 when you said that?

15 HON. WALTON: No, I did not.

16 BGEN SCHWENK: Never mind.

17 HON. WALTON: But I --

18 BGEN SCHWENK: Look at Dwight when you
19 do that.

20 HON. WALTON: I mean, I don't disagree
21 that can be the case, but I don't think you can
22 universally say that that is in fact a

1 determining factor of someone's capability of
2 being a good judgment of culpability.

3 So the idea that younger people are
4 not as well qualified may be the case, but it may
5 not be the case. So I just think that we should
6 be looking at the issue of culpability when it
7 relates to the military and the civilian world
8 from the same perspective because we're talking
9 about the culpability for crime regardless of
10 what the circumstances are.

11 So, you know, it is a difficult
12 problem because, you know, one, maybe the Army's
13 situation may not be as complex because of size
14 and maybe randomization, you know, can be more
15 easily implemented in the Army context as
16 compared to the other services because of size.
17 And I don't know what you do in that context
18 because obviously one of the complaints that
19 we've heard of, and I think it's a legitimate
20 concern, is diversity and whether you are, you
21 know, when you have a diverse person, you know,
22 being judged, you know, do you want some level of

1 diversity as far as the judging process is
2 concerned or the adjudication process is
3 concerned? And that seems to me to be a real
4 challenge for some of the services because of
5 size and the demographics of those services.

6 How you deal with that I don't know,
7 but it seems to me that this is an issue that has
8 to be grappled with because until it is
9 addressed, I think there is going to be, you
10 know, a segment of society that is going to
11 believe that the process is not fair and just.

12 BGEN SCHWENK: Thank you. A.J.?

13 MR. KRAMER: I was just going to say
14 I completely agree with your characterization of
15 what they said about wanting more -- people who
16 have been in the military for a long time and
17 obviously by definition older people. But the
18 people we all heard that from were people,
19 paralegals -- the enlisted panel was paralegals
20 who had been in the service for 25 or 30 years.

21 BGEN SCHWENK: In the subcommittee, we
22 heard it from lots of other people also.

1 MR. KRAMER: So that was my question,
2 did you hear? And I'm under the impression that
3 most of the people charged with sexual assault
4 offenses are in their, or maybe not even 20 yet
5 or in their very early 20s and probably more
6 diverse than the people, the older population of
7 the military, and I'm looking right at you.

8 But did you hear that from like that
9 population as well that they would prefer people
10 who had been in the military longer as jurors,
11 the panel, I mean?

12 BGEN SCHWENK: We heard from like the
13 criminal law chiefs that they emphasized the
14 length of service a lot, education a lot, you
15 know. And that's just, you know, that seemed --
16 and in the written comments, there are a lot of
17 different people they drift to that end.

18 I don't know how many of you have sat
19 as jurors or members, but I sat on two murder
20 cases as a romp and stomp 23, 24 year old first
21 lieutenant, and I was comfortable with my limited
22 knowledge base with the findings, guilty or not

1 guilty. I didn't have a clue when we got to
2 sentencing. I mean, I had no idea what anything
3 was worth. But the finding -- and only in
4 capital cases will members be sentencing in the
5 future.

6 So, you know, I guess personally I am
7 less thrilled with the idea that you have got to
8 be older in order to be able to figure out guilt
9 or innocence. But nonetheless, I am just
10 reporting what we heard, and there is a real
11 across the board emphasis more towards the --

12 MR. KRAMER: But even that sounds like
13 it was from people who had been in the service
14 for quite a while. The chief --

15 BGEN SCHWENK: Yes, yup.

16 MR. KRAMER: That's what I'm asking is
17 --

18 BGEN SCHWENK: Yeah. We haven't
19 talked to younger people.

20 MR. KRAMER: -- to that population.
21 And it seems to me the population from which most
22 of the accused come from.

1 BGEN SCHWENK: Comes from, yeah. We
2 should talk to Bill and let him talk to his
3 clients. Martha.

4 MS. BASHFORD: We have to keep
5 remembering -- and we're looking at everything
6 through the lens of sexual assault, but there is
7 a bigger world out there. And I can -- of
8 course, I can't think of because I don't know the
9 general court martial really military specific
10 crimes, but I could see something involving
11 treason or a very sophisticated theft from the
12 PX, you know, where you would want somebody who
13 had a fair amount of military service as opposed
14 to an 18 year old deciding these because the
15 crime is steeped in the military. And I don't
16 know that you need it that much for a sexual
17 assault. But I think you do it need for other
18 things. And we can't say this for this and that
19 for that.

20 The other comment I have is about the
21 -- if you do the upfront randomization, you're
22 still going to have somebody there derandomizing

1 it because this person is going to be away. This
2 person is the head of our nuclear silos. We
3 can't pull him off. This person is --

4 BGEN SCHWENK: Personal problem.

5 MS. BASHFORD: Exactly. So it seems
6 almost like a waste of time because you're still
7 going to have somebody hand culling whatever it
8 is you give to them.

9 BGEN SCHWENK: Thank you. Suzanne,
10 did you have more?

11 MS. GOLDBERG: Yes. Just one point,
12 which is that we heard quite a lot about the
13 particular important differences between the
14 military justice system and the civilian justice
15 system for purposes of who should serve on a
16 panel.

17 And with respect to rank and with
18 respect to at least some experience in the
19 service, that made some sense to me. But I felt
20 in some of the conversation that what was lost
21 was the function in this role as a panel member
22 is as factfinder.

1 And factfinders, as you just pointed
2 out in your example, Jim, serving as a factfinder
3 is a very different thing to make a decision
4 about sentencing, which is why we allow many,
5 many people without a lot of criteria to serve as
6 factfinders in the civilian system.

7 And to continue my run on sentence so
8 that it stays to one sentence, it also strikes
9 me, and we heard some recognition of this, that a
10 system that systematically excludes some members
11 from the possibility of service is one that may
12 reduce confidence overall in the system when
13 people return from serving on a panel and come
14 back with renewed faith in the system, if that's
15 what they wind up, that can have a salutary
16 effect on military justice overall. And I think
17 that is not something that we heard taken into a
18 lot of consideration in some of the testimony we
19 heard.

20 BGEN SCHWENK: Judge Walton.

21 HON. WALTON: Attitudes about sex
22 obviously change with age. So a younger person,

1 you know, I mean, may have a totally different
2 perspective about whether there was a rape as
3 compared to an older person because, you know,
4 we've changed significantly when it comes to that
5 issue.

6 And that's why I have a real concern
7 when we talk about, well, should we be excluding
8 certain, you know, younger people because we are
9 talking about younger people who are probably the
10 ones by and large are going to be charged with
11 these offenses and their perspective about what
12 occurred may be very different as compared to an
13 old foggy like me.

14 And so, you know, obviously, you know,
15 as Ms. Bashford indicated, you know, if you're
16 talking about a certain type of crime, you're
17 going to want maybe a different type of juror.
18 But if you're talking about the type of crimes
19 we're talking about, I think you do want a cross-
20 section of the population of the military because
21 of the different attitudes that different people
22 with ages have about the issue of sex.

1 BGEN SCHWENK: Thank you. Do we have
2 presenters that are going to present from the
3 public --

4 HON. SMITH: Yes.

5 BGEN SCHWENK: -- Jeff. Okay. Oh,
6 yes, we do.

7 MR. CASSARA: One more quick comment.

8 BGEN SCHWENK: Go ahead.

9 MR. CASSARA: I think we're losing --
10 one thing that we need to keep in mind is that
11 there is the requirement that the panel member be
12 senior in rank to the accused. So to some
13 degree, this is all overcome by that mere factor,
14 you know. Not every case is an 18-year-old
15 accused. You know, sometimes, you know, I would
16 say my average client is 23 to 26 years old, in
17 which case just by the nature of the beast, the
18 panel members are going to be older. I just
19 wanted you to keep that in focus.

20 BGEN SCHWENK: Thank you. So to go
21 back to one of Suzanne's earlier points, one of
22 the reasons that I asked for an hour when I was

1 doing the PSC update for September was to do
2 exactly the same thing, to have the subcommittee
3 put together a list of issues and options under
4 each issue, a list of the concerns we heard so
5 write up, you know, what's wrong and do we think
6 it's broken and if so, what's broken and what's
7 the remedy. So that will help drive the
8 discussion so we're going to try to do that for
9 the September meeting.

10 COLONEL BOVARNICK: Okay. So we have
11 two public comments. They are both online. They
12 are both going to have five minutes. At the four
13 minute mark, I'm going to give them a one minute
14 warning, and they will be cut off at five
15 minutes, which is the prescribed procedure. And
16 so we're going to start with Mr. Jerry Clifft,
17 and then second, Ms. Holly Yeager. So, Mr.
18 Clifft, you have five minutes, sir, and you can
19 start now, please.

20 MR. CLIFFT: Thank you. Good evening.
21 My name is Jerry Clifft, formerly gunnersmate
22 third class in the United States Coast Guard.

1 My career was ended at a general court
2 martial in 2016 where I was convicted of numerous
3 counts of domestic violence. Those counts
4 stemmed from allegations that were brought to
5 light after asking my wife of five years for a
6 divorce and refusing her request for
7 reconciliation.

8 One of those convictions was a sexual
9 assault by bodily harm under the article and
10 statute in effect in 2014, and it will be the
11 main focus of my statement.

12 The evidence at trial largely
13 consisted of her version of events as she
14 described on the stand and in numerous statements
15 she made to individuals prior to trial, including
16 several law enforcement professionals, family and
17 friends and other individuals acting in a
18 professional capacity that were not bound to
19 confidentiality.

20 Her pretrial story was a moving
21 target, but the version she settled on at trial
22 is as follows.

1 After a three to four day period in
2 which she claims upwards of six consensual sexual
3 acts took place, on the night in question she
4 uttered the words just take me in response to my
5 badgering for sex.

6 She goes on to testify that she took
7 initiative, played along and wanted me to think
8 she was into it, never said no, never said stop.
9 Said that she loved me twice during the act and
10 once immediately after. And most astonishing of
11 all, when asked by my defense if she considered
12 herself an active participant in the act, she
13 answered yes. I do not give credence to this
14 version, but it was the testimony the members had
15 to consider in contrast to my plea of not guilty.

16 I was convicted and served three years
17 of a four year sentence. At trial, it was
18 heavily argued that her apparent consent was
19 invalid due to her sense of fear she had. The
20 fear pled, which was not in relation to any
21 particular threat or event, it was just the
22 general atmosphere of our marriage as described

1 by her.

2 The CCA confirmed on the same grounds
3 alleging that she was in fear at the time and
4 could not consent. The CAF as is within their
5 power and authority to do so denied review
6 without explanation. Bear in mind that the
7 charging document made no mention of a theory of
8 fear and only that of bodily harm, making these
9 conclusions a direct contradiction of the
10 congressional intent behind the reconstruction of
11 the statute and explicitly creating separate
12 theories of liability in that statute.

13 Case law such as Pease, Riggins and
14 Ballantine all help clearly outline those degrees
15 of separation laid out in the new statute.

16 While this could make for interesting
17 conversation and legal debate, it is for me
18 absolutely meaningless. Despite what legal merit
19 they may hold, that ship has sailed and I can no
20 longer seek and receive relief based on those
21 assignments of error at trial and on appeal.

22 My appeals were finalized in 2018. I

1 filed a timely Fourth Circuit habeas petition in
2 2019 that was also denied. After that, I shifted
3 my focus to rebuilding my life, but I did not
4 entirely give up hope.

5 My very last and best hope at any sort
6 of justice would now lie in the very narrow legal
7 confines of a writ of coram nobis. In February
8 of 2023, those hopes were greatly lifted in the
9 idea that I could still one day receive justice
10 were validated when I was contacted by a high
11 ranking member of my jury panel. They told me of
12 an alarming event that occurred outside the
13 record of trial. The event is as follows.

14 Immediately after my ex-wife's direct
15 testimony, a brief recess was called. She was
16 placed in a room that shared a thin false wall
17 with the jury. She proceeded to wail and cry and
18 carry on for approximately 15 minutes according
19 to the juror all while her victim advocate told
20 her things like how great she did and that she
21 did her part, and it would all be over soon.

22 The juror said it was if she was in

1 the same room with them. The entire panel looked
2 uncomfortable. The juror said the situation
3 seemed unfairly prejudicial, told the bailiff as
4 much and asked the bailiff if they could be moved
5 to a room further away as a result.

6 And once moved, the juror asked the
7 bailiff to inform the judge of the move and the
8 reason why. The juror said many panel members
9 expressed relief to be out of that room.

10 The record reflects that trial counsel
11 knew of the move and a very brief exchange of the
12 judge. When the judge asked what was taking the
13 members so long, there was no mention as to why
14 they moved. It was simply noted that they were
15 moved to a larger conference room.

16 The implications of this scenario are
17 many and all of them are the antithesis of due
18 process.

19 COLONEL BOVARNICK: Sir, you have one
20 minute left, Mr. Clifft. So if you want to sum
21 up in the last minute.

22 MR. CLIFFT: Will do. A common topic

1 brought before this committee is the advocacy for
2 some sort of conviction integrity unit. If one
3 existed, it would surely have been well equipped
4 to discover such constitutional violations.

5 That said, a petition for a writ of
6 coram nobis is on its way and thorough debate
7 hearing will surely follow. In what the CGCCA
8 called, and I quote, a concededly close case, I
9 cannot possibly fathom a version of events in
10 which the investigating court or the appellate
11 court could rationally find that the incident did
12 not constitute a gross violation of my
13 constitutional rights for an impartial jury and
14 fair trial and require immediate action.

15 I will end it on this note. I am
16 eager to answer any of your questions, and I
17 thank the Committee for the time. I had to cut
18 it a little short.

19 HON. SMITH: Thank you, sir. Any
20 questions? Yes.

21 MS. BASHFORD: Sir, it sounded like
22 you were reading from something. Would you be

1 able to forward that to us so that we could look
2 at it at our leisure?

3 MR. CLIFFT: I can. Should I send it
4 to Mr. Trexler?

5 COLONEL BOVARNICK: Yes, please.

6 MR. CLIFFT: Okay. I'll do that.

7 COLONEL BOVARNICK: And --

8 MS. BASHFORD: Thank you.

9 COLONEL BOVARNICK: -- sorry. Next up
10 we have Ms. Yeager. And I'll also remind the
11 Committee that she did provide extensive written
12 materials in your update and posted online. Ms.
13 Yeager, you have five minutes, ma'am, and you can
14 start, please.

15 MS. YEAGER: Yes. Can you hear me
16 okay? My name is Holly Yeager. And I thank you
17 for giving me his opportunity to talk about my
18 son, Robert Condon. Our journey began (audio
19 interference). One person lied and his entire
20 case was based with that lie. I agree with that
21 assessment and not only as his mother but also --

22 HON. SMITH: Ms. Yeager, I don't mean

1 to interrupt you.

2 MS. YEAGER: Yes?

3 HON. SMITH: Can you maybe try turning
4 your volume down a little bit? I'm not sure --
5 we're getting a lot of feedback here so it's very
6 difficult to understand you. And I'm going to
7 ask that you start over again.

8 MS. YEAGER: Hold on a second. Hold
9 on one second. Is that better? Can you hear me
10 now? Is that any better or any worse?

11 HON. SMITH: Okay. That's better.

12 MS. YEAGER: It is better? Okay. I
13 really have my volume down. Okay. As a retired
14 police officer looking strictly, I would like to
15 use my time today to bring your attention to
16 three little mistakes that have left what I'm
17 (audio interference) a 30 year prison sentence
18 for my son, Staff Sergeant Robert Condon.

19 (Audio interference) was an otherwise
20 impeccable service record. I wish there was one
21 definable issue I could present you with to
22 encapsulate the error in his case where over the

1 years there were multiple at the federal level of
2 the military judicial system from the
3 investigation, prosecution and finally his
4 appeal.

5 Third, investigators interfered with
6 the witness testimony by first drafting an
7 illegal search warrant of the witness' phone.
8 They then bullied and manipulated her into
9 participating in an investigation that she wanted
10 no part of, ultimately, ordering her to testify
11 against as the victim against her will.

12 She wrote a three page letter to the
13 convening authority begging to be excused from
14 this prosecution, but that request was denied.

15 The investigators altered a statement
16 by directing the next witness to change the
17 previously written statement with regard to
18 (audio interference). They then used that
19 altered statement to put Staff Sergeant Condon in
20 confinement where he remained for 344 days before
21 trial, violating his right to (audio
22 interference) as well as making it difficult for

1 him to assist in his own defense. At trial,
2 Staff Sergeant Condon was found not guilty of her
3 alleged charges.

4 Third, physical evidence was
5 destroyed, most of which was concerning, what my
6 son found, which investigators took into
7 evidence, left lying on a random desk without
8 proper chain of custody. It was broken and the
9 information within unable to be recovered,
10 evidence that was crucial.

11 Exculpatory evidence was withheld when
12 the accuser's prior criminal record was not
13 turned over during discovery. This record showed
14 that the initial accuser had a felony conviction
15 along with several other legal issues which she
16 never disclosed to the Air Force, knowledge of
17 which would have proven the accuser enlisted
18 fraudulently into the Air Force while also
19 speaking directly to her lack of integrity.

20 Fifth, investigators further attempted
21 to influence witness testimony when they
22 contacted Staff Sergeant Condon's friend and

1 threatened her using false evidence, attempting
2 to manipulate her into making a complaint as a
3 victim.

4 The record at trial provided by the
5 Air Force for his appeal did not match the record
6 at trial provided to his defense attorney, thus
7 compromising the entire appellate review.

8 To this day, we are uncertain what
9 record was provided. We do know that two records
10 exist, that the prosecutor was aware of this and
11 made no effort to inform defense counsel. This
12 made the case extremely complicated, and it is
13 difficult to explain it in such a short time.

14 However my son has written an account of his case
15 in a book entitled, The Invisible Casualty by
16 Robert A. Condon, which is available on Amazon as
17 an eBook for \$2.99, and I can offer a PDF book to
18 this Committee if you would like.

19 In closing, as a retired police
20 officer with 20 years' experience in the field, I
21 know that if I had been responsible for even one
22 of these infractions, (audio interference) 10

1 years of my son's (audio interference), I still
2 cannot understand how it could -- which resulted
3 in a 30 year prison sentence could have been
4 handled with such casual disregard for due
5 process.

6 My son's appellate packet went in on
7 May 18. During the last 10 years, my son has
8 lost both of his grandmothers and last Thursday
9 his father. He just wants to come home. (audio
10 interference) members of his family are gone. We
11 ask that you intercede on his behalf with the Air
12 Force Parole and Clemency Board. He would like
13 the Board to understand these issues that are
14 specific to his case.

15 As his mother, I want far more than --

16 COLONEL BOVARNICK: Ma'am, one more
17 minute, Ms. Yeager. Thank you.

18 MS. YEAGER: I want him free to
19 (audio interference), and his rights and benefits
20 reinstated. Have legal experts review his case
21 and see if they don't agree. Please, give me
22 back my son. If you have any questions at all

1 (audio interference).

2 HON. SMITH: Thank you.

3 MS. YEAGER: Okay. Thank you.

4 COLONEL BOVARNICK: And just to remind
5 members, we do have Ms. Yeager's statement there,
6 and we will request whatever she wrote, which I
7 believe is substantially similar to what you have
8 in your packet. But we will get that as well.
9 Thank you.

10 Judge Smith, that ends the public
11 comment session.

12 HON. SMITH: All right. Thank you.
13 Wrap-up?

14 COLONEL BOVARNICK: Yes, ma'am, I
15 could just cover at a minimum the schedule how it
16 looks like it is shaping up for September based
17 on the requests.

18 So Monday, I believe it would be
19 September 18, that is going to be a separate Case
20 Review Subcommittee meeting. So nothing to do
21 with the full Committee. So on the first day of
22 the full Committee meeting, Tuesday morning,

1 would be reserved for the Policy Subcommittee and
2 Special Project Subcommittees to meet as long as
3 they want during the morning and then the public
4 meeting would start at 1300 after lunch.

5 And so two panels, which requested 90
6 minutes each, could take up that afternoon former
7 court martial convening authorities as requested
8 by General Schwenk for 90 minutes and then court
9 martial observations 90 minutes and then we would
10 end with public comment on day one.

11 And then day two, I will ask a little
12 bit about morning, but the afternoon would be
13 reserved for more in-depth subcommittee updates,
14 at least an hour for the Policy Subcommittee to
15 be final discussions obviously from the Special
16 Projects Subcommittee as well as an update in the
17 Case Review Subcommittee, collateral misconduct
18 report.

19 But I think in the morning there would
20 be time for three panels, I think, so they are
21 not jammed in and go over. But that's what I
22 will throw back to the Committee, whether there

1 is a specific request for an update on the OSTC
2 policies, the follow-up, a more focused follow-up
3 on some of the diversity statistics and reports
4 that were discussed today.

5 But, again, I'm going to throw that
6 back to the panel for what you would like in the
7 morning for potentially three panels on day two.

8 MS. TOKASH: This is Meghan Tokash
9 speaking. And I sent you an email to this
10 effect, Colonel Bovarnick, but I would request a
11 joint panel rather large, but the three lead
12 special trial counsel and the five special victim
13 counsel, victim legal counsel chiefs who we heard
14 from today, specifically to provide updates on
15 their internal office procedures and how
16 coordination between their offices is actually
17 going.

18 I think there may be value to having
19 all of them at the same table together. So I
20 would recommend -- I know this is a rather large
21 time block, but a two hour time block because I
22 think there is going to be a lot of robust

1 discussion.

2 And then my other request would be for
3 an update on the IRC's implementation timeline
4 with appropriate representatives from the
5 Department of Defense and the respective offices
6 that are responsible for those implementations,
7 such as the Office of Force Resiliency and other
8 offices like that. Thank you for your
9 consideration.

10 BGEN SCWHENK: Yeah, Meghan, do you
11 mean all of the recommendations of the IRC or the
12 ones from whatever, LOE 1?

13 MS. TOKASH: All of the
14 recommendations because I think many of the ones
15 from LOE 1 are in the middle of the execution
16 phase right now. And I have a pretty good handle
17 on -- I feel, I get that sense that I have a good
18 handle on those implementations but for the other
19 IRC recommendations that affect our charter.
20 Thank you.

21 HON. SMITH: All right. Not hearing
22 anything else, I think we are ready to adjourn.

1 As always, the staff did a phenomenal job
2 preparing. You are appreciated and thank you to
3 everyone on the Committee for your participation.

4 MR. SULLIVAN: This public meeting is
5 closed.

6 (Whereupon, the above-entitled matter
7 went off the record at 4:29 p.m.)
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Before: DAC-IPAD

Date: 06-13-23

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