

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

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31st PUBLIC MEETING

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WEDNESDAY
SEPTEMBER 20, 2023

+ + + + +

The Advisory Committee met in the
General Gordon R. Sullivan Conference & Event
Center located at 2425 Wilson Boulevard, 4th
Floor, Arlington, Virginia, at 8:29 a.m., Karla
Smith, Chair, presiding.

PRESENT

HON. Karla Smith, Chair
MG (Ret.) Marcia Anderson
Ms. Martha Bashford
Mr. William Cassara
Ms. Meg Garvin*
Ms. Suzanne Goldberg
Judge Paul Grimm*
Ms. Jennifer Gentile Long*
Dr. Jenifer Markowitz
Hon. Jennifer O'Connor*
Dr. Cassia Spohn
Ms. Meghan Tokash
Hon. Reggie Walton

DAC-IPAD STAFF

Mr. Dwight Sullivan, Designated Federal Officer

Mr. Peter Yob, Director

Ms. Julie Carson, Deputy Director

Ms. Stacy Boggess, Senior Paralegal*

Ms. Amanda Hagy, Senior Paralegal

Ms. Theresa Gallagher, Staff Attorney

Ms. Nalini Gupta, Staff Attorney

Mr. Michael Libretto, Staff Attorney

Mr. Robert C. Mason, Staff Attorney

Ms. Marguerite McKinney, Management Analyst

Ms. Meghan Peters, Staff Attorney

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri Saunders, Staff Attorney

Ms. Kate Tagert, Staff Attorney

Ms. Eleanor Vuono, Staff Attorney

* Present via video teleconference

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

2 8:29 a.m.

3 HON. SMITH: I'd like to welcome the
4 members of the DAC-IPAD and everyone in
5 attendance. Today is day two of the 31 public
6 meeting of the Defense Advisory Committee On
7 Investigation, Prosecution and Defense of sexual
8 assault in the Armed Forces, or DAC-IPAD.
9 Today's meeting will be in person with video
10 conference via Zoom, also available for members,
11 presenters, and other attendees.

12 The DAC-IPAD was created by the
13 Secretary of Defense in 2016 in accordance with
14 the National Defense Authorization Act for fiscal
15 year 2015 as amended, for a 10-year term. Our
16 mandate is to advise the Secretary of Defense on
17 the investigation, prosecution, and defense of
18 allegations of sexual assault and other sexual
19 misconduct involving members of the Armed Forces.

20 I'd like to acknowledge again, with
21 gratitude, the military justice experts from each
22 of the military services' criminal law divisions

1 who serve as the DAC-IPAD's dedicated service
2 representatives, and who have joined us for the
3 meeting today. Welcome and thank you.

4 We will begin today's meeting by
5 hearing from committee members who have observed
6 courts-martial. The members will share and
7 discuss with the full committee their
8 observations from these highly informative
9 experiences. Next, the professional staff will
10 brief the Committee on the status of the sexual
11 assault case adjudication data collection project
12 for cases closed in 2021 and 2022.

13 Before lunch, the Policy Subcommittee
14 will brief the Committee on its Article 25, UCMJ
15 panel selection study. The Full Committee will
16 then deliberate on the Subcommittee's proposed
17 findings and recommendations on panel selection
18 criteria. In the afternoon, the Special Project
19 Subcommittee will brief the Full Committee on the
20 results of its statutory section 549B study of
21 victims' access to information, and the members
22 will deliberate on proposed findings and

1 recommendations for inclusion in that report.

2 Next, the Case Review Subcommittee
3 will brief the members on the panel selection
4 data collection project, followed by a
5 professional staff presentation on the statutory
6 DOD biennial collateral misconduct data report.
7 That will be submitted to the DOD General Counsel
8 and to Congress following the DAC-IPAD's briefing
9 and discussion of proposed recommendations
10 related to that report today.

11 Finally, the Committee has received
12 multiple requests to provide public comment at
13 this meeting. We will hear from five speakers
14 who will each have five minutes to discuss their
15 experiences and perspectives on sexual assault
16 and military justice policy in the Armed Forces.
17 After the public comments conclude, the DAC-IPAD
18 Director will wrap up the meeting before
19 adjournment by the DFO.

20 I'll end with a couple of housekeeping
21 items. To those joining by video, I ask that you
22 please mute your device microphone when not

1 speaking. If any technical difficulties should
2 occur with the video, we will break for ten
3 minutes, move to a teleconference line, and send
4 the dial-in instructions by email. Today's
5 meeting is being recorded and transcribed, and
6 the complete written transcript will be posted on
7 the DAC-IPAD website.

8 Thank you again to those in attendance
9 today, and I'll now hand the meeting over to the
10 Staff Director, Mr. Pete Yob.

11 MR. YOB: Thank you, Chair Smith and
12 good morning, everybody. Welcome back to Day
13 Two, I just had a couple of admin announcements.
14 The first one is almost embarrassing, but when
15 you use the microphones, there's a button you
16 push -- I'm just going to reiterate this because
17 -- push the button and the light will come on,
18 you can talk. But, when you finish talking, just
19 push the button again so that you're off, so
20 there's no feedback or anything like that. So,
21 that is how you use the microphone.

22 And then, the second thing I'd like to

1 point out is that I need to correct the record
2 for yesterday's attendance. Yesterday, I noted
3 that there were nine members attending in person
4 and that there were, there was one member
5 attending online. I want to correct that to say
6 that, yesterday, there were nine members
7 attending in person and there was three members
8 who were attending online. So, I'll correct
9 that. I'll also point out that, for today, there
10 are ten members attending this meeting in person
11 and there are, there's one member who's attending
12 online. And one is correct, because I know her,
13 so.

14 And with that said, I'm going to hand
15 it over to Ms. Terri Gallagher, who is going to
16 facilitate the Court-Martial Observations
17 Discussion for the first hour or so take it away,
18 Terri.

19 MS. GALLAGHER: Good morning, Chair
20 Smith and Committee members. Starting in 2019,
21 Committee members were afforded the opportunity
22 to attend court-martial with three main purposes.

1 One, to educate the observer on court-martial
2 practice. Two, to orient the observer to
3 practice areas affected by recent or pending
4 changes. And three, to identify issues that may
5 warrant further review.

6 One current member, Dr. Spohn, and two
7 former members, Mr. Jim Markey and Ms. Kathleen
8 Cannon, were able to attend court-martials prior
9 to the COVID shutdown and the Federal Advisory
10 Committee review. Members started attending
11 court-martials again in 2022 Ms. Martha Bashford,
12 Major General Anderson, and Mr. A.J. Kramer were
13 able to attend court-martials. These members
14 were able to observe courts of all services,
15 except the Coast Guard. However, with only six
16 court-martials observed, several members attended
17 the same court. Their observations are only
18 anecdotal.

19 I want to take a moment to thank the
20 services very sincerely for your exceptional
21 support in facilitating member attendance. Both,
22 our liaisons to this Committee and the

1 practitioners at the trial locations were
2 incredibly responsive to our ever-changing
3 demands and requests. So, our sincere gratitude
4 for all of the effort put into this.

5 So, going forward the Committee is
6 encouraged to continue attending court-martials
7 whenever your schedules permit. Anytime you have
8 an opening, reach out to me and we will
9 facilitate filling that opening in your very busy
10 schedules. What we will not be doing is, we're
11 no longer going to be providing lists of
12 available court-martials. They really are sort
13 of outdated by the time they're printed, with
14 court-martials changing so rapidly. And so, the
15 best way to ensure that when you have an opening
16 and you are ready and available to attend a
17 court-martial, reach out, tell me your dates, any
18 preferences and locations, forums, charges and we
19 will link you up with a court-martial and make
20 sure that you're able to get there.

21 Are there any questions on the way
22 ahead, for observing courts?

1 (No audible response.)

2 MS. GALLAGHER: Okay. That being
3 said, today is going to be in a roundtable
4 format, this discussion. The purpose is really
5 to discuss some of the practices that were noted
6 by observers during the court-martial, and to
7 determine if these practices are likely to be
8 recurrent and whether they warrant further
9 review.

10 And so, the input of the entire
11 Committee is really imperative to take these
12 observations, these bullets -- they really are
13 not specific to any one case -- and determine
14 whether, you know, something is working better in
15 the civilian world, whether there's any
16 recommendations for further study of a practice
17 in the military that might be improved upon, or
18 really to commend the military for a practice
19 that is far better than in the civilian practice
20 at this time.

21 So, I am going to -- and I do want to
22 note, also, that Dr. Markowitz and Mr. Bill

1 Cassara will be joining in to provide some
2 opening remarks on some of these topics. They
3 are two individuals on the Committee that
4 regularly attend and review court-martials in
5 their, really, daily lives. So, thank you for
6 helping us out on this.

7 The first subject that we're going to
8 turn to is court-martial members. That's the
9 first topic and we're going to focus in on the
10 voir dire practice. I'm going to have Dr. Spohn
11 and General Anderson make some opening remarks,
12 and then have the Committee just join in to
13 really figure out whether anything is worth doing
14 further review on. With that, Dr. Spohn?

15 DR. SPOHN: Thank you. I attended a
16 sexual assault court-martial that included an
17 allegation of strangulation. And I think what
18 was notable about it was the professionalism of
19 the judge. The judge was, I think, very fair to
20 both sides. The judge did castigate one of the
21 attorneys for asking misleading questions that
22 involved double negatives, that the potential

1 jurors had a difficult time understanding.

2 But, overall, I thought that the
3 questions that each of the trial counsel, the
4 trial counsel and the defense counsel asked were
5 relevant. The counsel for the government asked,
6 you know, will sexually explicit testimony make
7 you uncomfortable, do you believe that a Marine
8 would not rape a civilian -- this did involve a
9 civilian victim -- are you familiar with the
10 Hollywood chokehold, do you believe that consent,
11 once given, cannot be withdrawn -- which this
12 case also involved -- and would you be willing to
13 convict solely on the testimony of the victim.

14 And these were, I think, were very
15 relevant issues that -- relevant to the case that
16 was being litigated.

17 The defense counsel asked many
18 questions and seemed to be priming the jurors for
19 the testimony that would be elicited during the
20 trial. And particularly focused on whether the
21 jurors, the potential jurors, understood that the
22 defendant did not have any obligation to testify.

1 Because, initially, it was thought that the
2 defendant would not testify -- he actually did
3 end up testifying. Would you be able to find the
4 defendant not guilty, even if he chooses not to
5 testify.

6 And the government objected to, or
7 raised four challenges to the jurors, the defense
8 raised seven. The judge questioned the trial,
9 each of the counsels, about the rationale for
10 bringing the challenge for cause. And, actually,
11 only one challenge by the defense was successful
12 and three of the seven challenges by the
13 prosecution were successful.

14 So, all in all, I thought -- it did
15 take six hours to choose the jury, and I think
16 that was because it was a pretty complicated
17 case.

18 MG ANDERSON: I attended a
19 court-martial that involved two specifications,
20 one for sexual assault without consent, and
21 abusive sexual contact without consent. During
22 voir dire, a couple of things I noted were that

1 judge tended to want to ask questions himself.
2 So, he excluded a question or two by the defense
3 that he felt -- that were regarding potential
4 juror bias, and potential impact on the ability
5 to follow the court's instructions, and to
6 objectively weigh facts. And instead, he asked
7 the question himself. And I couldn't necessarily
8 discern the difference in the way the counsel
9 asked the question and the judge posed it, but
10 apparently he felt there was a difference.

11 In terms of excusals, and I mentioned
12 this briefly yesterday, an individual was excused
13 for readiness reasons for pilot. Because he told
14 the court that if he did not get enough flight
15 hours in he would be non-deployable. So, he was
16 excused. Although, he did not excuse someone who
17 wanted to attend an organizational date event on
18 a Friday -- he was not excused, so.

19 And then, female jurors in this case
20 were asked, regarding any sexual assault in their
21 past, and they were removed from the jury. And
22 in both instances, the female -- I think it was

1 two female jurors -- the incidents had occurred
2 well in the past, when they were much younger,
3 and had nothing -- and they were not service-
4 related. So, it was nobody in the Service that
5 had assaulted them. They weren't violent sexual
6 assaults, and they were something, you know,
7 contact that they felt was not consensual, and
8 they objected to it.

9 But, we still ended up with a very
10 diverse jury, which I was really impressed with.
11 There were several women on the jury that still
12 remained, as well as it was diverse in terms of
13 race. And it also had a wide range of ranks,
14 there was an enlisted/officer jury. So, there
15 were junior enlisted, senior enlisted, and both
16 junior and senior officers. So, I thought they
17 had a very good mix of experience and rank on the
18 jury.

19 So, those were my observations.

20 MS. GALLAGHER: And everyone else is
21 free to join in now. I neglected to mention, we
22 are on Tab 6 in your read-ahead there's a Court-

1 Martial Observation Discussion Guide that has
2 bullets under each subject. So, if the
3 presenters do not mention those bullets, feel
4 free to jump in to discuss any of those.

5 HON. SMITH: So, I have a question.
6 Dr. Spohn, you didn't indicate, what did your
7 panel look like in the conclusion?

8 DR. SPOHN: I didn't take notes on
9 that, but I recall that it was diverse, both, in
10 terms of race and ethnicity, and I believe there
11 were three female jurors left, after the
12 challenges for cause and the peremptory
13 challenges.

14 HON. SMITH: And were you -- were they
15 at large bases or small? What was the -- I know
16 that's one of the things the panel discussed
17 yesterday, was that, if you're convening
18 authority at a smaller base you have more
19 difficulty getting a diverse jury.

20 MG ANDERSON: Sorry, we were at Hill
21 Air Force Base, which is where they train the F-
22 35 pilots. I thought it was a, you know, it

1 wasn't a very, it wasn't a large base, but I felt
2 that they had enough potential jurors to, you
3 know, we weren't going to break the bank there.
4 But, yeah, they had enough jurors, I thought.

5 DR. SPOHN: I was at Camp Pendleton,
6 which is a bigger base. They started out with, I
7 believe, 20 potential jurors.

8 HON. SMITH: How long did it take? I
9 think General Anderson said it took six hours --
10 you said it took six hours. So, how long did it
11 take to pick your jurors?

12 MG ANDERSON: It took a better part of
13 the day for this, as well.

14 HON. SMITH: Okay.

15 MS. GOLDBERG: Thank you for reporting
16 back on these experiences. General Anderson, I
17 wondered, you mentioned that the female jurors
18 were asked whether they had experienced sexual
19 assault or been subjected to sexual assault, were
20 all jurors asked that question?

21 MG ANDERSON: A.J. was there, he can
22 -- I can't remember.

1 MR. KRAMER: Yes, they were all asked
2 that question, but it was almost -- some of the
3 male jurors had knowledge of females who had had
4 sexual assault in their lives, but they had not
5 had personal experience was the way it -- can I
6 just add a couple, or did you have-- go for it.

7 MS. GOLDBERG: I had just a follow-up
8 question on that, and then I wanted to ask Dr.
9 Spohn the same question. But, follow-up question
10 was going to be, were jurors asked about having
11 people close in their lives who had been
12 subjected to sexual assault. And my question
13 related to that is, were jurors who acknowledged
14 having those close contacts also removed from the
15 jury and the panel? And then, my sort of follow-
16 on question to that, just to get it all out, is
17 did anybody argue in favor of keeping those
18 jurors on?

19 MG ANDERSON: I think they were asked
20 -- yeah, they were asked if they had any personal
21 contacts, as well. And I don't believe that
22 people were excluded for that, on that basis. I

1 think it was because of their personal, their own
2 personal experience. And then --

3 PARTICIPANT: What's your second
4 question?

5 MS. GOLDBERG: I'd have to -- I've
6 forgotten my second question. Oh, no, did
7 anybody argue in favor of either the prosecution
8 or if victims counsel asked to speak up --

9 (Simultaneous speaking.)

10 MG ANDERSON: No. They did not.

11 HON. SMITH: Was there a follow-up
12 question about whether they could be fair and
13 impartial in -- you know, in a sex assault case,
14 unfortunately, women are more likely to say
15 they've had an experience or they know someone
16 who's had an experience. The question is, can
17 you be fair and impartial even though you've had
18 that experience. Was that follow-up question
19 asked, or was it just that they had a sexual
20 assault experience and therefore they could not
21 be selected, or they were struck?

22 MR. KRAMER: So, as I recall, they

1 were asked those questions, the general
2 questions, at the beginning. But then, it came
3 up -- so there was -- everybody was in the room,
4 and I completely agree with General Anderson
5 about the diversity. And I was incredibly
6 impressed with how honest everybody was, and open
7 in their answers, on the panel, and how seriously
8 they took it.

9 But then, they came in for individual
10 voir dire about their, about a number of issues,
11 including experience with sexual assault. And
12 they weren't really -- as soon as somebody said
13 that they had a personal experience of being
14 assaulted, or knew someone, or a personal
15 experience of being assaulted, they were
16 essentially -- nobody asked if they'd be --
17 followed-up with, can you still be fair. They
18 were essentially excluded from the jury.

19 Can I just say one more thing? The
20 judge in the case seemed intent on -- he, as
21 General Anderson said, he wouldn't let the
22 defense ask a couple of questions. And then, in

1 the individual sessions, he said, now, these are
2 going to be open-ended questions so we can get
3 information from you, and get more answers. And
4 then, he proceeded to ask all closed-ended
5 questions --

6 (Laughter.)

7 MR. KRAMER: And not ask any open-
8 ended questions. And really gave the lawyers
9 very little chance -- both sides -- to follow-up.

10 DR. SPOHN: So, the case that I
11 observed was different in the sense that there
12 were several people who said either, that they
13 had been falsely accused of sexual assault in the
14 past or that they knew someone who had been
15 sexually assaulted. And the judge and the
16 opposing attorney did try to rehabilitate those
17 jurors, asked, you know, despite this, can you be
18 very impartial, can you listen to the evidence,
19 and so on.

20 So, there was quite -- again, this was
21 four years ago, but my recollection is that there
22 was quite a long discussion about impartiality

1 and fairness, despite those experiences.

2 MR. KRAMER: One more thing I want to
3 -- I remember now is that -- I found my notes on
4 my email. They had to go get some more jurors at
5 the lunch break, because so many people were
6 excused for cause. So, at the lunch break they
7 went out and got some more.

8 DR. MARKOWITZ: I will just say, my
9 general experience in trial with the voir dire
10 process is that, even for people who may have
11 people that they know who are close to them --
12 even potentially a family member -- depending on
13 how close the actual crime is to the charged
14 offenses, it's possible that person may still be
15 sat on the panel, or seated on the panel.
16 They'll be brought back in the individual voir
17 dire process, you know, both sides will have the
18 opportunity to individually voir dire that
19 person. And then, depending on the closeness of
20 the relationship, the closeness in time to the
21 events, and things like that, you know, there's
22 the possibility that that person may still be

1 kept on.

2 So, it really does depend on just the
3 nature of the events, how close it is to the
4 actual charges, and the specifics in the case.

5 So, it's definitely not something that I've seen
6 is an automatic, you know, dismissal from the
7 panel. And it's definitely very judge-specific,
8 as well. So, I think there are a lot of factors
9 that really go into whether or not a person will
10 be kept, even if they know somebody who is close
11 to them who's experienced a similar offense.

12 MR. CASSARA: So, just by quick way of
13 background, my experience in participating in
14 court-martials ended about five years ago. But,
15 I still review a lot of court-martials, because I
16 have a largely appellate practice. And, at least
17 in my experience over 30 years, is there's not a
18 great deal of uniformity amongst judges, in terms
19 of how they conduct voir dire. I'm not saying
20 whether that's a good thing or a bad thing, I
21 think judges should be allowed to control their
22 courtroom.

1 But, I've had some judges who say, I
2 will not allow any group voir dire from any of
3 the judges, I conduct all of the voir dire and
4 then we'll follow up with individual voir dire.
5 I've had some judges that would say, you want
6 individual voir dire, of which panel members?
7 And then, some who will say, you need to tell me
8 specifically why you want individual voir dire of
9 that panel member. And they may have litigation
10 ahead of the voir dire as to whether or not
11 they're even going to be able to ask individual
12 voir dire questions.

13 I was curious -- not to put Judges
14 Walton and Smith on -- but, in your civilian
15 practices, do most of the judges do it the same
16 way, or are you all are given a great deal of
17 autonomy? And, you know, are their district --
18 or, I know the federal circuit, there's not
19 rules, but.

20 HON. SMITH: We all do it however we
21 want to do it. I don't let anybody answer their
22 questions openly because I think it gives people

1 ideas about what to say and, you know, how to say
2 it. So, I asked the entire voir dire and then
3 call them up to the bench, and I allow counsel to
4 ask questions. And it doesn't take six hours,
5 usually, but.

6 (Laughter.)

7 HON. WALTON: My process is similar.
8 However, I do ask the entire voir dire the group
9 of questions I'm going to ask. And then, I
10 actually move them to, the voir dire, to another
11 location and bring the jurors individually into
12 the court. And they sit in the jury, in the
13 witness box, and they respond to the individual
14 questions.

15 I find that to be very effective
16 because I think many times jurors are intimidated
17 when they're at the bench and they've got a
18 defendant standing right next to them, because
19 the defendant has a right to be present and hear
20 what's being said. So, I just think that the
21 potential jurors are a lot more open in that
22 setting, as compared to the close, you know,

1 quarters of being in close proximity to the
2 lawyers, and also the defendant.

3 MS. TOKASH: This is Meghan Tokash.
4 As a practitioner, prosecutor in front of
5 different district court judges, some district
6 court judges will use a questionnaire ahead of
7 time. So, a question could include, have you
8 ever experienced sexual assault or harassment?
9 And then, that way when we as the practitioners
10 trying the case get those questionnaires, we can
11 already have that issue flagged so that we know
12 to follow up with them. But, I find it helpful,
13 so I kind of know in advance who on the voir dire
14 might have some issues that we want to voir dire
15 further, individually.

16 HON. WALTON: Regarding
17 questionnaires, many of my colleagues use them, I
18 don't. And one of the reasons I don't is because
19 -- and it may not apply to the military, based
20 upon what I heard yesterday about the makeup of
21 the members of the military, as far as their
22 education is concerned. But, many of the

1 individuals I have, who are potential jurors, may
2 not read well, and therefore, may not articulate
3 themselves well in writing. And therefore, I
4 think they're put at a disadvantage when they
5 have to fill out a questionnaire, and therefore,
6 I don't do it.

7 And I've found that my voir dire
8 doesn't take any longer than what my colleagues
9 take, even though some of them use
10 questionnaires. So, there are pros and cons in
11 reference to questionnaires, I just don't use
12 them because, as I said, I think they
13 disadvantage people who don't have a lot of
14 formal education.

15 MS. GOLDBERG: Have we heard as a
16 committee about the training that judges receive
17 related to handling sexual misconduct cases? I
18 know that we've heard a lot about -- and I've
19 gone to observe, and I know some others of us
20 have gone to observe the trainings that
21 prosecutors, and defense counsel, and victims
22 counsel receive. And with respect to those

1 trainings, have we heard, you know, in
2 particular, and maybe in regards to sexual
3 assault?

4 MS. GALLAGHER: We have not
5 specifically had speakers come in to talk about
6 the training military judges receive. Military
7 judge training is done separate from the
8 prosecutors and defense, there are specific
9 military judge training courses. Often, those
10 are attended by all Services. But, there is
11 certainly a yearly kind of certification training
12 that is held once a year, I don't know how much
13 additional training there is.

14 MS. GOLDBERG: I guess part of my
15 question was, given the sensitivities that can
16 arise in connection with sexual misconduct cases,
17 whether there is any training for judges on this,
18 these and other similarly sensitive issues.

19 DR. MARKOWITZ: There is. There's an
20 annual all-Services judge training, and then, at
21 least for the Army, there is an Army-specific one
22 once a year.

1 MS. GOLDBERG: Would it be possible to
2 get some of the training materials, or learn more
3 about how we might attend those trainings? And
4 Dr. Markowitz, since you're familiar with the
5 trainings, do you know if they are required or
6 optional?

7 DR. MARKOWITZ: At least, I know for
8 the Army that it's required.

9 HON. WALTON: Could I ask a question,
10 were the race and ethnicity of the victim and the
11 defendant the same or different?

12 DR. SPOHN: It was the same.

13 MG ANDERSON: It was the same in ours,
14 as well.

15 MR. CASSARA: Okay, so one of the
16 things that I don't know that it's encompassed by
17 this question, but that I do think might be worth
18 looking into as a committee.

19 Military judges are assigned as any
20 other servicemember is assigned, subject to
21 rotation every two years.

22 I know that this past summer, two

1 military judges that I know fairly well, spent
2 two years on the bench and then were moved back
3 into the normal JAG force.

4 Both of them would much rather have
5 stayed on the bench. These are not people who
6 want to be general officers; they want to be
7 judges.

8 I have always been concerned with the
9 perception and again, perception maybe not the,
10 may become the reality.

11 But if the judge advocate general
12 moves a judge after two years, is there a
13 perception that that judge has been too soft on
14 crime, too hard on crime.

15 As a defense hack, my argument would
16 be that they'd probably be considered too soft on
17 crime.

18 And, does that factor into why that
19 judge is moved. Because we do, we spend a lot of
20 time, we taxpayers, spend a lot of money on
21 training military judges.

22 And then for a judge to go out into

1 the field and you know, every judge I've ever
2 talked to and I'm sure the two of you would say
3 the same thing would say, it's at least a couple
4 years before I feel like I have some clue as to
5 what I was doing on the bench.

6 And to take somebody who's gone
7 through that training and after two years on the
8 bench say, well now you're going to be the chief
9 of some service.

10 Or you're going to be the staff judge
11 advocate in some field position, I think is,
12 raises a question as to whether that's an
13 expeditious use of taxpayer dollars, and whether
14 it's a good way to train judges.

15 So along with Suzanne's question about
16 what training do they go to, go through, you
17 know, I don't know if we have time to do this and
18 if it's even within our purview.

19 But the fact that a judge will be
20 moved two years after being on the bench, I find
21 and I've always found, to be problematic.

22 HON. WALTON: I would agree with that.

1 It took me several, I've been on a bench for 40
2 years and I'm still learning.

3 So, I think two years is just not
4 enough time to become very proficient as a judge.

5 MS. GOLDBERG: And it seems like a
6 logical fall onto some of the conversation that
7 happened on this committee.

8 I know prior to my arrival, about the
9 length of, tour of, of tours for I think it was
10 prosecutors or defense counsel, or victims
11 counsel.

12 So it seems that the piece with trying
13 to support a justice system that, military
14 justice system that operates at the best possible
15 level.

16 MS. GALLAGHER: Okay. Just real
17 quickly before we wrap up the whole court-martial
18 members, there were a couple of comments, you
19 know, General Anderson, Ms. Bashford, maybe you
20 can address you know, some found the voir dire to
21 be more cursory than in civilian courts.

22 And some found the voir dire to be

1 more thorough than in civilian courts. So maybe
2 you could kind of discuss that briefly.

3 MS. BASHFORD: I think it's hard to
4 make really broad distinctions, because you could
5 go into 10 civilian courts and find some people
6 are better at it, and some people are not so good
7 at it in terms of actually eliciting information.

8 I saw an officer panel and it was, it
9 was diverse as to gender and ethnicity. And
10 given the location, there was a lot of medical
11 personnel on, on the panel.

12 I did think while the questions were
13 good by both sides, they were phrased in such a
14 way that it didn't really elicit information.

15 It was more of the, would you agree
16 with me that. And then they would say, everyone
17 has answered in the affirmative, and move on to
18 the next question.

19 I don't think that actually gets any
20 real information. It was a very different
21 demographic because it was an officer panel.

22 But as I said, it was diverse as to

1 gender and ethnicity as it came in, and seated
2 the panel, as well.

3 I do want to say one thing about the
4 unanimous verdict, because the lack of one,
5 because I thought that was crazy.

6 And, on the other hand, several
7 panelists had expressed concern that their
8 verdict would be known.

9 And, the judge explained since it's
10 not unanimous necessarily, nobody will know what
11 you voted.

12 In civilian you're either, you either
13 voted to convict, or you voted to acquit. Or you
14 have a hung jury and nobody knows which side you
15 came, you came down on.

16 Two or three members expressed that
17 concern, which actually made me do a 180 on the
18 unanimous verdict.

19 MR. CASSARA: You went from what to
20 what?

21 MS. BASHFORD: I went from not having
22 a unanimous verdict as crazy, to I think there

1 might be reasons in this environment to have
2 that.

3 MG ANDERSON: I would agree with what
4 Ms. Bashford said. Also, and I, you know, even
5 though I'm an attorney I never did any criminal
6 practice so I can't really you know, that's a
7 disclaimer.

8 So, the jurors were able to pose
9 questions, which I thought was very interesting.
10 The judge would look at them and then I think, I
11 think A.J. can confirm this.

12 I think the judge wouldn't just let
13 them ask the questions, I think they were, kind
14 of screened them. But I just found that very
15 interesting.

16 MR. KRAMER: Yes, they have to submit
17 them in writing, and then the judge would consult
18 with the, both sides about whether they would ask
19 the question or not.

20 HON. WALTON: Are you talking about
21 questions during voir dire?

22 MR. KRAMER: No, no, no --

1 (Simultaneous speaking.)

2 FEMALE SPEAKER: At trial.

3 MR. KRAMER: -- during the trial.

4 HON. WALTON: Oh.

5 MR. KRAMER: Which I find to be an
6 abhorrent practice.

7 HON. WALTON: Everything except, about
8 it. I think it's a great practice.

9 (Laughter.)

10 HON. WALTON: It gives the jurors the
11 opportunity to elicit information they otherwise
12 would not under the -- not know. And causing
13 them not having to go back and guess about things
14 that they haven't heard about.

15 (Simultaneous speaking.)

16 JUDGE GRIMM: This is Judge Grimm, I
17 think I agree with Judge Walton.

18 I think that that in an individual
19 case, if there's an objection which is a
20 legitimate basis to make an objection, counsel
21 can raise that objection. The court can screen
22 it.

1 But when the jury wants to know
2 something and counsel doesn't know that, and
3 they're rumbling along in a direction that they
4 think is the right direction and the jury doesn't
5 know, it's very frustrating.

6 And those are the jury reform measures
7 that are being taught so that when the jury can
8 ask questions, they're much more satisfied with
9 the process.

10 So, with respect A.J., I disagree with
11 you.

12 HON. WALTON: Except I'll say this,
13 when I was a litigator, I probably would have
14 taken the same position Mr. Kramer is taking.

15 But as a judge, I just don't agree
16 with it.

17 MS. BASHFORD: I just want to say one
18 odd thing I saw in the context of the panel
19 members asking questions.

20 One question was posed, which the
21 other side then said had opened the door to
22 different information coming out now.

1 And the opposite side was like, I
2 didn't open the door. You know, the panel member
3 opened the door.

4 And there was a lot of discussion as
5 to you know, who can open the door to information
6 that had been previously excluded.

7 DR. MARKOWITZ: I will just say that
8 as, as an expert witness, there is nothing better
9 than panel questions for me.

10 Because if you are not, if you have
11 not said something clearly, if your message has
12 not gotten across clearly, panel questions really
13 sum that up very well.

14 And the ability to clarify in the
15 moment, is a gift. So for me, panel questions
16 are really one of the best things that happen to
17 be able to do that in that moment, is fantastic.

18 HON. WALTON: If I can say one other
19 thing about the voir dire, and jury selection
20 process.

21 I'm always troubled when I hear judges
22 pride themselves on how fast they were able to

1 pick a jury.

2 I think the jury selection process is
3 one of, if not the most important part of trial,
4 because if you select one person to that jury who
5 can't be fair and impartial, it undermines the
6 integrity of the process.

7 So obviously, you don't want the
8 process to take forever with the huge backlogs
9 that we have in trials.

10 But at the same time, if you rush
11 through the process, I think you're undermining a
12 fair adjudication of the case.

13 HON. SMITH: That's one of the reasons
14 I allow attorneys to ask questions. Because I
15 think that they know their cases. They know the
16 ins and outs of the case.

17 And ,just because I'm asking a
18 question doesn't mean that I'm necessarily
19 getting to whether or not there's going to be
20 bias.

21 So, I know a lot of judges don't like
22 to allow counsel to ask questions, but I think it

1 is about, you know, for me, it's just the way I
2 like to do it.

3 MS. GOLDBERG: Thinking a bit ahead to
4 our next conversation, I'd be interested in
5 hearing from those of you who have seen one or
6 many court-martials, your sense of whether the,
7 all of the members of the committee, or the
8 potential panelists, seem to understand the
9 process.

10 You know, as we think about what are
11 the criteria for selection and whether we might
12 adjust those, one other comments that was made in
13 I think our last meeting, was a concern that
14 maybe more junior members of a panel might, or
15 possible panel members, might not understand the
16 process.

17 And of course in the civilian context,
18 there are not the kinds of extra limitations on
19 who can be selected for a panel.

20 Did you have any sense that people
21 weren't understanding? And if so, could you say
22 a little bit more about what trends you saw?

1 DR. MARKOWITZ: Yes, I would
2 definitely say that people do not understand the
3 process. There's a lot of questions even going
4 up to the point of deliberation. There's still a
5 lot of questions people have about process
6 issues.

7 And, I was in trial for the Air Force
8 last week. And even as the judge was getting
9 ready to close the court for deliberations, the,
10 there, it was clear that the panel still had some
11 lingering questions about the process, and things
12 like that.

13 So, I do think that it can be somewhat
14 confusing. And so, I don't think that there's an
15 automatic understanding of the way that this
16 whole process works.

17 I think there's a lot of, a lot of
18 detail related to the process. And it's
19 important for people to be able to follow along
20 with judges' instructions.

21 There's a lot of detail related to
22 small aspects of trial as you go through.

1 There's a lot of, a lot of back and forth in
2 terms of what happens during, during a trial.

3 A lot of can you follow my
4 instructions, can you disregard this. Can you,
5 you know, and so I don't think it's necessarily,
6 it doesn't happen certainly the way that people
7 think it might. The way people see things on
8 television, or the movies.

9 And so, I don't necessarily think it's
10 what people necessarily expect. It's certainly
11 much more boring than what I think people believe
12 it will be.

13 And far less dramatic than what they
14 might be led to believe.

15 MS. GOLDBERG: Thank you very much.
16 And, I could refine my question a bit.

17 DR. MARKOWITZ: Yes.

18 MS. GOLDBERG: Some witnesses before
19 the committee had raised some concern that
20 certain individuals, either based on rank or
21 experience level, would be less capable of
22 understanding the process than others.

1 And the question is how, you know,
2 should that factor in at all to selection
3 criteria.

4 I mean, I tend to agree just having
5 taught civil procedure for a long time, that the
6 process is for the most part, not obvious to a
7 lot of people and that anybody who hasn't been
8 through it, probably would you know, have
9 difficulty understanding some pieces of it. And
10 even people who have been through it many times
11 will have difficulty understanding some pieces of
12 it.

13 But I guess the question is, did you
14 see, have you seen more difficulty either among
15 more junior members of a, that have been here, or
16 people with different sorts of jobs because of
17 over time, right, those have been considerations
18 that have, have been sort of gatekeepers from
19 participating.

20 MR. CASSARA: Suzanne, the panel
21 president generally asks the questions for the
22 entire panel. So you wouldn't know who was

1 struggling.

2 I know that Theresa was very concerned
3 that we weren't going to be able to like fill an
4 hour, but we're also.

5 But you know, I just have really, just
6 a yes or no question for Judges Walton and Smith.

7 Do you give the jury your
8 instructions, a written copy of the instructions?

9 HON. WALTON: I do.

10 And, in addition to the written
11 instructions, I also tape-record my instructions.

12 MR. CASSARA: Oh.

13 HON. WALTON: Because again, some
14 people may not comprehend well by reading, but
15 they do if they hear it.

16 So, I tape-record my instructions, and
17 provide them with a written copy of the
18 instructions.

19 HON. SMITH: I provide written copies.
20 I had not thought about tape recording, but it
21 absolutely makes sense. I might start doing
22 that.

1 MR. CASSARA: Because I know in the
2 military, we sometimes have 20, 30, specification
3 charge sheets.

4 And you're giving the panel members,
5 you know, a ton of information, you know. You're
6 like here, I'm going to read this to you and
7 after you fall asleep from me reading it, then
8 I'm going to give it to you and you're going to
9 read it and fall asleep.

10 You know, and I do have that concern,
11 certainly in very complex cases. I have less of
12 a concern you know, I'm talking about practicing
13 in federal courts.

14 But I have less of a concern in panel
15 cases than in federal cases, only because as a
16 gentleman said yesterday, we tend to have more
17 educated panels.

18 HON. WALTON: So, is it the norm in
19 the military that written instructions aren't
20 provided to the panel?

21 MR. CASSARA: At least as of when I
22 was trying cases five years ago, Judge, it was.

1 DR. MARKOWITZ: Yes.

2 The judge has to read the entire
3 instruction. All of the instructions first, and
4 then they are sent back with the written
5 instructions.

6 MS. GALLAGHER: Judge Grimm?

7 (No audible response.)

8 MR. CASSARA: I think you're muted,
9 Judge.

10 JUDGE GRIMM: Sorry about that.

11 I'm not sure that all federal courts
12 do this, but in our court, we would typically
13 give preliminary jury instructions before the
14 voir dire began.

15 Where you actually spoke to the jury
16 about what the process was, what it meant, who,
17 what was the sequence in which they would go.

18 The presumption of innocence. We talk
19 about the fundamental elements of the fact that
20 the charge is nothing, is not evidence. It's no
21 evidence of requirement, it's just a charge.

22 That the burden of proof is with the

1 government; that it remains with the government
2 forever.

3 That the defendant has no obligation
4 to present evidence, and is presumed to be
5 innocent. All of those things are set out.

6 Talk about unanimous verdict. We talk
7 about who's going to be a foreperson. Give some
8 sort of an overview of what the charges are, so
9 that they are familiar with it.

10 And then that's done at the very, very
11 beginning. After the voir dire process has taken
12 place.

13 Do those preliminary jury
14 instructions, are they given in courts-martial
15 because they do orient the jury as to the
16 procedure before the actual evidence begins.

17 DR. MARKOWITZ: They are, yes.

18 HON. WALTON: The other challenge that
19 we now face that we didn't in the past because of
20 technology, is the internet and social media.

21 And, it's critical in my view, that
22 the jury appreciate the prescription against you

1 know, going on the internet to find out
2 information.

3 Or engaging in discussions through
4 social media about the case. Because we've had
5 significant problems in that regard.

6 MS. GALLAGHER: Yes, I do believe the
7 military judges are providing that instruction,
8 as well.

9 At this time, I do want to turn to a
10 different subject. One of, and I'm skipping over
11 things so let's hone in on a comment that really
12 occurred a number of times from observers.

13 The government witnesses were not as
14 prepared as they should be. For example, victims
15 and witnesses were not familiar with their prior
16 statements, or investigators did not recall the
17 investigation.

18 Do Dr. Markowitz, specifically with
19 regards to the experts, do you want to make a
20 comment on that, and then anyone else?

21 DR. MARKOWITZ: Sure, I'm happy to.

22 I do want to clarify that I'm in a

1 slightly different position, because I am in my
2 role where I'm working often as an expert in
3 these cases.

4 And I've worked as an expert
5 consultant and an expert witness for all of the
6 services, including the Coast Guard in these
7 trials.

8 I am often the person who is assisting
9 in prepping, in helping to prep the con, or prep
10 the treating clinician, and working on cross of
11 the opposing expert.

12 So in my role, it's a little bit
13 different than in the civilian world where you're
14 just coming in and you're providing expert
15 testimony, and you're going home.

16 In courts-martial, I'm working as part
17 of the team. So, my role is really to be part of
18 that prep process.

19 Is to be part of getting the treating
20 clinician up to speed, and ensuring that they are
21 ready to take the stand. They have everything
22 they need, and all of that.

1 So, I do think that there are varying
2 differences in terms of how prep occurs; in terms
3 of how far in advance that kind of thing's
4 happening.

5 In terms of making sure that people
6 are prepared with medical records, and things
7 like that. That all of that is available and
8 ready.

9 That treating clinicians in
10 particular, are familiar with, with their own
11 records, and have that available so that they are
12 prepared to go ahead and take the stand. And,
13 that everybody's sort of on the same page.

14 But there's definitely not uniformity
15 in terms of how people approach the process. And
16 even in terms of training in putting up
17 clinicians and other experts, to be able to get
18 the most out of medical evidence, and medical
19 experts in this process.

20 So, I am interested in hearing what my
21 colleagues have experienced. Because obviously
22 my own experience is simply in doing the work, in

1 my own cases.

2 So, I look forward to hearing what
3 people's experience has been when they have, when
4 they have seen their, their own boards.

5 DR. SPOHN: So, there was a, an expert
6 witness in the case that I observed. It was a
7 sexual assault nurse examiner, who was an expert
8 on strangulation.

9 And she discussed the physiology of
10 strangulation, the likely outcome of an attempted
11 strangulation.

12 And, she presented pictures that were
13 taken during the forensic medical examination
14 showing the victim, injuries to the victim's neck
15 and face.

16 She was very articulate and did not
17 overstate her conclusions, which I thought was
18 important.

19 For example on cross-examination, she
20 admitted that there was no way to tell whether
21 the injuries resulted from consensual, or non-
22 consensual sexual activity.

1 She also brought out that the, or the
2 cross-examination also brought out that the
3 victim had lied to the nurse examiner, in that
4 she said that this incident occurred on a first
5 date and it was not a first date.

6 So she was very, I thought that the
7 expert witness was very, very effective. Well
8 prepared. Maybe you prepared her for that.

9 DR. MARKOWITZ: I don't think it was
10 me. Was she the treating clinician, or was she
11 testifying to the work that the treating
12 clinician had done?

13 DR. SPOHN: She was the treating
14 clinician.

15 DR. MARKOWITZ: Okay.

16 And did you find that in the
17 interaction on direct with trial counsel, that it
18 felt like it was a pretty smooth conversation
19 back and forth, like trial counsel was listening?

20 Like it was that kind of conversation,
21 or did you feel like it was like, she did well
22 because she was experienced, and regardless of

1 whether counsel was prepared, like, she had it
2 already sort of taken care of.

3 Because that's an issue that I find
4 sometimes is that inexperienced counsel sometimes
5 doesn't listen to the answers.

6 And so sometimes that can be a little
7 bit of a challenge.

8 DR. SPOHN: So, the trial counsel was
9 not particularly well prepared in this case. But
10 she was.

11 DR. MARKOWITZ: Okay.

12 DR. SPOHN: And so I think it was the
13 latter, that she was well prepared despite the
14 trial counsel's inexperience.

15 MR. CASSARA: To answer your question,
16 Theresa, from my experience, I was reading a
17 court-martial last week. I read court-martial
18 trial results pretty regularly.

19 And, the alleged victim had given four
20 or five prior statements. And didn't, either
21 feigned lack of knowledge of any of those
22 statements, or was not prepared to testify as a

1 witness.

2 From a defense counsel's standpoint,
3 you're of course arguing that you know, she lied
4 in the prior statements.

5 But she said several times, I have
6 not, you know, I haven't talked to anybody on
7 this case in several months.

8 And, I see that on a fairly regular
9 basis where witnesses, and I think part of that
10 is simply endemic to a system where your counsel
11 may not be co-located, or be located where the
12 crime allegedly took place.

13 I always say allegedly because I'm a
14 defense hack.

15 But you know, so you may have a
16 counsel in a small air base in New Mexico, and
17 every lawyer trying that case is from another
18 location.

19 So any interviews that have taken
20 place are going to be telephonic. Or are going
21 to take place by an OSI, or a CID agent.

22 So, it's, you know, from the get, from

1 a defense perspective you're cross-examining, but
2 from a government perspective you're saying, well
3 how do you expect her to be consistent. You
4 know, she gave these statements months ago.

5 And I don't know that there's a good
6 solution when, you know, and I know that
7 particularly in the Air Force, they have these
8 circuit counsel that will fly in a weekend before
9 a trial takes place.

10 And, they may not have spoken to a
11 single witness about, about the case.

12 So it creates in my experience, a
13 another of OSTC or hopefully there's going to be
14 a defense equivalent of the OSTC.

15 But I don't know if that is a system
16 and an issue that they have addressed, is whether
17 counsel are going to be able to prepare better
18 than in my experience, they have been.

19 MS. BASHFORD: I saw something similar
20 where on cross-examination by defense, do you
21 remember saying X, Y, and Z, which would be very
22 much at odds with the testimony.

1 And the answer was always no, I don't
2 remember saying that. And then surprisingly,
3 there was no well, would looking at this refresh
4 your recollection.

5 Or would you, you know, it just was
6 sort of left there. It struck me as odd.

7 MR. CASSARA: And Judge, as to your
8 question about the investigatory agencies, CID
9 agents will notoriously tell you that they don't
10 remember this case very well because it took
11 place you know, six months ago, and they've got
12 8,000 cases on their docket.

13 And again, that may very well be true,
14 but if it is true, somebody's not preparing their
15 witnesses properly to testify at a trial.

16 HON. SMITH: So it sounds like there
17 could be a course on trial prep, perhaps, for the
18 investigators. And just solely on trial
19 preparation.

20 MG ANDERSON: Yes, I just want to add
21 real quickly. For me, and I'm just an observer.

22 Honestly, it was distracting when they

1 were trying to, to prove key elements of the
2 timeline, when the witnesses had to keep being
3 refreshed.

4 So, it became very disjointed and hard
5 to follow what actually had happened. And so,
6 that's just my opinion you know, as an observer
7 but I can't but think that that had some impact
8 on the jury, as well.

9 MS. GALLAGHER: Mr. Kramer, did you
10 have any specific observations with regards to
11 the preparation of the victims, and the
12 investigators specifically, in comparison to the
13 civilian trials?

14 MR. KRAMER: This was a special trial
15 counsel actually, who prosecuted the case. And,
16 I thought that it seemed like a lot of both the
17 witnesses and victims answers surprised the
18 special trial counsel.

19 Because when they were inconsistent
20 with prior statements, and it seemed like they
21 were taken by surprise that there had been very
22 little, or have no witness preparation even

1 though this was as I said, a special trial
2 counsel from another location who flew in.

3 And I have no idea when they, when
4 they got there.

5 So it did seem very strange that a lot
6 of the answers shouldn't have taken them by
7 surprise, and give the defense a lot of the ammo
8 for cross-examination.

9 There was a SANE nurse who testified,
10 and it was very bizarre because the nurse
11 testified about the examination, and then about
12 taking DNA swabs.

13 And then nobody asked what the results
14 of those DNA swabs were. And it was just like,
15 why did they even present the expert because they
16 obtained no information that was of evidentiary
17 value to the case.

18 And the defense objected to the
19 qualifications of the expert at trial, even
20 though they hadn't filed a motion pre-trial to do
21 that.

22 And then the judge asked them well

1 what basis did they, and they didn't really have
2 a basis so that looked kind of silly. But it
3 wasn't in front of the jury at least.

4 But the whole SANE nurse evidence was
5 a little strange, in that it was never connected
6 to anything to do with the case.

7 DR. MARKOWITZ: I do think that
8 sometimes when it comes to things like medical
9 evidence, sometimes there's this you know,
10 thought that it exists and therefore, we need to
11 put it on.

12 But there's no real understanding of
13 why we're putting it on. And so, you know, it's
14 a checking the box kind of thing without any real
15 context behind it.

16 And that becomes a challenge I think,
17 for you know, at trial. Just it's sort of
18 sitting out there disjointed, with no real
19 understanding of what we're going to do with it
20 now.

21 And, I think that's a function of a
22 lack of experience unfortunately, on the part of

1 both the clinician who is testifying, who is
2 unable to provide context for the counsel.

3 Because ideally, you want a clinician
4 who can help you know, give it some context. And
5 then of course on the part of counsel, who
6 doesn't know what to do with it at trial.

7 HON. WALTON: What was the verdict in
8 the two cases?

9 DR. SPOHN: He was acquitted.

10 MG ANDERSON: Ours was found guilty.

11 MS. GALLAGHER: I do want to note that
12 we have graciously been given another 15 minutes
13 to carry on the discussion, by the esteemed
14 director.

15 So, at this time I want to just focus
16 in on evidence and Ms. Bashford, and Mr. Kramer,
17 specifically maybe you can address whether or not
18 you thought the use of evidence was equivalent to
19 what you see in the civilian practice.

20 So, like you know, was there any
21 indication that phones that kind of should have
22 been searched weren't, or any comments you have.

1 MR. CASSARA: So, this is, I don't
2 know if you said that Mr. Kramer, and it might
3 have been me. But either way.

4 MS. GALLAGHER: You're good.

5 MR. CASSARA: This is Mr. Cassara.

6 It has become one of my pet peeves,
7 and I talked to a number of practitioners last
8 night who are still actively out in the field, is
9 the inability to retrieve digital and forensic
10 evidence from the alleged victim.

11 But it has become I think, well, it's
12 not easy, I'll put it that way. And it's
13 basically on the, one of them said it's even
14 harder to get a phone from an alleged victim,
15 than to get their mental health records.

16 That might be the hyperbole, but I
17 understand the concern where if an accused says,
18 we had several text conversations.

19 And I'm dealing with a case right now
20 where the accused testified in the pre-trial
21 session and said, we had several text
22 conversations back and forth about hooking up

1 that night.

2 The alleged victim denied having any
3 of those conversations. The accused did not have
4 that phone anymore. So they subpoenaed the
5 alleged victim's phone, and she refused to turn
6 it over.

7 And we have litigation over that
8 because that's her private phone, and the judge
9 did not require her to turn it over.

10 Now again, I'm the appellate lawyer so
11 you know, I'm pretty, I look at it from that
12 perspective.

13 But I'm curious as to those I think
14 Jennifer especially, and the civilian judges.
15 You know, what are you seeing in terms of the
16 ability to get forensic data. And, are the
17 subpoenas being sent out properly.

18 At least from the short survey I've
19 done of, and the number of cases that I read, I
20 think it's a pretty significant issue, and a
21 pretty significant problem.

22 JUDGE GRIMM: This is Paul Grimm,

1 requesting my appropriate.

2 HON. SMITH: Oh, so I can answer at
3 least from my perspective.

4 The use of phones by the Montgomery
5 County Police Department, is overwhelming. So
6 every case that you have, they've done a phone
7 dump of every single phone that they could get
8 their hands on.

9 And there really is no, and I mean,
10 and that's happening by the investigators.
11 That's not, they're not coming to court later on
12 saying you know, this person won't turn over
13 their phone.

14 Before the case is even indicted,
15 they've already got the phone, made a copy, done
16 whatever they do.

17 So, every single case has tons of you
18 know, cell phone communications, computer,
19 Snapchat, Instagram, whatever.

20 And, last week I was the duty judge
21 during the day. I must have signed you know, 20
22 search warrants a day.

1 And most of them are for phones, or
2 guns. Phones or guns.

3 And so, it is a huge tool. It's
4 surprising to hear that that's not something
5 that's done, as part of the investigation.

6 DR. MARKOWITZ: I feel like I'm trying
7 to think of a case where I haven't seen a huge
8 amount of like, text messages and things like
9 that as a part of the, as a part of the
10 investigative file.

11 I don't often review those because
12 it's not relevant to a lot of the work that I do.
13 But I feel like I, most of the cases that I see
14 these days have an enormous amount of like, text
15 messages, phone, photos from phones and that, as
16 a part of it.

17 I wouldn't be able to give you know,
18 a percentage or anything like that, but it does
19 seem like a significant amount of what I see
20 coming through.

21 MS. BASHFORD: What I saw was yes,
22 there were text messages, but they had been self-

1 selected by the parties.

2 And it was not -- it was clear from
3 the questioning that this is what they had turned
4 over, not necessarily everything that was on the
5 phone. But one thing we found, and I don't know
6 if this is the curse in the military, but we now
7 have to dump our detectives, investigators'
8 phones because they communicate with the victims
9 not by phone call anymore, they send them a text.

10 And you know, they'll say it's just to
11 set up a meeting, but when you actually look at
12 the texts, there's usually quite a bit more not
13 necessarily improper, but there is stuff there
14 that needs to be turned over.

15 HON. SMITH: Judge Grimm?

16 JUDGE GRIMM: Yes, thank you.

17 The two issues that I see here, one is
18 the disclosure and the production. So that you
19 have the information, and can make it available.

20 But there's another issue that comes
21 up that I see all -- saw all the time.

22 And that is that under rule of

1 evidence, the original writing rule which is part
2 of the Military Rules of Evidence, it's found at
3 1001 through 1008.

4 Says that to prove the contents of a
5 writing, recording or photograph, it requires an
6 original or a duplicate, and only if an original
7 or duplicate is not available can you get
8 secondary evidence.

9 So from the defense perspective, if
10 someone is referring to text messages that were
11 sent, and then begins to talk about what those
12 text messages said, there's an evidentiary
13 objection there under the original writing rule.

14 And, lawyers have completely lost
15 track of the significance of that rule, and the
16 importance of it in making an objection.

17 And even, even in the cases that I
18 saw, it was because people communicate through,
19 through text message, and tweets, and social
20 media so pervasively.

21 It's so much a part of what they do,
22 that people testify all the time well, I sent an

1 email and got an email response and it said X.
2 Or I sent a text, or they sent me a tweet and it
3 said Y.

4 That all technically violates the
5 original writing rule, and should not be allowed
6 to have secondary evidence unless you can show
7 that it was either lost without bad faith.

8 Or that if it's in the possession,
9 custody or control of an adverse party who has to
10 bring it and does not bring it, then you can get
11 secondary evidence.

12 So, there's an access information that
13 I understand why that's frustrating to not be
14 able to have access to it.

15 And I think in the civilian community,
16 there is access. But there's also a proof issue,
17 an evidentiary issue, where throughout my
18 experience in 26 years as a judge, the original
19 writing rule's a completely forgotten rule.

20 And it's an important rule,
21 particularly as pervasive as this communication
22 is.

1 MS. GALLAGHER: Okay. So let me --
2 (Simultaneous speaking.)

3 HON. WALTON: Yes, I've never had a
4 original writing rule objection made before me.
5 I've never seen it.

6 But in the example that you gave, I
7 mean, I, if there was a request made, that that
8 information would be produced, I would have
9 ordered it be produced.

10 I think it would be relevant
11 obviously.

12 MS. GALLAGHER: I'm going to shift
13 quickly over to a comment about the questioning
14 of victims.

15 Ms. Bashford, can you speak a little
16 about counsel not eliciting, eliciting enough
17 detail about an incident?

18 MS. BASHFORD: God is in the details,
19 and I don't know if this is a training issue, or
20 if it is that the courts-martial seem to be
21 scheduled you will do this, you'll start this
22 day, and you will end this day, that are there

1 time constraints.

2 But things that I and my colleagues
3 would have spent 10-15 questions on bringing out
4 the facts so that you can get the picture, seem
5 to be one question.

6 He pushed me on the bed. And then
7 they move on to something and put, you know,
8 pushed you how, touched you where, on the bed
9 how. Face down, sideways, face up, kissed me.
10 What does that mean.

11 Just, it just was kind of like a
12 checklist of things you wanted to get out, and it
13 did not seem to me that there was a lot of time
14 spent by either side really developing that.

15 And I can see why the defense might
16 not want to spend a lot of time developing that.
17 But it was a little bit pro forma, I thought.

18 MS. GALLAGHER: Mr. Cassara, I know
19 your remarks would be from the defense
20 perspective, but did you, were you very excited
21 they didn't --

22 (Simultaneous speaking.)

1 MR. CASSARA: I would actually agree.
2 I think most trial transcripts that I read, I can
3 literally cut and paste the questions from the
4 last transcript that I read.

5 You know, they are very much pro
6 forma, and I think that that's a problem again
7 endemic to a system where, and I'm speaking pre-
8 OSTC so I want to make sure that that's clear,
9 that these are problems that may be resolved.

10 But I think it's a, you know, endemic
11 to a system where most of the counsel are not in
12 that area.

13 Some of the judges have been on the
14 bench for two years and are getting ready to
15 leave.

16 And a lot of the lawyers are, you
17 know, I tried my first murder case with a year
18 and a half as a lawyer. And, I was the sole
19 counsel in a shaken baby case.

20 And he was acquitted because I didn't
21 know what the heck I was doing.

22 You know, and that's bothersome to me

1 to this day that this person was acquitted,
2 because I didn't really know what I was doing.

3 I'm you know, a brand new captain and
4 they're like oh, we've got a murder case, and
5 you're trying this.

6 Oh, okay. Didn't even have Law and
7 Order back then to go back you know, and do any
8 research on.

9 (Laughter.)

10 MR. CASSARA: You know, and while the
11 non-enumerated offenses, well, the numerated
12 offenses will be tried by experienced trial
13 counsel, I'm still concerned about you know, some
14 of the other cases.

15 Are we putting young prosecution and
16 defense counsel, who are basically using a
17 checklist from another trial, so.

18 MS. BASHFORD: I'm not sure it has to
19 do with experience because the prepared portions,
20 the summations, the openings, were, were very
21 skillfully done.

22 I mean, these, I mean, very, very

1 good. It's the stuff that sort of comes up where
2 it just seemed to be glossed over a little bit.

3 I don't know that it's experience.

4 DR. MARKOWITZ: But I think that is
5 the experience part, right. It's the ability to
6 pivot. It's the ability to think on your feet.

7 Like, that is the stuff of experience
8 for me, that I see at trial, right.

9 You can prepare for the things that
10 you know and expect to happen in every single
11 trial, right. Openings, closings. The stuff
12 that you expect to happen.

13 It's the things that go awry at trial.
14 The answers that you don't expect to get from a
15 witness. And, the ability to then pivot.

16 And that's where you see the lack of
17 experience really rear its head. And it's the
18 difference between the people who have the
19 experience, and maybe even the passion for
20 litigation.

21 And the people who are maybe brand new
22 to this, or don't have a real love for this, that

1 are in the job because that's the next thing in
2 the career progression.

3 And I think that's where we sort of
4 see the diversion between you know, the different
5 types of counsel in these, in these cases.

6 And so, having worked with all types
7 of counsel on both sides, because I work for both
8 sides equally in these cases.

9 I've worked with some spectacular
10 young litigators, and I've worked with some
11 really seasoned counsel who just have never
12 really gotten their feet underneath them. And
13 are still in the job.

14 So, I think we sort of see all types
15 in these cases. But I do think the experience
16 piece in particular, really does make a
17 difference when things don't happen the way
18 people expect for them to happen in trial.

19 MS. TOKASH: This is Meghan Tokash.

20 Just for the people who did observe
21 the courts-martial, do you think it's in this
22 area, questioning a victim, experience or

1 specialization in terms of someone who like in
2 your special victims unit, Martha, in the DA's
3 office in Manhattan.

4 You know, for people who live in this
5 world of DV and sex assault, when things come up
6 while questioning the victim on the stand, they
7 don't even have to pivot because they know that
8 this is how these victims are because of trauma,
9 and because of specialization.

10 So I wonder about that.

11 MS. BASHFORD: I think that's a lot of
12 it. And, I think the assistants who do this all
13 the time understand that you have to bring out
14 details, details, details, details.

15 It's not enough to say you know, my
16 clothes came off. I mean, that is worth 30
17 questions. How, when, describe.

18 I mean, there's just not much
19 description being elicited and I think that's
20 what really resonates with, with panel members,
21 or jurors is to make it vivid. To make it real.

22 And you know, he kissed me doesn't do

1 too much. You know, kissed you on the cheek,
2 used his, I mean, what does that mean he kissed
3 me?

4 Everybody can have 10 different views
5 of what that might mean. And, you want to know
6 what actually happened.

7 MS. GOLDBERG: So perhaps it's the law
8 professor in me, but some of this seems to call
9 out for training not just in the sense of annual
10 training, but in the sense of effective
11 supervision.

12 So that after the trial, you know,
13 with the checklist, that questions are asked
14 about well, what worked and what didn't, and what
15 would you do next time, to kind and sort of
16 reflection that I think leads to the seasoned,
17 you know, sort of enables people to make the most
18 of their experience.

19 And you know, from everything I
20 understand people are stretched very thin. And I
21 guess, but this is another question for me about
22 what sorts of ongoing training will be built into

1 the system going forward.

2 Just got a separate question also
3 which I know this is not the right time for it,
4 happy to put it on hold.

5 Which is are the panel members polled
6 afterwards, and are there processes to learn from
7 either for the lawyers or the judge, or both, to
8 learn from the panel members about how they, how
9 the experience was and what they, I understood or
10 misunderstood in the process.

11 MR. CASSARA: Oh, I'm sorry, Suzanne.
12 I was allowed to ask a panel member as a general,
13 what, what your thoughts were.

14 Panel members specifically cannot be
15 polled. That's part of the rules. And no, you
16 will never know how a particular panel member
17 voted.

18 And, in fact, one of the instructions
19 is you will not disclose the vote, you will not
20 disclose or discover the vote of yourself, or any
21 other panel member.

22 So unlike when you have a unanimous

1 verdict and you know everybody voted one way or
2 another, we are specifically prohibited from
3 asking how a particular panel member voted.

4 MS. GOLDBERG: But you can ask for the
5 general questions sounds like, well, about the,
6 also having a process.

7 And I wonder if that, think that that
8 is something that is legally permissible. Is it
9 something that's?

10 MR. CASSARA: I think it's a very
11 generic question.

12 And I think most lawyers, and I know
13 most prosecutors certainly, are afraid to do it
14 because you're concerned about you know, what's
15 his name, the Alex Murdaugh effect down in South
16 Carolina where all of a sudden you've got you
17 know, a petition for new trial based on the
18 statement of a panel member.

19 MS. GOLDBERG: Were there any final
20 thoughts on experience level of counsel?

21 MS. LONG: I have a question on that,
22 or maybe more of a statement. It's Jennifer

1 Long, whenever it's appropriate.

2 MS. GALLAGHER: Go right ahead.

3 MS. LONG: This is sort of following
4 up on the conversation by, between Ms. Bashford
5 and Ms. Tokash about experience for training.

6 And this came up yesterday during the
7 testimony I think, on the OSTC and maybe the
8 different services.

9 And I might have misunderstood, but I
10 thought some were talking about new recent
11 graduates coming in and then second, going right
12 into that office and second chairing.

13 And the note I wrote down it was a bad
14 experience because I do think it's invaluable in
15 the civilian world, where we have prosecutors
16 doing low-level cases, or non-sex cases.

17 Voluminous handling issues, learning
18 how to question. And doing that before they
19 specialize because I think it does provide a
20 foundation, and helps with the critical thinking
21 and the process.

22 And I don't think training alone, or

1 observing that actually will ever build the same
2 kind of prosecutor.

3 So, just in listening to, I'm thinking
4 that that kind of experience level, whether they
5 are put in the civilian world, or whether we're
6 thinking about recruiting prosecutors that have
7 gone, gone into the services and been JAGs on
8 lower level cases, just to get that base, would
9 be important.

10 MS. GALLAGHER: At this time, I'm
11 going to go ahead and wrap up this session. And
12 what I'll say is that the staff will take what
13 we've learned from all of you, and kind of some
14 different areas.

15 And we'll try to figure out whether
16 any of the discussion, discussed areas fit into
17 any ongoing studies, or whether within the
18 subcommittees, they want to propose any
19 additional studies into specific areas based on
20 this.

21 MS. BASHFORD: I just want to take one
22 moment to say, I don't know how it works on the

1 federal level, but in the sexual assault field in
2 the military, the resources being provided are so
3 far above and beyond what you would see at a
4 state level.

5 Generally it's one prosecutor, one
6 defense attorney. It's two prosecutors, two
7 defense attorneys in the courts-martial.

8 Each side has an expert that is there
9 throughout the trial, that it seems to me
10 ridiculous if they're still sitting there being
11 paid during deliberations, because there's
12 nothing they can offer at that point.

13 The experts available to everybody to
14 testify. The resources are really abundant.

15 MR. YOB: Chair Smith, I'd just like
16 to say thanks for the great conversation. I want
17 to reiterate what Terry said in the beginning is
18 that staff is here to support you.

19 If you do want to do court-martial
20 observation continue, we are sort of I guess I
21 could put it as a concierge service.

22 So, if you pick the dates and a

1 geographic location where you would like to
2 observe, we will get out there and beat the
3 bushes to try to find a case.

4 You have to keep in mind though, that
5 courts-martial cases, they may be set one week
6 and then a week goes by, and then they've been
7 delayed because whatever reasons.

8 Or you could get there at the last
9 minute and it becomes a plea, or it gets delayed
10 at the last minute.

11 So, you'll just have to keep in mind
12 that that's just the nature of how we operate.

13 So, with that said, I would propose
14 that we take it's 9:49. We can take a 15 minute
15 break as scheduled till 10:05.

16 MS. GALLAGHER: Sounds good, thank
17 you.

18 (Whereupon, the above-entitled matter
19 went off the record at 9:49 a.m. and resumed at
20 10:09 a.m.)

21 MS. PETERS: Hi, DAC-IPAD members.
22 This is Meghan Peters. Terri Saunders and I are

1 just going to give you a quick update on a
2 project we're working on for you all, and that's
3 going to follow immediately with the Article 25
4 criteria briefing that's up on the screen in the
5 slides in front of you. This is just a
6 replacement for the, I think, 9:45 item in the
7 schedule. We've shifted it to now, and so I'll
8 just get started.

9 Since the DAC-IPAD reconstituted last
10 year, and even before then, you all have been
11 asking for case adjudication data to understand
12 the processing and the outcomes of sexual assault
13 cases prosecuted across the Armed Forces.

14 So, to be a little bit more specific,
15 case adjudication data, when the staff talks
16 about it, we are essentially referencing case
17 processing statistics. So, take a case preferred
18 under the UCMJ involving an Article 120 or other
19 sex offense, and find out what were the charges,
20 the disposition, and the outcome of that case and
21 all cases prosecuted in a given time frame.

22 So, again, we have in the past, as the

1 staff, produced for you case processing
2 statistics for cases of interest to this
3 committee, and that was penetrative and contact
4 sexual offense cases.

5 In November of 2019, you all issued a
6 case adjudication data report that again was a
7 comprehensive overview of three or four years'
8 worth of case processing statistics for cases
9 prosecuted under the UCMJ involving penetrative
10 or contact sexual offenses.

11 And subsequent to that, the rules and
12 a lot of the substantive law applicable to sexual
13 assault offenses changed. A lot of changes went
14 into effect the 1st of January 2019 that would
15 require sort of the staff reorganizing the entire
16 approach to producing case processing statistics
17 to match the new processes, right, applicable
18 that had been in effect.

19 And we have been working to bring you
20 information along those lines again because it's
21 been valuable, and even the data that we did
22 collect in years past has been of value. For

1 example, in your pretrial processes' report, a
2 lot of your deliberations and findings were
3 grounded in a review of case data that the staff
4 had pulled for you.

5 For example, we had many years' worth
6 of Article 32 preliminary hearing reports, and we
7 married those up with case outcomes and produced
8 those data for you, and they were central to a
9 lot of your findings and recommendations.

10 So, whether it's providing a
11 comprehensive and informative picture of where
12 cases are falling out in the system and what
13 their results are across the Armed Forces or in a
14 specific service or for a specific type of
15 offense, this has value to you in general and it
16 informs a lot of your substantive projects and
17 your analysis.

18 So, as you've been briefed in recent
19 months, the staff undertook a project consistent
20 with our past methods to provide these data based
21 on a reliable methodology that you all have
22 validated and found important, and that is to

1 collect case data from source documents,
2 standardized source documents produced in the
3 course of every court-martial.

4 So, we do that as an organization by
5 asking the services to provide us with a standard
6 set of case documents. We did that in the past,
7 and as you've been briefed recently, we have done
8 that again for recent years' data to sort of
9 update our case adjudication data project.

10 So, we use a sort of document-based
11 method to look at an actual charge, the actual
12 statement of results of trial, and a few
13 procedural documents generated in between like
14 the pretrial advice and the preliminary hearing
15 findings and recommendations to understand, or a
16 record of dismissal or alternative resolution to
17 sort of understand where all of these cases are
18 falling out.

19 And then we use -- that's the source
20 material, but we as the staff have to build the
21 resources to pull that data, aggregate it and
22 organize it, and to have somebody familiar with

1 statistics and criminology to analyze it.

2 So, again, we just want to update you
3 on how we're going to do that because we're
4 finally at a stage where we have collected, with
5 the help of our friends over here and the service
6 representatives who are also here virtually as
7 well, collecting every case charge and completed,
8 that was charged under the UCMJ and completed in
9 2021 or 2022. We have all of those case
10 documents and they're ready for analysis.

11 So, it takes a while to build a
12 project of this magnitude, but my colleague Terri
13 and I, and it's been a full staff effort, but
14 Terri's going to tell you a little bit about what
15 we're going to do with all of the case documents
16 we've collected to try to make available to you
17 the case adjudication data, the dispositions, and
18 the outcome data that's been so useful and
19 valuable to you in the past.

20 MS. SAUNDERS: Thank you, Meghan. So,
21 as Meghan said, we have all of these cases in our
22 files right now, but we don't have a database.

1 So, what we're working -- what we are at the end
2 stages of working through right now is working
3 through the Library of Congress, the Federal
4 Research Division, for them to build us a
5 database and actually input, right now, for three
6 years' worth of data, so fiscal years '21, '22,
7 and '23, starting at preferral so we would be
8 able to --

9 And I think the plan is that they
10 would be able to do this within about 14 months,
11 so we're, you know, we're -- I think there are a
12 couple of -- I think there is still some ink that
13 needs to be spilled on some agreements between
14 the two organizations, but I think we're just
15 about there to begin that process.

16 So, hopefully within the next 14
17 months, we will be able to provide you the data
18 that Meghan has just talked to you about, so, you
19 know, conviction and acquittal data for not only
20 sexual offense, but for all offenses as a
21 comparison, Article 32 data, you know, how many,
22 how frequently are Article 32 preliminary hearing

1 officers finding there's no probable cause and
2 what's happening to those cases, plea agreements.
3 You know, it obviously won't be, you know, it
4 won't be able to provide an answer to every
5 question we have, but it will at least be a good
6 starting point for most of it.

7 Right now, when we want to do a data
8 collection, we are, you know, sorting through
9 hundreds or thousands of files to find what we
10 need, and that is obviously incredibly
11 inefficient. With this database, it will either
12 be able to directly answer our questions or give
13 us a shortcut to be able to, you know, have a
14 finite group of cases that we can then, you know,
15 dive into some of those case files and find the
16 answer.

17 So, we just wanted to update you on
18 what's going on with that. We'll continue to
19 update you as we go through, but we're very
20 optimistic that soon we are going to have a
21 workable database that will be able to provide
22 you all the data that you have been asking for.

1 Any questions on that? No, okay, thank you.

2 MS. PETERS: Thank you.

3 MR. YOB: Thanks to both of you for
4 the great efforts on that database. I think
5 we're going to get to the finish line before the
6 fiscal year ends. It will be pretty close, but
7 it looks like it's on track and we're going to
8 make it, I think. I'm optimistic.

9 So, now we move onto the Policy
10 Subcommittee presentation and they're going to
11 talk about deliberations on Article 25, so I'll
12 throw it over to Terri Gallagher again with this.

13 MS. GALLAGHER: Thank you, Pete.
14 Thank you all and good morning, I guess we're
15 still in morning, to the members. So, for this
16 session, we're going to present information that
17 the Policy Subcommittee has gathered on Article
18 25 court-martial panel selection criteria and the
19 member selection process, and as well, we have
20 some proposed recommendations for your
21 deliberation.

22 So, for your reference, you should all

1 have in front of you -- I know that these screens
2 are not situated ideally for you to be able to
3 see the slides that are up on the screens, but we
4 did provide you a copy of the slides that should
5 be in front of you or perhaps in your folder so
6 that you can follow along without craning your
7 necks.

8 Also in your folders that were
9 provided to you this morning was a single piece
10 of paper. It's draft panel selection
11 recommendations and there are nine proposed
12 recommendations on that.

13 For more background information, you
14 know, in Tab 7 of your materials, we also have
15 the background and deliberation guide which has a
16 little more information. We go into a little bit
17 more detail on some of the background
18 information, you know, if you want to review that
19 later, but we're not going to go through that
20 particular document in this session.

21 So, first, the way, the order of
22 events here is that Terri and I are going to

1 present a summary of the information that the
2 subcommittee replied on in formulating the
3 recommendations that you have in front of you,
4 along with an overview of the proposed selection
5 process and what it would look like if these
6 recommendations were adopted. So, then at that
7 point, we will open the floor to the committee to
8 discuss the draft recommendations.

9 So, to get started on the information
10 summary, you know, again, this information is
11 provided in greater detail in your background and
12 deliberation guide in your materials, but we're
13 going to give you an overview here. There we go.

14 So, it all starts with Article 25.
15 We're on slide two now. It all starts with
16 Article 25 of the UCMJ, and so we're going to
17 discuss the changes to Article 25 regarding panel
18 member selection criteria and the selection
19 process.

20 So, the pertinent language that you
21 see here in front of you has existed virtually
22 unchanged since Article 25 was incorporated into

1 the Uniform Code of Military Justice back in
2 1950.

3 So, the very language of Article 25
4 requires the convening authority to use their
5 subjective judgment to select the best-qualified
6 court-martial panel members based on the criteria
7 of age, education, experience, length of service,
8 and judicial temperament. Article 25 also
9 provides that no panel member may be junior in
10 rank to the accused when it can be avoided.

11 MS. GALLAGHER: So, if you could all
12 please look at the current selection process
13 slide, and what this is designed to do is give
14 you just the basic general overview of the
15 process.

16 The services, in that black box or the
17 black oval, their processes differ somewhat
18 depending on whether they're doing standing
19 panels, individual panels, a large installation,
20 small installation. They have differences, but
21 overall, this is the general system.

22 You have the lower level commands.

1 They take the original source pool of potential
2 court-martial members. These are usually the
3 servicemembers under the convening authority's
4 command or that they have kind of borrowed based
5 on geographic location. You heard a little bit
6 about that yesterday.

7 So, they solicit nominations, and, you
8 know, several different commands, different
9 layers of command will propose members that are
10 available and that they have selected to nominate
11 based on Article 25 criteria, and those go to the
12 military justice office for screening, and
13 there's --

14 You know, they go through
15 questionnaires and other information in order to
16 kind of remove people from the list that may not
17 be available or qualified, and then it goes --
18 you know, they prepare a packet that goes to the
19 convening authority himself.

20 You heard from the convening
21 authorities yesterday kind of the types of
22 material they get. They get maybe a list of

1 members that, you know, for their approval or
2 disapproval, or they get a long list, you know,
3 and they select from the long list. They
4 generally get like an alpha roster of all
5 individuals in the command that they can also go
6 down into and select from.

7 So, they do their selection and they
8 detail the members to a specific convening order,
9 and then you have -- so that pool is then
10 narrowed. Either coming up, the special trial
11 counsel or the convening authority will then
12 refer charges from a specific case to that
13 specific convening order that identifies members.

14 Only then are the charges provided to
15 the military judge who sets a trial date and sets
16 dates for the accused to select the forum that he
17 wants to be tried by, be it military judge or
18 members. If it's an enlisted servicemember, then
19 they can request enlisted member representation.

20 And then when it comes -- and now
21 beginning in December, they will also provide a
22 list of the detailed members to the military

1 judge who will randomize the members detailed to
2 the court, assign them random numbers, and those
3 numbers will be the order of priority.

4 So, the judge will determine how many
5 members are supposed to show up at trial, and so
6 if they detailed 20 members and the judge says
7 look, only 15 of them need to show up for
8 assembly to be sworn in, the other five, make
9 sure they're available in case they have to run
10 out at lunch and bring in more members.

11 And so, but because a great length of
12 time has gone on between either setting the
13 standing panel or detailing those members at
14 referral, there may be a lot of changes shortly
15 before trial because of availability and excusal
16 reasons, and so then they have to amend that
17 convening order, so that's the current selection
18 process.

19 And you heard a lot yesterday as well
20 about why change the system? I mean, here's our
21 system. It's been operational for a lot of
22 years. Why change it and why change it now?

1 And the answer to that is in some
2 sense the consolidation of power and authority in
3 the convening authority and the potential for
4 him/her to unlawfully influence the court-martial
5 has been a source of discontent since 1950 with
6 the implementation of the Uniform Code of
7 Military Justice and maybe even before that,
8 which impacts both trust in the system and
9 fairness, both actual and perceived.

10 The lack of transparency adds to the
11 distrust and can provide cover for abuses.
12 Despite these concerns of unlawful command
13 influence on the court-martial, the expansive
14 duties court members have historically performed,
15 data fact finding, along with sentencing and
16 judicial functions, have supported the need for
17 the convening authority to personally select and
18 detail these best-qualified members.

19 And so, why are we exploring change
20 now? These conditions that have historically
21 supported this best-qualified system have changed
22 a great deal. Beginning in December, the only

1 duty the court-martial members will have is fact
2 finding. The sentencing authority for all but
3 capital cases will shift to the military judges.

4 Additionally, the last type of special
5 court-martial they could be convened without a
6 military judge has been eliminated, so all
7 special and general court-martials are presided
8 over by a military judge.

9 Additionally, you also have the
10 congressional mandate to, by December of 2024,
11 implement a form of random selection in this
12 process. So, you have that new requirement, and
13 then importantly, you now have significant
14 technological improvements over the past 50 years
15 that enable all services to have a computer
16 randomly select panel members according to
17 preselected criteria. And so, the next slide?

18 These historic changes have set the
19 stage for finally addressing the concerns voiced
20 by the IRC in making their recommendation to
21 randomize member selection. That would be the
22 need to build trust in the system and to bring

1 actual and perceived fairness to the process.

2 Although there are protections against
3 convening authorities using the authority to
4 unlawfully influence the system, abuse is very
5 hard to prove, but there are instances in which
6 it has been proven.

7 So, to address these concerns, the IRC
8 recommended eliminating the Article 25 best-
9 qualified criteria in favor of leaving the
10 determination of court-martial member
11 qualifications to the voir dire process of the
12 court-martial.

13 Instead, members would be randomly
14 selected by the convening authority, who would
15 continue to make, or randomly selected with the
16 convening authority continuing to make those
17 member availability determinations.

18 MS. SAUNDERS: So, while Article 25
19 has remained unchanged for over 70 years, there
20 have been significant changes in the court-
21 martial process during that time as Terri has
22 alluded to earlier. So, when the UCMJ was first

1 enacted in 1950, you know, there was no trial
2 judiciary, so rather than having a military judge
3 preside over the court-martial, a law officer was
4 appointed, often from the staff of the staff
5 judge advocate.

6 They did not have the powers of
7 today's military judges. So, often instead, the
8 senior member of the panel, the president of the
9 panel, would perform some of the administrative
10 and judicial functions such as setting the time
11 and place of the trial, administering the oath to
12 counsel, and some other administrative and
13 judicial functions.

14 In special courts-martial, there
15 wasn't even a law officer assigned, and so more
16 of that judicial role fell on the president of
17 the panel. So, and again, the members were also
18 responsible for both findings and sentencing.

19 The Military Justice Act of 1968
20 brought about the creation of the trial
21 judiciary, which meant that a military judge then
22 presided over the court-martial, and the panel

1 president was relieved of many of those
2 administrative and judicial tasks and assumed the
3 more traditional role of a juror, although they
4 were still responsible for sentencing.

5 With the creation of the trial
6 judiciary, accused servicemembers now also had
7 the option of requesting that the military judge
8 hear the case. It wasn't until the fiscal year
9 2022 NDAA that Congress amended the UCMJ to
10 require that military judges serve as the
11 sentencing authority in all but capital cases,
12 and this provision, as Terri said, will go into
13 effect in December of this year.

14 And with those changes in effect, the
15 function of military panel members will be
16 essentially the same as for jurors in federal and
17 most state courts, to determine whether the
18 government has met its burden of proving that the
19 accused is guilty beyond a reasonable doubt.

20 And then finally, in the FY23 NDAA,
21 Congress amended Article 25 to require
22 randomization of the panel selection process

1 according to regulations prescribed by the
2 President, and the Joint Service Committee is
3 currently working on those changes for the
4 executive order, so now is the time for this
5 committee to weigh in on these issues.

6 MS. GALLAGHER: So, in 1999, so about
7 23 years ago, Congress required the Secretary of
8 Defense to report on alternatives to the current
9 court-martial selection system. However, they
10 also required the alternatives to comply with the
11 Article 25 best criteria mandate and selection
12 criteria, which is, you know, somewhat similar to
13 where we are now where we still have Article 25
14 best-qualified criteria in place, but we also
15 have to look at the alternative to bring random
16 selection into the process.

17 In the report, the JSC relied heavily
18 on the need for military court-martial members to
19 have a high degree of competence to perform
20 unique military duties, that of fact finding,
21 sentencing, and judicial roles.

22 The JSC differentiated the civilian

1 system's use of a minimum level of competence in
2 order to allow all citizens to participate in the
3 process from the high degree of competence needed
4 for the military courts. When they talked about
5 high levels of competence for fact finding, they
6 talked about highly competent members are able to
7 reach fair and accurate verdicts more
8 efficiently.

9 For sentencing, they did single this
10 out as a basis that would require members to
11 possess a unique level of competency within the
12 military, and the judicial roles, which are the
13 cases without the military judge, though the
14 president would be able to resolve procedural and
15 evidentiary issues.

16 And as you've learned, two of those
17 are gone, and now they're fact finding, and, you
18 know, whenever you think about the level of
19 competency that's needed for fact finding is what
20 you're left with. So, the JSC explored various
21 alternatives, you know, selection before, random
22 selection before the convening authority does his

1 final chop, the convening authority doing their
2 final chop and then randomizing it, and a variety
3 of others.

4 They evaluated against three criteria,
5 the first being will the system select competent
6 members under the best-qualified criteria?
7 Second, will the system select impartial members?
8 And third, will the alternative restrict the
9 ability to conduct military missions?

10 The JSC did determine that the current
11 selection system is the best system to ensure
12 fair panels of court-martial members who are best
13 qualified. In essence, they sort of determined
14 that a random selection system is not compatible
15 with the best-qualified mandate and Article 25
16 selection criteria.

17 So, you know, that begs the question
18 whether the implementation of these changes to
19 the system eliminate the need for the convening
20 authority to personally select the best-qualified
21 court-martial members based on the criteria.

22 The JSC, during their examination,

1 found no evidence of systemic unfairness or
2 unlawful command influence. They did acknowledge
3 random methods reduce the possibility and the
4 perception of unlawful command influence, but
5 they determined the randomized processes were not
6 uniformly operable in all units, locations, and
7 conditions, and they increased administrative
8 burdens and reduced member competency.

9 So, the other thing that we had was a
10 test. This is kind of the largest test of
11 randomizing the selection process. Now, this
12 occurred in Fort Riley, Kansas about, you know,
13 roughly 50 years ago.

14 And the community that was polled
15 after this, I think it was about a 14-month
16 process, the community members supported the
17 randomization. They, you know, commented that it
18 improved both the actual and perceived fairness
19 of the system.

20 During this, the members went from
21 being very senior members to have a lot more
22 junior representation on the panels. While the

1 community and the defense were very supportive of
2 this randomization process, the trial counsel and
3 the military judges expressed some concerns about
4 military competency and the ability to follow the
5 judge's instructions.

6 Then immediately -- and the
7 recommendation was that this test be expanded to
8 gain more information about the functioning, but
9 immediately following the randomization test, the
10 GAO was directed to issue a report, and so they
11 kind of put a pause on that pending this GAO
12 report, which was issued in 1977, and they took
13 into consideration this Fort Riley test project
14 as well as other things.

15 This test was -- well, they
16 recommended random selection of military jurors
17 from a pool made up of qualified jurors
18 representing a cross section of the military
19 community. This was a two-year study by them of
20 civilian and military jury selection processes.

21 They noted the clear potential for
22 abuse in the convening authority power to select

1 jurors combined with the low number of jurors
2 needed to convict, and that was at a time when
3 there was not a set number of court-martial
4 members like there is now.

5 With that background, if you would
6 take a look at slide nine, which is the proposed
7 selection system? This is what the process would
8 look like based on the recommendations from the
9 Policy Subcommittee.

10 Instead of starting the entire process
11 with selecting members, instead the first step
12 would be actually referring the charges to a
13 convening authority, an administrative type of
14 convening order that creates the court, but does
15 not detail members, and then those referred
16 charged would be submitted to the military judge
17 who can set the trial date and form election
18 dates.

19 Only then, in light of the trial date
20 and perhaps in light of the forum selection,
21 would members be selected, and they would be
22 selected more by a computerized selection process

1 that takes into account different variables like,
2 you know, all members must be senior to the
3 accused, or the selection must be diverse by
4 ranks.

5 So, the computer would generate a list
6 of members, the list of members, you know,
7 however many were determined to be needed, 50,
8 100, however many. You'd get a list of these
9 members and the command would then screen them
10 for availability. Are these members going to be
11 available next month or in two months for these
12 trial dates?

13 And they would make the availability
14 determinations. The members that are available
15 then would be screened for further
16 disqualifications, if any, right, and that list
17 would then go to the convening authority, who
18 would detail the remaining members to that
19 specified court-martial that was already
20 convened.

21 The list of members would then go to
22 the military judge, who would assign them the

1 random numbers and tell them how many of those
2 members needed to appear at trial. And so, that
3 is what --

4 MS. BASHFORD: Can I interrupt for
5 just a moment?

6 MS. GALLAGHER: Yes.

7 MS. BASHFORD: Can you just take a
8 moment and say what was the disqualification
9 screening system? Thank you.

10 MS. GALLAGHER: So, yes, and that's
11 one of the recommendations, so we'll talk about
12 that a little further on, but for example,
13 members might be disqualified or pulled off of
14 the list now if they are pending investigation,
15 or if they have received non-judicial punishment.
16 I think somebody spoke yesterday about a letter
17 of reprimand.

18 It kind of wouldn't be really the best
19 qualified available in the command if you're
20 somebody that's, you know, kind of having your
21 own disciplinary problems, and so people are
22 being, you know, screened out along the way for

1 different reasons right now. Maybe you've got a
2 federal conviction somewhere, right?

3 So, one of our proposals is that, you
4 know, there be a uniform list of what should
5 disqualify you to be applied instead of ad hoc
6 determinations. So, that's the type of screen
7 according to the prescribed disqualifiers.

8 For example, in the Fort Riley study,
9 anyone that had within three years received non-
10 judicial punishment was automatically
11 disqualified based on the criteria the general
12 court-martial convening authority had set, and a
13 large, a large number of the pool of selected
14 members was eliminated, were eliminated based on
15 the non-judicial punishment criteria.

16 MS. SAUNDERS: Okay, moving onto the
17 issue of diversity in panel selection, you heard
18 from some of the convening authorities yesterday,
19 and I know a number of you observed this morning
20 in the earlier session, talking about, you know,
21 the diversity of the panels that you observed,
22 and some of the convening authorities spoke to,

1 you know, it was important to them to ensure that
2 there was diversity on these court-martial
3 panels.

4 Where that comes from and what allows
5 that is there's a case, United States v.
6 Crawford, back from, you know, from 1964. The
7 Court of Military Appeals, which is the
8 predecessor of the Court of Appeals for the Armed
9 Forces today, you know, issued a decision that
10 said, basically held that it was permissible for
11 a convening authority to consider race when
12 selecting a panel for purposes of inclusivity,
13 obviously not for excluding them.

14 And we've heard, you know, we've heard
15 from the convening authorities and we've also
16 heard from the services that convening
17 authorities frequently do consider race,
18 ethnicity, gender for purposes of inclusivity
19 when selecting panels.

20 So, the subcommittee wanted to ensure
21 that if we're moving from a system where the
22 convening authority is picking best-qualified

1 members under the current criteria, that if it
2 became a random system, that this would still,
3 you know, that there would still be a method to
4 be able to ensure diversity in the panels, you
5 know, so, and we'll talk about that a little bit
6 in a little bit when we get into the
7 recommendations.

8 The potential caveat to that, you
9 perhaps have heard mention of this case, United
10 States v. Jeter, which is pending decision in
11 front of the Court of Appeals for the Armed
12 Forces now.

13 I've been checking the website every
14 morning, and as of this morning, it is still not
15 there, but I think we're expecting a decision
16 before the end of September, which is when the
17 court's term ends. And the question in that
18 case, or one of the questions in that case is
19 whether or not United States v. Crawford, the
20 decision I just spoke to you about, should be
21 overruled.

22 In other words, should the convening

1 authority be allowed to consider race, ethnicity,
2 gender for purposes of inclusivity? So, more to
3 come on that hopefully within the next ten days,
4 I believe. So, that's where we're at with
5 diversity.

6 We heard from a number of
7 stakeholders, both through RFI, you know,
8 responses to RFIs and in person, both at
9 subcommittee meetings and at panel, or at the
10 full committee meetings. You know, we're so
11 incredibly grateful to the military services.

12 I know we've hauled so many of these
13 groups in here on numerous occasions to speak on
14 a variety of issues, so many thanks to all of the
15 service organizations that came and spoke on this
16 issue, as well as some victim advocacy
17 organizations and members of academia responded
18 to some requests for information from us on that
19 as well.

20 And, of course, we heard from a senior
21 enlisted member panel, and just yesterday from
22 the former general courts-martial convening

1 authority, and they provided, you know, a
2 valuable, a lot of valuable information on this
3 issue and a lot of valuable perspectives.

4 Okay, so now we're going to turn to
5 the proposed recommendations. There are nine of
6 them, and you'll see that the recommendations are
7 very intertwined with each other. You know, they
8 build on each other as you go along. So, I'm
9 going to give you a brief roadmap to the
10 recommendations before we get going.

11 The recommendations start by
12 recommending that the current Article 25
13 requirement that the convening authority select
14 members who they deem as best qualified based on
15 certain criteria be eliminated. The following
16 recommendations cover a modified randomized
17 system to replace how members are selected and
18 what authorities the convening authority should
19 retain.

20 And then the next few recommendations
21 discuss objective criteria for service as a panel
22 member that would replace the current best-

1 qualified criteria of age, education, training,
2 experience, and judicial temperament, and then
3 the final recommendation discusses the timing of
4 when the members are detailed to a court-martial.

5 Because of how intertwined these
6 recommendations are, we're going to discuss the
7 recommendations in groups. We've grouped them in
8 a way that we think makes sense, although you
9 will, you know, you can deliberate individually
10 on each of them.

11 So, Terri is going to start by
12 discussing recommendations one, two, and three,
13 and then we'll open the floor for the committee
14 deliberations. And one thing, following the
15 meeting today, we are going to prepare the report
16 on this, which we will present at the December
17 public meeting.

18 HON. SMITH: Before you start, Terri,
19 can you just kind of give a quick little Article
20 25 versus rule explanation for the members of the
21 committee?

22 MS. SAUNDERS: Certainly, so you will

1 note that some of the recommendations call for
2 amendments to Article 25. Obviously, that would
3 have to go through Congress to amend Article 25
4 in there, so that's recommendation one, four,
5 six, seven, and nine.

6 But the other recommendations call for
7 changes to the rules for court-martial, which
8 goes through the executive order process, which
9 typically would initiate with the Joint Service
10 Committee. They would make recommendations to
11 change the rules for court-martial, and then it
12 would go through this executive order process up
13 to the President for signature.

14 As was mentioned earlier, there has
15 been a recent change to Article 25 that does
16 require randomization in the court member
17 selection process, and that amendment directs the
18 President to establish rules for that, so that is
19 currently going through this process right now
20 with the statutory date of December of 2024 when
21 those need to be established.

22 So, some of the recommendations, and

1 we'll highlight that as we go through the
2 recommendations, which ones are calling for an
3 amendment to the article through Congress and
4 which ones would go through the rules' process or
5 perhaps would be a DoD-level recommendation,
6 recommended change.

7 MS. GALLAGHER: So, I'm going to just
8 give some brief comments on recommendations one,
9 two, and three, and then open the floor to Judge
10 Smith to see if she has any additional comments
11 on those. Are we going to go through all of them
12 before deliberation or --

13 MS. SAUNDERS: Why don't we just do --

14 MS. GALLAGHER: One, two, and three?

15 MS. SAUNDERS: Yeah.

16 MS. GALLAGHER: Yeah, and then we'll
17 open the floor up for everyone to discuss those
18 recommendations. So, recommendation one -- well,
19 the three recommendations taken together would
20 remove the ability for the convening authority to
21 handpick panel members based on his or her
22 subjective opinion regarding who is best

1 qualified according to the criteria listed in
2 Article 25, age, education, training, experience,
3 length of service, and judicial temperament.

4 Instead, there would be a modified
5 random selection of members using the services'
6 personnel and pay systems as the base computer
7 system. The convening authority would not be
8 involved in the selection process, but would
9 retain the authority to determine availability of
10 the selected members and retain authority to
11 excuse the selected members.

12 The selection wouldn't be entirely
13 random, but would be filtered to include required
14 eligibility criteria such as incorporation of
15 diversity of members based on rank, perhaps race,
16 ethnicity, and gender. You have the seniority,
17 senior to the accused requirement.

18 And we also recommend a pilot program
19 to create -- and when I say we, I really mean the
20 Policy Subcommittee. Unfortunately, Chair
21 Schwenk could not be with us today -- recommend a
22 pilot program to create a court administrator

1 position for the selection process as a possible
2 alternative to the command or staff judge
3 advocate office running the program.

4 As discussed earlier, this seems to be
5 the right time for those changes because of the
6 changes to the system that are being made. The
7 court-martial system looks very different now
8 than it did when the Article 25 criteria were put
9 in place.

10 Elimination of the subjective best-
11 qualified criteria and implementation of a
12 randomized selection system will go a long way
13 towards eliminating the perception that the
14 convening authority is selecting members most
15 likely to convict the accused, and will provide a
16 more transparent process that will increase trust
17 and confidence in the system, and you've heard,
18 you know, computerizing the selection also
19 removes the embedded biases from the different
20 levels of nominators and screeners along the way.

21 With that, Judge Smith, do you have
22 any additional comments you'd like to make before

1 deliberation on recommendations one, two, and
2 three?

3 HON. SMITH: So, I thought the
4 convening authority panel yesterday made some
5 good points, but I think what the committee has
6 been thinking all along is really a couple of
7 different things. One, this idea of
8 randomization is kind of contrary to holding onto
9 Article 25 and allowing the convening authority
10 to continue to pick, in essence, the panel.

11 If it's randomization, then it's
12 randomization with the caveat that, making sure
13 that the proper, you know, that there's a
14 representation of ranks and that a more senior
15 officer doesn't have less senior officers.

16 So, obviously, there would be an
17 algorithm to make sure that those issues or those
18 criteria are met with respect to selection, but
19 it seems that if we want to have a process that
20 is transparent, that is fair and perceived to be
21 fair, then the defense should be involved in the
22 jury selection process. The prosecution should

1 be involved in that initial process.

2 It just seems that at this point, the
3 Article 25 criteria has kind of had its day and
4 it makes more sense to, if we're moving to
5 randomization as Congress has statutorily
6 required, then the Article 25 seems outdated and
7 far too subjective.

8 MS. GOLDBERG: Building upon Judge
9 Smith, first of all, thank you for the great
10 presentation and the tremendous work on
11 supporting our subcommittee. Stepping back, at
12 the most general level, right, the system is
13 changing, and, you know, regardless of what this
14 committee advises.

15 And I think as you both pointed out,
16 the system has changed tremendously over the
17 years since Article 25 was put in place, so the
18 questions to my mind are, you know, what problems
19 are we trying to solve for, and because best
20 qualified has been a kind of foundational element
21 of the analysis, the question is best qualified
22 for what purpose since the role of the panel

1 members has changed significantly over time?

2 And so, it does strike me that on a
3 question -- you know, I was unable to be a
4 panelist today, but can things just sort of
5 basically stay the same? You know, the answer is
6 there is no staying the same because the process
7 has changed, and so the question is how does this
8 committee advise in a responsible way with
9 respect to the updating of the standards?

10 So, it seems to be at least, or I have
11 persuaded that the time is exactly right to
12 consider changes, and that to not make changes
13 would sort of prove further cost. It's not that
14 maintaining the status quo has no cost. I think
15 it really has serious costs for many of the
16 reasons you laid out.

17 And when I turn to the next question,
18 at least for me, which is, well, what problems
19 are we trying to solve for when we think about
20 those changes? My sense is we have generally
21 heard that commands try to do their very best to
22 ensure fair selection, and that many of them,

1 certainly in their own eyes, are doing that, and
2 they may well be doing that.

3 I mean, we don't have kind of a
4 strictly empirical way to evaluate that, but what
5 we have heard consistently is that there are
6 concerns about perceptions of unfairness in the
7 process, and that really at every single meeting
8 that I've been a part of, we've heard that from
9 people who have been victims, or defendants in a
10 process, or the accused in the process, and we've
11 heard the concern raised about perceptions of
12 fairness are valid, the concerns about
13 perceptions and fairness validated by members of
14 the services and former members who have spoken
15 to us.

16 So, then when we think about the
17 question of, well, what to do, Congress has
18 obviously answered with respect to randomization,
19 and the question is then how to implement, right?
20 And I think that is what these recommendations
21 speak to.

22 I'll just say kind of two things on

1 the substance of the draft recommendations. I
2 want to -- one is best qualified as fact finder
3 is different from best qualified to function as
4 kind of fact finder and sentencer.

5 And we talked a lot in the
6 subcommittee about the role of civilian jurors
7 who, you know, for whom the qualifications are,
8 generally speaking, you have to be 18 or older,
9 not convicted of a felony, and speak English,
10 right, and maybe there are some others, but, you
11 know, sort of on the assumption that people who
12 can hear, you know, who can understand the
13 evidence presented will be able to find facts and
14 follow the instructions, and so -- sorry, did I
15 miss something?

16 PARTICIPANT: No, no, no.

17 MS. GOLDBERG: Okay, one of the pieces
18 that struck me as important, which is in a later
19 recommendation, but I think is worth thinking
20 about as we're talking about this right now, is
21 the point that because the services differ, that
22 how you experience your military service is an

1 important piece as we talk about removing or
2 changing what is required by Article 25, and that
3 is where, at least to me, we require the two
4 years in service prior to being, participating as
5 a panel member is an important point and one that
6 is worth considering as we talk more generally
7 about making a change here.

8 MR. CASSARA: Suzanne, I agree. As I
9 was listening to the five two-star generals, I
10 think they were all two stars, weren't they?

11 MS. GOLDBERG: Yeah.

12 MR. CASSARA: I think so.

13 (Off-microphone comments.)

14 MR. CASSARA: Okay, I don't know what
15 that is, but, anyway, when I was listening to all
16 of the flag officers yesterday, I just disagree.
17 I don't know another way to put it. I just
18 disagree as to their desire to retain control
19 over the selection process, and one of the
20 comments that struck me yesterday is when one of
21 the gentlemen said, you know, and I've got my
22 lawyer in there advising me, and my thought was

1 that's the prosecutor. I mean, no matter how
2 else you slice it, the staff judge advocate is
3 the senior prosecutor on a military base, or
4 there are certain --

5 And I realize that the rules say that
6 they perform a quasi-traditional function,
7 whatever that might be, and, you know, but they
8 are the bosses of the prosecutor, and the senior
9 trial counsel, and the chief of military justice.
10 So, what the convening authority is saying is as
11 I'm selecting the jury, I've got the senior
12 prosecutor in the room helping me with that
13 process.

14 And I remember former Chief Judge Cox
15 famously saying a number of years ago, when
16 discussing the issue of peremptory strikes, that
17 the government gets unlimited peremptory strikes
18 because they pick the panel. So, I agree with
19 Suzanne. The time is now.

20 As for the two-year requirement, I
21 think if nothing else, the fact that most
22 servicemembers spend their first two years

1 learning how to be a servicemember and, you know,
2 a lot of them are in training for two years --
3 you know, I've got a family relative who is in
4 flight school, and she'll be in flight school for
5 three or four years before she's able to go out
6 into the fleet.

7 So, I just think from a practicality
8 standpoint, even your basic, you know, even your
9 lower enlisted officers or lower enlisted
10 soldiers and junior officers are really not
11 available for two years as they learn how to be a
12 servicemember, but in terms of the elimination of
13 Article 25, I agree with Suzanne completely. The
14 time is now.

15 HON. SMITH: The elimination of the
16 criteria, the best qualified.

17 MR. CASSARA: Yes.

18 HON. SMITH: Not the entire --

19 MR. CASSARA: No.

20 HON. SMITH: Okay.

21 MS. BASHFORD: I have one question and
22 one comment. The question first, what does the

1 convening authority should retain the authority
2 to detail the panel members mean?

3 MS. GALLAGHER: So, the convening
4 authority owns all of the people. You know,
5 they're his people under his command subject to
6 his orders, and, you know, I discussed the issue
7 of civilian jurors not showing up. The reason
8 military jurors show up is because they are told
9 to show up, and so, the convening authority would
10 still detail the members or else --

11 MS. BASHFORD: Detail some of the
12 members.

13 MS. GALLAGHER: Well, he would detail
14 the randomly selected members --

15 MS. BASHFORD: Right.

16 MS. GALLAGHER: -- to the court-
17 martial. So, he's got the list of randomly
18 selected members and he has to then order them to
19 appear at the court.

20 MS. BASHFORD: So, you would be
21 randomly selecting members for every single
22 court-martial?

1 MS. GALLAGHER: I think that that is
2 something that the services would work out,
3 whether they are still able to do standing panels
4 of some sort or whether a random selection is on
5 a case by case basis.

6 MS. BASHFORD: I'm just trying to
7 decide, understand does the detailing step
8 involve the command looking through the randomly
9 selected list and then choosing people from that
10 list to go to the court-martial?

11 MS. GALLAGHER: No, it would be a --
12 you detail the entire list. Here is your list.
13 Detail them to the court. But then that detailed
14 list now would be randomized by the military
15 judge, so --

16 (Simultaneous speaking.)

17 MS. GALLAGHER: So, we're trying to
18 eliminate the ability -- the convening authority
19 would no longer have the ability to look at that
20 randomly selected list and, say, just cross
21 somebody off.

22 MS. BASHFORD: So, if you are at a

1 base where you have a standing list, those same
2 people would be detailed to every court-martial
3 for a particular period of time? Are you going
4 to mark it professional jurors sort of?

5 MS. GALLAGHER: I think that it would
6 be unlikely that the professional juror aspect
7 would occur because you're, under this proposed
8 system, you're selecting jurors close in time,
9 relatively close in time to the trial date, and
10 with the ability to randomly select members, you
11 know, the service -- I mean, that's part of what
12 the JSC and the services would have to figure out
13 is whether, when the convening authority is
14 eliminated and you have a random selection
15 system, is it even still --

16 I mean, they're going to have to
17 figure out is it still possible to do their
18 pools, standing pools, or will they be able to do
19 it on a case by case basis? So, I mean, I don't
20 have an answer for that because I really think
21 that is something that would be worked out by the
22 services.

1 MS. BASHFORD: And then my comment is
2 the DAC-IPAD has always been data driven. I
3 think it has really kind of differentiated us
4 from other groups. And we seem to be moving
5 towards a recommendation based on perception and
6 anecdote.

7 And oddly, the DAC-IPAD has given to
8 one of the subcommittees, the Case Review
9 Subcommittee, to look at what these orders
10 actually look like, to see if they are accurate,
11 what compositions of people are being, in given
12 years, being brought forward, and this just seems
13 a little premature to me because we don't know
14 what it actually looks like as opposed to
15 people's perceptions or anecdotes.

16 MS. GALLAGHER: I think that what the
17 Policy Subcommittee has used as the basis is that
18 assuming that these panels are diverse, these are
19 the recommendations, assuming they're diverse,
20 and I think that they -- the preliminary
21 indications, at least with regards to the Army,
22 the data is that there is diversity.

1 In the pool or, you know, the detailed
2 members that show up at court for swearing in,
3 there is diversity, and so that the baseline
4 assumption, that the current process is resulting
5 in diversity to a greater extent than the past.

6 HON. SMITH: I also just think that
7 this is more -- as much as the perceptions and
8 issues in my mind would be more of a best
9 practice issue, it just doesn't, it just, in
10 2023, when we're looking at something that was
11 created in 1950, it just isn't a best practice to
12 have one person, or whether they're there with
13 their lawyers, and as Bill pointed out, they
14 probably are the prosecutors, it just wouldn't --
15 it isn't a best practice to have that be the
16 methodology for picking potential jurors when
17 you're talking about offenses that, you know,
18 could land someone in jail for the rest of their
19 lives or whatever.

20 A best practice would be or is to
21 allow the attorneys to be involved, to allow the
22 accused to sit in and observe the process, and to

1 use voir dire and questioning to determine any
2 biases that potential jurors might have as
3 opposed to having one person or a couple of
4 people pick the panel. So, I see it more as a
5 best process issue and a best practice issue, so
6 I'm not sure that data plays as big of a role
7 when we're talking about a best practice.

8 DR. MARKOWITZ: I also don't think
9 that we can ignore the fact that we've heard,
10 again, from both the people who have been accused
11 and victims in these cases, and not just us but
12 the IRC as well, that the perception is
13 inherently unfair. And I don't think that in a
14 case -- in this particular case that we can --
15 and we've heard it over and over again, right?
16 We continue to hear that, and I do think we have
17 to pay attention to that.

18 MS. TOKASH: This is Meghan Tokash.
19 Thought a lot about this and have kind of gone
20 back and forth but am landing on that the issue
21 seems to be the commander and the command
22 influence, and it does seem to be a perception

1 issue. I also think that in the year 2023 where
2 servicemembers have instant access to outside
3 media and they see what civilian courts look like
4 and how they act and behave and the jurors are
5 picked from either voter registration rolls or
6 motor vehicle registration rolls, I mean it's,
7 you know, completely random in that regard.

8 And as I look through these
9 recommendations, if I'm right -- and please
10 correct me if I'm wrong -- only recommendation 3
11 is one that would not still involve the convening
12 authority. So this would be a stove-piped court
13 administration office that would be solely
14 responsible that would actually take away the
15 power of the commander's, quote, "ownership" as
16 you mentioned, Ms. Gallagher, of that potential
17 servicemember for a time being and now they are a
18 member of a veneer for a court that they must sit
19 in judgment of you and determine guilt or
20 innocence.

21 To me, draft recommendation 3 --
22 again, if I'm wrong, and please correct me if I

1 am -- is the one charted course that seems to
2 ameliorate the entire perception of the command
3 having any hand in this. I don't know what this
4 will look like. I imagine the services won't
5 like it, but I also think if we're trying to
6 legitimize Article 1 courts and bring them into
7 the year 2023 when the offenses that they are
8 primarily prosecuting, based on the data that we,
9 as members, have seen, largely do not involve
10 military offenses; right? It's rape. It's
11 sexual assault, domestic violence. I still hope
12 that we can get, as members, some data as to the
13 projected docket of the OSTC; right? Again, if I
14 were a betting person, I'd say that the OSTC is
15 going to be in charge of at least 80 percent of
16 the general court-martial docket. And if that's
17 the case and they're not military-specific
18 crimes, then what is the harm in trying to make
19 or stand up a court administrative office for the
20 Department of Defense to handle what once was a
21 commander's responsibility? That would then
22 remove the perception that many members of the

1 public have and that many members who have gone
2 through the process have actually experienced.

3 So those are just my thoughts as I've
4 been listening to all of the evidence that's come
5 before us. And I agree with you, Martha. I
6 don't think that we have data on this, but if
7 it's a perception issue and if we can cure that
8 by making a good recommendation to get rid of
9 that perception issue, then I think it's a win
10 for the system.

11 (Simultaneous speaking.)

12 JUDGE GRIMM: Madam Chair, if it's
13 appropriate, I'd like to make a comment but
14 whatever you feel is appropriate.

15 HON. SMITH: Okay. Did you want Judge
16 Grimm to make a comment or did you --

17 MS. GALLAGHER: I was just going to
18 clarify that the court administrator position
19 proposal is not necessarily one court
20 administrator for all five, so there would
21 probably be very many court administrators spread
22 throughout each of the services, however they

1 want. But the pilot program would be to kind of
2 test it out and see how it works. And please,
3 Judge Grimm.

4 JUDGE GRIMM: My only comment is that
5 the perception issues, while perception issues
6 are hard to quantify, and we should be mindful of
7 if we have any remedy available that can tell us
8 whether or not there's an actual basis for a
9 perception issue or not -- cause perception
10 issues are very important. And we are going
11 through this right now in the civilian community
12 as well where public perception of the fairness
13 of the judicial system, and confidence in judges,
14 state and federal, is declining for a number of
15 reasons. And that is problematic because when
16 the public does not believe in the integrity of
17 the system, then their compact with government
18 that is fundamental to the operation of the rule
19 of law erodes.

20 Within the military, the notion of the
21 military justice system at the very beginning and
22 certainly the way it was in the 1950's is it was

1 designed to promote good order and discipline
2 within the military. And that is why you have
3 series of criminal charges in the military that
4 don't exist in the civilian community; AWOL,
5 disrespect, disobedience of an order. And then
6 of course, the rule or standard criminal
7 prosecutions for assaults and drugs and thefts
8 and then, of course, the subset that has been the
9 jurisdictional focus of this advisory committee
10 are offenses that are very challenging.

11 And when you have a perception that
12 the selection process controlled by the convening
13 authority or their staff judge advocate picking
14 people on the notion of who is best qualified, as
15 opposed to the process that's being used in the
16 civilian community where of all the things that
17 the public seems to have faith in more than
18 anything else is the juries, because they're
19 members of the community making these decisions,
20 that, there's a process that makes it clear that
21 the commander is not simply selecting or has the
22 ability to select a jury that that commander

1 believes in determining who is best qualified or
2 not best qualified who will get a conviction.

3 It is important to try to fight
4 against that perception, and so if there is a way
5 to do that that sort of can square the circle and
6 some of the recommendations that have been made
7 here, then it seems to me that that is really a
8 careful consideration because perceptions go to
9 the ability for not only within the military
10 community for the military members to feel that
11 this is a fair system but also, it is inevitable
12 that when Congress and the public looks at this,
13 they're going to compare it with what the system
14 is in the civilian community. And that selection
15 process just seems to go counter to the entire
16 tradition of parties, of a -- the unit comes in,
17 counsel being able to challenge on the basis of
18 the composition of those people whether they
19 should be jurors or not, fair and impartial, not
20 include someone who has either because of youth
21 or inexperience or some other legitimate question
22 about whether or not they are qualified for the

1 informed decision can be a basis for a challenge
2 before the military judge, and the military judge
3 can rule on it.

4 So, you know, I think that this may be
5 a situation where we're never going to be able to
6 get the quantification to say based upon data
7 this is a recommendation we're making. It is
8 important and I think that Ms. Tokash is right,
9 the military hates this. But they hated the idea
10 of adding the -- I'm sure they're not crazy about
11 having the DAC-IPAD, and they're probably are not
12 crazy about special trial counsel, and they not
13 crazy about a lot of things they have, because
14 it's taking away something that they had before,
15 and that's always going to be a reaction. So
16 those are my points.

17 MAJOR GENERAL ANDERSON: Just to
18 quickly weigh in on this. I'm on a subcommittee
19 but having been a convening authority as a two-
20 star, having discussed this with colleagues, and
21 having seen the panel yesterday, you know, for
22 me, I think it's important to take bias out of

1 this process. That also, I think, as previously
2 noted, is part of transparency and perception.
3 You know, we may think we don't have biases, but
4 we do.

5 And, you know, listening to the panel
6 yesterday and several of them commented on, you
7 know, the importance of maintaining good order
8 and discipline and this will impact that, I was
9 not persuaded at all because, again, I think they
10 don't realize it, they don't think it, they may
11 think they're doing their very best -- and
12 they're doing their very -- they are doing their
13 very best. But they are human and they have
14 biases that I think that position will help
15 eliminate from the process and again, presents
16 the public and our military members and potential
17 military members -- I think that's important
18 right now in the recruiting issues. If people
19 who go out and who have served and then, you
20 know, convicted by a jury that they didn't feel
21 are their peers, they're going to tell their
22 friends and family and other people, and that

1 could have an impact -- a greater impact on our
2 ability to recruit the best and brightest. So
3 that's my position.

4 CHAIR SMITH: Judge Walton.

5 HON. WALTON: You know, I listened
6 yesterday to the presentation from those two
7 officers, and I have a lot of respect for them
8 and what they've done and what they had to say.
9 But I, you know, think back to the foundation of
10 this country, the adoption of our Constitution,
11 and why the requirement was created in our
12 Constitution for a jury system. And it was
13 predicated on the belief that society would more
14 readily accept the decisions of a court if a jury
15 was, in fact, making that determination as
16 compared to i.e. the king or a judge. And I
17 think that that is a valid, as it was then, a
18 very valid reason for a jury system to exist.

19 And then the question becomes is there
20 any reason why because of the nature of the
21 military that fundamental principle, which was
22 the predicate for the adoption of the Sixth

1 Amendment, should not apply equally in the
2 military context. And I just can't -- despite
3 the respect for what they said, I just can't buy
4 into the proposition that the military is so
5 different from the rest of society that we should
6 deviate from that fundamental reason for the
7 existence of the jury system in order to advance
8 the objectives of the military, which are very
9 important. So I guess I come down to the
10 conclusion that the Sixth Amendment should
11 control and a result of that, I think it's very
12 important that there be a system where the
13 citizens i.e. of the military are making the
14 decision and it's not just one person, i.e., the
15 commanding officer who is making the decision,
16 who should be a part of that jury system that's
17 deciding these very, you know, significant and
18 important issues as it relates to society in
19 general and the military in specific.

20 DR. SPOHN: I think it might also be
21 relevant to point out that nearly 70 years ago,
22 the Supreme Court struck down a system very

1 similar to the one that the military uses in
2 Texas in the Castaneda v. Partida case in which
3 the grand jurors were selected by a jury
4 commissioner who was expected to only select
5 jurors who were of sound mind and good moral
6 character. And the Supreme Court ruled in that
7 case that those who were challenging it had
8 established a prima facie case of discrimination
9 against Hispanics. And so even though that is
10 not applicable to the military system, the
11 Supreme Court has said that a system like this is
12 unconstitutional.

13 MR. CASSARA: I'd like to make one
14 final comment. I told the story, said it again
15 yesterday about my first and last court-martial.
16 If I tell my client your entire jury is going to
17 be white males even though you are a young
18 African American male, and that's because the
19 general who sent this case to court-martial, who
20 decided that there was enough evidence to send it
21 to court-martial wants those 12 people deciding
22 your case, my client is going to perceive that

1 system as being inherently unfair.

2 If I tell my client you're entire
3 panel is going to be 12 white people because a
4 computer-generated system did that, he's going to
5 have the same 12 white people potentially, but my
6 suspicion is that it's going to be at least
7 perceived as, I don't want to say less unfair,
8 because I'm sounding much more like a lawyer than
9 I should, but the perception of this person who
10 picked -- decided that I committed this crime or
11 decided there's enough evidence that I committed
12 this crime, who the prosecutors work for is the
13 same one who picked these 12 people personally
14 because he or she wanted them to decide my fate
15 is a much harder sell than General Anderson, I've
16 had several clients. You know, I'm the one who
17 gets the call from the family after somebody's
18 been convicted and telling me how their
19 perception of the system is so unfair. And I
20 have so many of them tell me "I would never allow
21 my child to serve in the military again" or, you
22 know, another child to serve in the military. So

1 I do think it is a strength issue as well.

2 MS. GOLDBERG: I align myself with
3 virtually everything that has been said. I
4 wanted to just make three quick points. First,
5 just a small note from the record that when our
6 briefers were discussing who the Policy
7 Subcommittee consulted with, it also included in
8 the additions the -- everyone who has mentioned
9 defense counsel, I appreciate those representing
10 defense counsel. So we really heard from a very
11 wide variety, as you heard, of people with
12 experience and expertise, and virtually all of
13 them recognized issues with perceptions of
14 fairness and different ideas about how to go
15 forward but want to note that.

16 Also want to note for the record on
17 the question of do we have data. The discussion
18 has been sort of an either/or, like we have it,
19 we don't have it, but we have anecdotal
20 impressions. And we actually do have some data.
21 Some of it -- it's old, right, but the Fort Riley
22 data, I assume, the Fort -- excuse me -- the Fort

1 Riley test case was -- indicated that the
2 community noted improved actual and perceived
3 fairness of the process to the accused. That's
4 from back in 1973-74.

5 At the same time, human beings have
6 not changed so much in the sense that if they
7 have an opportunity to participate and perceive
8 that the mechanisms by which decision-makers are
9 selected are fair, that they are likely to find
10 the process more fair. There's also a lot of
11 scholarship backing up these points as I've seen
12 in the teaching I've done, and I think our
13 responding, I'm sure -- you have perhaps written
14 yourself. But -- so we -- there is data.

15 The last point is really a not. It's
16 not a rationale for moving forward in this way,
17 but it is a benefit that I think is worth noting
18 for the record from a process selection that
19 enables a broader cross-section of servicemembers
20 to participate as panel members. There's
21 obviously the benefits that we've talked about,
22 that a randomization process, a more randomized

1 process is perceived as fair to the extent people
2 know about the procedure.

3 But there's the actual on the ground
4 benefit also that when a more diverse cross-
5 section of servicemembers is actually
6 participating, they then bring that experience
7 back to those with whom they work, and that is
8 the kind of peer-to-peer conversation that can
9 enhance the legitimacy of a process if it's
10 understood to be fair. And if it's not, there
11 will be more information that comes up the chain
12 and can be, I think, broadened to a continuous
13 improvement.

14 And I think -- again, it may not be a
15 rationale, but I think we want to sure recognize
16 the fact that perceptions have various -- come
17 from many different places, and they come from
18 looking at procedure but also from the benefits
19 that those procedures that bring in a broader
20 cross-section of the population actually to serve
21 in the decision-making role and fact finding
22 role.

1 HON. SMITH: May I suggest -- I was
2 looking at the time. Is it possible to go
3 through -- I was going to say go through the
4 draft recommendations that affect Article 25 so
5 that folks just can understand what the
6 recommendations are; you know, get rid of the
7 best qualified but keep the following things?
8 And I don't know if we're going to be in a place
9 to vote on it based on the time, but --

10 MR. YOB: Just I would, if it's --
11 with the consent of the committee, yourself, I
12 would suggest if you have time on the schedule
13 that we could do that, we can take lunch. We
14 could spend an additional half an hour after
15 lunch on this issue, and we'll still have time
16 because we can shorten the victim access
17 information or the viral misconduct reports.
18 Both of those are flexible and can be shortened
19 to make up for that time that we can devote to
20 this.

21 HON. SMITH: And maybe we can shorten
22 lunch if -- I mean but maybe we could -- is that

1 okay, can we shorten lunch a little bit? So keep
2 talking now and what time are we going to break
3 for lunch?

4 MR. YOB: It's currently 11:30. We
5 can do lunch at noon. If people like half an
6 hour is sufficient, we have boxed lunches here
7 for those who've wandered in and some extra ones
8 for those who didn't. So a half an hour, we can
9 do it 'til --

10 HON. SMITH: Okay. Does it make sense
11 to do then the statutory things so everybody kind
12 of sees what we're saying with respect to Article
13 25, and then we'll go to the rules?

14 MS. TOKASH: This is Meghan Tokash
15 speaking. Can you also confirm across the nine
16 recommendations, eight of the nine still have
17 some form of convening authority role in the
18 selection process, and recommendation 3 is being
19 one recommendation that contemplates removing the
20 commander.

21 MS. GALLAGHER: So even in
22 recommendation 3, I don't know that the convening

1 authority is removed, because if you look at
2 draft recommendation 4, the -- really, the input
3 from the stakeholders, the discussions with the
4 Policy Subcommittee, there has been no indication
5 that there's -- that you can remove the convening
6 authority from making availability
7 determinations. I mean for readiness, you know,
8 there's just no discussion that the commander
9 would be removed from those availability
10 determinations. So even if the court
11 administrator's running the process, he --
12 they're just running the process of the list.
13 The commander wouldn't be removed.

14 MS. TOKASH: So to remove the
15 commander, we would have to recommend amending
16 Article 25 to do that explicitly?

17 MS. GALLAGHER: To remove if --

18 MS. TOKASH: Any hand in --

19 MS. GALLAGHER: Right.

20 MS. TOKASH: -- picking --

21 MS. GALLAGHER: Right.

22 MS. TOKASH: And that's not -- sorry

1 --

2 MS. GALLAGHER: Yet.

3 MS. TOKASH: But that's not one of the
4 draft recommendations?

5 MS. GALLAGHER: No. If you look at 4
6 and 5, it's specifically to preserve within
7 Article 25 the authority of the convening
8 authority to make availability determinations,
9 although if you look at recommendation 5, it's to
10 amend the rules for court-martial to provide a
11 transparent method for those convening authorities
12 to document the availability and excusal
13 determination, but that would have to be done in a
14 way not to jeopardize mission or personal
15 information. That's how that was kind of balanced.

16 CHAIR SMITH: Okay. Do you want to
17 just highlight -- go through which ones are --

18 MS. GALLAGHER: So yes, and with that,
19 I've just gone through draft recommendations 4 and
20 draft recommendations 5. Four was an actual
21 amendment to the Article because Article 25
22

1 specifically leaves excusal authority with the
2 convening authority, but it doesn't address the
3 availability determinations. That's normally
4 been kind of part of that best qualified Article
5 25 criteria, cause you're really not best
6 qualified to sit in judgment if you're not
7 available to sit in judgment. I think one of the
8 members said we want them to focus on the trial.

9 With regards to draft recommendation
10 6, that is a recommendation not to amend Article
11 25 but to keep it that no accused servicemember
12 may be tried by a court-martial in which any
13 member is junior to the accused in rank or grade.
14 Really, there was no reason expressed to move
15 away from it, and the stakeholders, you know,
16 overwhelmingly supported keeping that seniority
17 requirement. The Policy Subcommittee recommends
18 that that requirement in Article 25 remain as is.

19 MS. SAUNDERS: Recommendation 7 also
20 would be an amendment to Article 25, and it goes
21 to the criteria, you know, these objective
22 criteria that would replace the current system of

1 the best qualified mandate and its criteria. So
2 draft recommendation 7 would add a two-year time
3 in service requirement for court-martial panel
4 member eligibility. And for service academy and
5 cadets and midshipmen, that two-year time in
6 service would commence upon commissioning. You
7 don't want to pull the cadets out of their
8 classes to sit on a court-martial panel. But the
9 subcommittee determined that a two-year length of
10 service requirement -- when we talked to a lot of
11 our stakeholders, you know, that seems to be a --
12 it would allow those servicemembers to get the
13 training that they require, whether it's basic
14 training, their follow on training, training in
15 their career fields.

16 And then also, you know, a number of
17 our convening authorities yesterday talked about,
18 you know, military culture. It would allow them
19 to gain some familiarity with military culture
20 which could be important for those military
21 specific offenses. So draft recommendation 7
22 would be to amend Article 25 for the two-year

1 time in service requirement.

2 Draft recommendation 8 is actually a
3 rule, recommended rule change rather than a
4 statutory change, and that would be for the
5 President to establish a uniform rule for
6 eligibility requirements, you know, that would be
7 standard across all the services relating to
8 whether potential members have been -- and it
9 would be to establish certain criteria for what
10 members could be deemed ineligible to serve on a
11 court-martial panel, and that could include
12 receipt of nonjudicial punishment, being under
13 investigation, some of those things we talked
14 about earlier. But it leaves it to the President
15 and the rule process to determine what those
16 criteria should be that should disqualify a
17 member from service on a court-martial panel.

18 HON. SMITH: And then the convening
19 authority would be responsible for when the
20 randomized list comes out, for taking those
21 people who meet those ineligibility criteria off
22 the list; is that right?

1 MS. GALLAGHER: No. That would be --
2 those would be the prescribed reasons, and they
3 would be automatically crossed off based probably
4 on information coming in through questionnaires,
5 because a lot of that criteria would not be
6 available in the pay and personnel systems. And
7 so that's whoever is left responsible for
8 administration of a system, whether it's a
9 command member, whether it's the SJ, or whether
10 it's some kind of a court administrator.

11 MAJOR GENERAL ANDERSON: On draft
12 recommendation 8, it just popped into my head
13 where the -- for the phrase "have received
14 nonjudicial punishment as a possible eligibility
15 requirement." And my only concern about that is
16 nonjudicial punishment, Article 15, can range
17 anywhere from disrespect to showing up late for,
18 you know, formation. And I've seen promotion
19 records and I'm like, okay, you're habitually
20 late. Hopefully, you know, that would -- so it's
21 an exercise discretion and recognize that kind of
22 thing should not disqualify somebody from being a

1 panel member.

2 MS. SAUNDERS: And I think this
3 recommendation allows that discretion, so these
4 were some examples. I think it really throws it
5 to the rule process, the joint service committee
6 to come up with -- you know, perhaps they would
7 parse that out, you know, nonjudicial punishment
8 for x, y, z. But I think it gives them that
9 level of flexibility to determine, you know, what
10 exactly those criteria should be. And then it
11 also provides -- the recommendation also provides
12 that at the discretion of the Secretary
13 concerned, the military services could also
14 establish additional criteria through regulation,
15 and that would have to be through a transparent
16 process published in the Federal Register.

17 MS. GOLDBERG: I'd just like to follow
18 up on your absence point. I think that is a very
19 important point in terms of what we are trying to
20 do here through these recommendations overall,
21 which is to reduce the disparities that may occur
22 in the process as a result of individualized

1 implementation of a general prohib issue. And I
2 wonder if there is anything more that we need to
3 say in this recommendation to be sufficiently
4 clear that the requirement -- you know, that the
5 recommendation is a level of specificity about
6 the kinds of nonjudicial punishment or other --
7 that strikes me as the most kind of potentially
8 broad-based provision here, but the kinds of
9 nonjudicial punishment that would be subject to
10 exclusion so that there isn't disparity from base
11 to base or command or court-martial to court-
12 martial. If you think we have enough of that,
13 then that's great, but if you don't, then I would
14 ask for your suggestions about what else we might
15 say to ensure that level of transparency.

16 MS. SAUNDERS: So the language of the
17 recommendation, the President should establish a
18 uniform rule establishing eligibility
19 requirements for service on a court-martial panel
20 relating to whether the potential members have
21 been convicted of an offense or are under
22 investigation, have received nonjudicial

1 punishment or other potentially disqualifying
2 criteria. So that does give flexibility. So I
3 think it is throwing it to this process to
4 determine, you know, that level of specificity.
5 I guess it is up to this committee whether you
6 think there needs to be more specificity in the
7 language, you know, more guidance. And that
8 could come potentially either in the form of an
9 amendment to the draft recommendation or just in
10 the body of the report providing some examples or
11 providing more guidance. But that -- I guess
12 that would be up to the committee, how specific
13 do you want to be.

14 MS. GOLDBERG: Suzanne again. I think
15 I have one thought on that. I don't really want
16 to -- I'm not proposing to edit on the fly. Non-
17 judicial, punishment as we had phrased, sounds
18 like one category, you know, up or down. And I
19 wonder if we might say sort of types or --

20 PARTICIPANT: Areas.

21 MS. GOLDBERG: -- extend for
22 seriousness this or, you know, whatever it is

1 non-judicial punishment to indicate that we see
2 that category as having multiple levels, some of
3 which are relevant to service on a panel and some
4 of which would not be necessarily.

5 SaMAJOR GENERAL ANDERSON: Right.

6 Even though -- just on the term, you know, the
7 phrase, you know, "good order and discipline,"
8 maybe, you know, nonjudicial punishment that runs
9 to the level of impacting good order and
10 discipline. Being late for formation does not
11 rise to that level, but disrespecting a senior
12 NCO does.

13 HON. SMITH: Does everyone understand
14 that? I mean does everyone view that the same
15 way, what affects good order and discipline?

16 SaMAJOR GENERAL ANDERSON: That's just
17 thrown out. I know we're not trying to edit on
18 the fly. I apologize for raising this right now,
19 but it just struck me that I've seen too many
20 instances where there was, I'll say, disparate
21 use of nonjudicial punishment on certain groups
22 in the military.

1 MR. CASSARA: Not to put another fly
2 in the ointment, but --

3 HON. SMITH: Go right ahead.

4 MR. CASSARA: -- NJPs from 10, 15
5 years ago when somebody was a junior enlisted
6 servicemember and now they -- you know, the
7 commissioned are, you know, an 04, 05 in the
8 military, are we really going to say that that
9 person can't serve --

10 HON. SMITH: Right.

11 MR. CASSARA: -- on a panel because
12 when they were 20 years old, they were late to
13 formation one day?

14 HON. SMITH: What if we said
15 something, you know, have received a serious
16 nonjudicial punishment within a certain
17 timeframe?

18 MR. SULLIVAN: By statute, NJPs can
19 only be administered as disciplinary punishments
20 for minor offenses anyway, just by statute.

21 MS. GOLDBERG: So --

22 HON. SMITH: Go ahead.

1 MS. GOLDBERG: Is there a common
2 understanding about what is a minor offense?

3 MR. YOB: I think it's further defined
4 as -- I think it says ordinarily an offense which
5 would not be punishable by a dishonorable
6 discharge or more than one year confinement. So
7 you look at the offense which they're charging
8 and is it equivalent of like a misdemeanor
9 offense which would carry a maximum punishment of
10 less than one year, that's where you start. But
11 there's still discretion --

12 PARTICIPANT: Right.

13 MR. YOB: -- by the people imposing to
14 see if there's aggravating factors or mitigating
15 factors which would push it up or down. That's
16 sort of the snapshot of it.

17 MAJOR GENERAL ANDERSON: Right. I
18 just -- so for example, I did -- and Ms. Smith,
19 more than once -- Article 15s to junior enlisted
20 for disrespectful to either an officer or a
21 senior noncommissioned officer. They were stupid
22 but I also would never have issued one even as a

1 captain if someone was late to -- I would have
2 warned them. Being late to formation, I don't
3 think that would be -- that's just unnecessary.
4 But that's what I'm saying. Is that what the
5 statute said or the rule says? You know, in my
6 view, disrespect could be pretty serious but
7 doesn't rise to the level of a year imprisonment.

8 MS. SAUNDERS: If I could make a
9 suggestion? Maybe we could -- if you're
10 comfortable leaving it to the Joint Service
11 Committee, the rules making process to determine,
12 you know, what these objective disqualification
13 criteria should be, we can change the language in
14 the recommendation to make these more like
15 examples. You know, some examples would be
16 nonjudicial punishment within the last three
17 years or, you know, to make it clear that we're
18 not prescribing what exactly this criteria should
19 be, but these are some examples to provide some
20 guidance. But then the actual process, the Joint
21 Service Committee would, you know, take that into
22 account but come up with their own objective

1 criteria for what should disqualify a member from
2 panel duty.

3 So we'll work on that. And then
4 finally, our last recommendation, recommendation
5 9 is for an amendment to Article 25. And this
6 one is a little bit different than the others.
7 It's -- it actually would -- it would remove the
8 requirement that the convening authority detail
9 panel members at the time the court-martial is
10 convened and that would provide them the
11 authority to do that within a reasonable time
12 prior to trial.

13 And this concerns the timing because
14 what we have heard so frequently, back in --
15 probably back in 1950 when these requirements
16 were in place, you know, trials -- you know, a
17 court-martial might get referred one week and
18 perhaps tried the next. Obviously, we know that
19 things have changed significantly. So once a
20 case is referred to a court-martial, it may be
21 many months, perhaps a year or more before that
22 case actually ends up being tried at a court-

1 martial. So the members you're detailing at the
2 time of referral probably are -- you know, you'd
3 be lucky to have maybe a couple of them who are
4 still on that convening order who are available
5 at the time the trial is set and it actually
6 takes place.

7 So what this would do is just a
8 recognition of how things have changed, which is
9 it would allow the convening authority or the
10 special trial counsel to refer the charges to a
11 particular -- to a convening order. You would
12 still have to convene the court, but it would
13 allow the convening authority to detail the
14 members at a later time.

15 MS. BASHFORD: I just have one
16 clarifying question.

17 MS. SAUNDERS: Okay.

18 MS. BASHFORD: Does Article 25 apply
19 to special court-martials as well as GCMs or just
20 GCMs?

21 MS. SAUNDERS: It applies to both.

22 MS. BASHFORD: Thank you.

1 MS. TOKASH: Sorry to the staff
2 members who prepared this, but just based on
3 hearing what members of the committee have talked
4 about and the concerns about perception stemming
5 from command involvement, we could propose
6 recommending deleting -- amending Article 25,
7 UCMJ, by deleting parts echo 2, 3, and then
8 foxtrot and instead recommend that Congress
9 create independent court administrators who will
10 oversee the randomized court-martial panel
11 selection process. The court administrator shall
12 detail not less than the number of members
13 necessary to impanel the court-martial under
14 Section 829 of this Title -- That's Article 29 --
15 and may excuse a member of the court from
16 participating in the case depending on military
17 necessity and readiness. So in essence, they
18 would do just like a court administrator would do
19 in the civilian sector if, you know, somebody has
20 surgery, scheduled surgery. They can call and
21 they get a jury summons. They can call the court
22 administrator's office and tell them "I have a

1 scheduled surgery," and then they're not going to
2 be even part of the larger group that gets
3 considered. So that can be known up front, and
4 then the court administrators can be in charge of
5 the randomized process.

6 HON. SMITH: What would that do for
7 the pilot program of creating a court
8 administrator?

9 MS. TOKASH: It seems if the issue is
10 a perception one with respect to the command,
11 then this would likely ameliorate that. However,
12 it's -- the military needs some time to build
13 this into the process. I mean that would be
14 understood. I think it's pretty plain on its
15 face that randomization would avoid a lot of the
16 problems of biases and unfair perception of the
17 commander of in process right now. But this is
18 just one suggestion.

19 HON. SMITH: Ms. Long.

20 MS. LONG: Hi. Thank you, Chair. And
21 again, this might be a question that is for those
22 panelists who've served. When I was listening to

1 the convening authorities and just reviewing
2 everything for this meeting and, you know, even
3 going back, I get the sense that the excuse for
4 necessity, the argument's being made by the
5 military that it's beyond just someone having
6 surgery and that in a time of war or there is
7 something going on where the command would have
8 to make a decision that someone couldn't serve
9 because they were needed somewhere else.

10 My first question is, am I
11 understanding that correctly, and can someone on
12 the panel who has served and has been involved in
13 this process like offer a counter to that so I
14 can understand it, cause I agree with what's
15 being said. I mean if we really want it
16 randomized and it certainly is in the civilian
17 world, then you would want the commander's hands
18 off of everything, but I was persuaded by what I
19 understood by an argument made. I just -- I
20 didn't know how to get around that without
21 impacting other issues that the military was
22 concerned about.

1 MS. GOLDBERG: This is Suzanne. I'm
2 not sure this is responsive to your question. I
3 see the issue that we're focused on here as a
4 little bit of a different issue and maybe I'm
5 misunderstanding something. The issue I think
6 we're focused on here is at what point are all of
7 the names of servicemembers collected and moved
8 into the process as a person who would be
9 eligible for consideration and at that point,
10 right there is the question of who moves people
11 off because of military necessity.

12 But I think the problem this proposal
13 is trying to solve for -- but, you know, correct
14 me if I'm wrong -- is that that collection of
15 names happens multiple times before you get to
16 anything close to a trial. More of an issue here
17 -- just want to be sure because it seemed -- my
18 understanding from listening to various panelists
19 is that there is extreme inefficiency in the
20 current system because from the moment judges are
21 referred or the court-martial is convened, sorry,
22 that, you know, the potential panel members have

1 to be made and identified and put on a list, and
2 this whole process takes place so that who's
3 available, who's not available, there may not be
4 a trial for months or longer. And so the list is
5 shuffled and reshuffled in ways that are not a
6 good use of anyone's time. And so this is a
7 procedural fix for that point at which the names
8 would be gathered. I guess that was point one.

9 Point two -- unrelated, happy to come
10 back, is -- Ms. Tokash, I wasn't sure if your
11 proposal was to move this recommendation to
12 Congress rather than to a rule change. And if
13 that was your goal, I wanted to understand your
14 thinking, but I think we should sort out this
15 particular issue first.

16 MS. LONG: Do you mean me or the --
17 Meghan, cause my partial was in response --

18 MS. GOLDBERG: Your question.

19 MS. LONG: -- to Meghan's proposal.

20 MS. GOLDBERG: Oh, sorry.

21 MS. LONG: My question was in response
22 to Meghan's proposal. I had a question for her.

1 As I understood it -- as I understood that
2 section, it was the command's making a decision,
3 and I just wanted to understand the impact of
4 that. But if that seems out of scope, I'm happy
5 to stand down, and I'm fine with the rest of it.

6 MS. SAUNDERS: So Ms. Long, I think
7 you are asking maybe for some of our members who
8 have served, maybe General Anderson or Meghan
9 Tokash. The importance of having the convening
10 authority retain that ability to either excuse
11 members or to have them -- to say they are
12 unavailable perhaps due to mission requirements,
13 deployment, war, or other reasons, to have them
14 retain that authority?

15 MS. LONG: That's correct and I think
16 it was the command versus convening authority,
17 and I was -- it was in response to what Meghan
18 had recommended. I just wanted clarity.

19 MS. TOKASH: Yes. This is Meghan
20 Tokash. I mean if I knew that I was deploying
21 for a year and I get called up by the court
22 administrator for the Army, I'm just going to

1 tell them I have deployment orders, you know, and
2 they -- I don't think they're -- they need to go
3 up to my command to have to call down to them and
4 say she's deploying. I mean I can just show up
5 at the court administrator's office with my
6 deployment orders saying I'm deploying or I'm
7 PCS-ing. We all move or, you know -- when I was
8 in the military, we move on orders and so why do
9 you still need the command involved. Again, if
10 what our main concern is bias and perception,
11 then I think we're really looking at eliminating
12 the command from this. And yes, I think it's
13 radical, right? I mean we talk about things not
14 being radical in some of our other
15 recommendations. It is. But I mean this really
16 gets to the heart of what the issue is, and if
17 we're serious about eliminating bias and
18 eliminating that -- the perception that the
19 command still has a hand in this, if I am called
20 up by a court administrator for the Department of
21 the Army saying you have to serve but I can't
22 because I'm going to deploy or I'm going to PCS,

1 I don't need my commander to tell them that. I
2 can tell them that. And if I need backup, then,
3 you know, I can get the next person above me to
4 say no, she -- you know, she can't serve on this
5 court-martial.

6 So I think that that was kind of my
7 point, Jen Long, just that, you know, it could
8 look more like an independent stovepipe
9 organization where if the people need to, they
10 can always, of course, get backup from someone
11 more senior than them to say that I can't serve.
12 But there should be no reason that individual
13 servicemembers could not tell a court
14 administrator I'm unable to because of this
15 military reason.

16 PARTICIPANT: Right.

17 MS. LONG: That answered my question.
18 Thank you, because I think my question is there
19 some information someone has that isn't in orders
20 or something that can be shown so thank you.

21 MS. GALLAGHER: I think that we heard
22 that from the general officers yesterday to some

1 extent, because they talked about the speed with
2 which sometimes changes occur in the military and
3 situations can happen and really, you do have an
4 entire huge segment of a military installation
5 just disappearing overnight.

6 And so when you're talking about a
7 court administrator position, you're talking 24
8 hours a day responsiveness to hey, they're
9 leaving. Or they also talked about people come
10 in all the time and say I need to be excused
11 because I have flight training, and the convening
12 authority, the commander of that installation is
13 able to look at that and say, "No, you don't, you
14 are going to court."

15 And then I think that the problem
16 you're going to get into in making those kind of
17 decisions with a removed court administrator is
18 they're not going to be able to assess. It might
19 not be the same as a court administrator that has
20 a long list of statutory or regulatory reasons
21 like hey, you've got childcare responsibility,
22 you're a sole provider, your request for excusal

1 is granted because it's right there. Here's the
2 rules, here's all the -- I mean here's, you
3 know, 40 different things that I automatically
4 excuse people for. I'm not certain that that is
5 transferrable to the situations in the military.

6 And I know the commanders that spoke
7 yesterday were pretty adamant that they really
8 carefully balance those availability
9 determinations given the importance of the
10 military justice system against those individual
11 needs. And you're not -- I mean I would assume
12 that the orders are the easy part as opposed to
13 I've got pre-approved leave and have spent a lot
14 of money on this vacation, and I have been away
15 from my family for a year-and-a-half, can I be
16 excused, you know. And so those are the kinds of
17 decisions perhaps that the commanders may best be
18 involved in and if you include some kind of a
19 process where they have to transparently record
20 the reasons, not just for the -- the availability
21 determinations are prior to the detail, and then
22 the excusals would be after.

1 MS. TOKASH: So maybe it would be
2 helpful to -- just to wrap this to testimony from
3 stakeholder groups that we can look at to say that
4 that was not a problem, just the ministerial
5 availability requirement, because if that's the
6 case, I think then maybe -- you know, we can kind
7 of get to yes for some command involvement still
8 as to just to the availability determination if
9 that's okay with stakeholders that we've engaged
10 with? I just can't think of it off the top of my
11 head if some stakeholders have come in front of us
12 and said, "I'm totally okay with that, that
13 doesn't affect the perception issue."

14 DR. MARKOWITZ: Have we actually asked
15 that -- I mean that's a very granular sort of
16 detail. Do we know if we've even asked that
17 question?

18 MS. TOKASH: Yes. That's why I'm not
19 being able to think of it off the top of my head.

20 DR. MARKOWITZ: That's a read-
21 specific, you know --
22

1 MS. GALLAGHER: That is not something
2 that -- that specific question in that manner has
3 not been part of the RFIs that have gone out to
4 the services. And I don't know that that was
5 something the questioning, the in-person
6 questioning has been focused on.

7 MS. GOLDBERG: I don't think that this
8 -- this has not come up as a concern in any of
9 the testimony we've heard. I'm not saying that
10 it isn't a concern, but it has not been raised as
11 an issue at all in terms of either the -- to
12 process of just sort of general functionality of
13 going through the command or possible disparities
14 in when and how excusals are granted.

15 HON. WALTON: If I could add, I'm sure
16 courts operate -- civilian courts operate
17 differently and, you know -- but in my court, if
18 we have an issue of that nature with those of our
19 jury, a commissioner who probably would contact
20 the presiding judge, and the judge would say,
21 yes, that person can be excused. Again, I don't
22 know if you'd want to go that route, but at least

1 it's one way that at least our court operates.

2 MS. GALLAGHER: If I may propose with
3 regards to this issue, I mean when it comes to
4 this court administrator having these kind of
5 authorities and these kind of powers, I am not
6 certain that that is something that has been
7 studied and vetted enough. That would be more -
8 - the proposal would be more we would like to
9 have a pilot project with a court administrator,
10 let's see what the services come up with, and
11 then we can further assess that.

12 I mean I understand that you're trying
13 to wrap it all into one and transfer that
14 detailing authority to someone removed along with
15 these other things, but I don't know that this
16 study or the systems are ready for that.

17 MS. TOKASH: This is Meghan speaking
18 again. I think in that line, Ms. Gallagher, that
19 there would have to be some kind of an evaluation
20 piece after said study so that stakeholders can
21 say, I thought that this was more fair, or I felt
22 like the jury sitting and

1 judging my guilt or innocence was more fair
2 because it was selected and controlled, the whole
3 process was controlled by an independent
4 administrator. So I feel like the study would
5 need to have some really robust evaluation after
6 it to be able to get a sense of whether we had
7 cured the perception of command influence in the
8 jury selection process.

9 MR. YOB: Okay. I'll just note that
10 we're a few minutes after noon. This may be an
11 appropriate time for folks to break for lunch for
12 30 minutes, and we can reconvene and pick up
13 where we left off.

14 HON. SMITH: Perfect, 12:30. Thank
15 you.

16 HON. SMITH: All right. So Ms. Tokash
17 talked about -- and I'm paraphrasing -- removing
18 the convening authority from the entire member
19 selection process in a nutshell. Is that a fair
20 statement? Yes. Okay, sorry. Didn't mean to
21 catch you. So, curious as to how many members
22 feel that's necessary at this point, knowing that

1 one of the recommendations is for a court
2 administrator pilot program to see whether or not
3 that would work, which I think would maybe take
4 some of the responsibilities of the convening
5 authority off the table.

6 But at any rate, if everyone is in
7 agreement or majority is in agreement that they
8 want the convening authority, or the
9 recommendation should be that the convening
10 authority should be removed from the process,
11 then we have to go back to the drawing board.
12 We're definitely not going to have a report ready
13 to go by December which was kind of the goal,
14 right, December? Or is that a down-the-road,
15 perhaps, recommendation after we roll out some of
16 these recommendations if we can agree on them,
17 and then see if there's a pilot program and kind
18 of see how things work, and then perhaps get to a
19 place where the convening authority isn't
20 necessarily a part of this process? So anyone
21 want to weigh in on kind of where we are on that
22 issue? General Anderson, did I see your hand?

1 MG ANDERSON: No.

2 HON. SMITH: Well, okay, I'll say my
3 thought would be that, at least from the way I
4 understand the recommendations, the convening
5 authority would be removed from the selection
6 process which is really the issue. They still
7 would be detailing the military folks to be part
8 of the jury panel, but they wouldn't have a hand
9 in the selection other than with respect to
10 determining who was unavailable for certain
11 reasons.

12 But kind of the safety measure on that
13 would be a rule change that would require
14 specific details from the convening authority as
15 to why people were being excused from service.
16 So that might be kind of a protective measure for
17 that concern regarding abuse or perceived abuse.
18 So, in my mind, I think we go with these
19 recommendations and perhaps down the road
20 consider a complete removal of -- recommending a
21 complete removal of convening authority.

22 MR. CASSARA: One thing I would add is

1 if we're going to put in a temporary
2 recommendation about providing good cause or an
3 explanation if that decision should be reviewable
4 by the military judge. A decision of a convening
5 authority to excuse a member -- perhaps we should
6 discuss whether or not that decision is
7 reviewable by the military judge if we're looking
8 at getting a convening authority out of the
9 process. A military judge could say, yes, you
10 excuse that -- the convening authority excused
11 that pilot because they had to meet a certain
12 number of flight requirements. I find that that
13 was -- not a proper removal. I -- just a thought
14 process.

15 MR. KRAMER: How will that work?

16 Because the jury -- the panel that shows up, that
17 person would have to know that they've been
18 excused. I'm not sure how it would work.

19 MR. CASSARA: I'm not either. That's
20 why sometimes I speak without thinking.

21 (Laughter.)

22 MS. GALLAGHER: If I may on that. At

1 this point, the rules allow for the convening
2 authority to excuse a member without good cause,
3 without any showing, up to assembly. After
4 assembly, the convening authority can only excuse
5 a member for good cause.

6 I think that what you're talking about
7 is, we had the -- there would be the
8 documentation. It would be part of the selection
9 process, this annotation, this transparency in
10 the availability and excusal determination. And
11 it would be just like anything else. If your
12 defense wants to object that there is some kind
13 of unlawful command influence behind this excusal
14 or this unavailability determination to shape the
15 panel, you raise it as a motion at trial.

16 But you have the documentation,
17 perhaps, to support your argument, whereas now
18 there's no record of it. And by the time it gets
19 onto appeal or whenever, no one has that memory.

20 HON. SMITH: Does that address your
21 concern?

22 MR. CASSARA: You know, it does and it

1 reminds me of those cases in which a defense
2 counsel has challenged the entire convening
3 authority selection process. The same problem
4 comes up here. You're at trial, and it's up to
5 the military judge. The military judge decides
6 that a member or members were improperly excused.
7 Then they will craft an appropriate remedy for
8 that.

9 DR. MARKOWITZ: Can I ask a process
10 question? Who else is currently looking at this
11 issue right now besides us? Like what -- is
12 anyone else currently reviewing this? Is there
13 anything else going on right now? Are we the
14 only ones?

15 MS. GALLAGHER: We know the JSC is
16 reviewing the random selection mandated by
17 Congress. I am not aware of anyone else looking
18 at Article 25 as a whole.

19 DR. MARKOWITZ: I was just wondering
20 if we need to make sure that we are providing
21 something in a timely fashion so that our -- so
22 that we are getting something in front of -- you

1 know what I mean?

2 MS. GALLAGHER: Yeah, so the timeline
3 that the Policy Subcommittee is proposing is, we
4 want to get as much clarity on the
5 recommendations as we can from this meeting. And
6 the staff will be incorporating everything into
7 the draft report. The Policy Subcommittee will
8 review the draft report, and the report will go
9 to all of you in its final form for a vote at
10 the, I think, December -- early December DAC-IPAD
11 meeting and for publication right after.

12 DR. MARKOWITZ: Right. My concern
13 would be that if we didn't get this done today, we
14 had to push off that we might be missing an
15 opportunity to --

16 HON. SMITH: I think that's true. I
17 think that the goal is to -- if we can get this
18 done by December to be considered. Right. If we
19 don't, then it won't be, correct?

20 MS. GALLAGHER: Yeah.

21 HON. SMITH: So anyone want to be
22

1 heard on -- do we want to take a vote on the
2 statutory draft recommendations and then move on
3 to the rules? How do we feel about that? Yes?

4 All right. Hearing no one say
5 anything, let's take a vote on Draft
6 Recommendation 1 which is to amend Article 25(e)
7 to remove the best qualified and the best
8 qualified criteria. Okay. Anyone -- all in
9 favor of Draft Recommendation 1, say yea.

10 (Chorus of yea.)

11 HON. SMITH: Any nays?

12 MS. BASHFORD: Nay.

13 HON. SMITH: All right. Nay is Ms.
14 Bashford, Judge Grimm, and did I hear someone
15 else?

16 JUDGE GRIMM: No, that was -- Judge
17 Grimm was a late yea.

18 HON. SMITH: Oh, okay, yea. So nay I
19 think is just Ms. Bashford.

20 MS. BASHFORD: And I would just like
21 to say nay on all of these. I commend the work
22 the staff and the subcommittee has done and the

1 people they have heard, the stakeholders. I
2 think we are going way out of our league -- these
3 provisions apply to special courts-martial as
4 well.

5 We have gone out of our lane in the
6 past, the standard of proof. But I think our
7 committee follows the whole -- that that was such
8 an important threshold level that we thought we
9 had evidence that we would convince a trier of
10 fact beyond a reasonable doubt that we made that
11 recommendation.

12 I think when we're talking about
13 people's perception, we still have to deal with
14 the fact that the vast majority of sexual
15 assaults courts-martial end in acquittals. I
16 suspect that if you had the people coming forward
17 who have been acquitted, their perceptions on the
18 fairness of the procedure might be very
19 different. I also recall that the conviction
20 acquittal percentages were pretty much the same
21 whether it was by a panel or by a judge.

22 When it's by the judge, you don't have

1 a panel selection procedures. The only
2 difference I remembered is that a judge might
3 acquit you of a sexual offense. But a judge is
4 going to get you for something. The panel
5 members tended to do straight -- if they were
6 acquitting, they were straight acquittals. So
7 for all those reasons, my vote is going to be no
8 on all of these, again with tremendous
9 appreciation for the work that's been done.

10 HON. SMITH: All right. Thank you.
11 Well, Job Recommendation 3, that would be a rule?
12 Or how would that occur?

13 MS. GALLAGHER: That is not a rule.
14 That is not a statutory amendment. That is just
15 a --

16 (Simultaneous speaking.)

17 MS. GALLAGHER: -- to the Secretary of
18 Defense.

19 HON. SMITH: Just a recommendation?
20 Okay. Well, I think we can vote on that then.
21 Skipping over two because it's a recommended rule
22 change. So Draft Recommendation 3 which would be

1 for the Secretary of Defense to initiate a pilot
2 project for the creation of a court
3 administrator. All those in favor, say yea.

4 (Chorus of yea.)

5 HON. SMITH: Are those yeas on Zoom?

6 JUDGE GRIMM: Yes.

7 HON. SMITH: Okay. And Ms. Bashford
8 is a nay.

9 MS. BASHFORD: Correct.

10 HON. SMITH: Okay, very good. So --
11 yes?

12 MS. GOLDBERG: After you do the count
13 of that, I just wanted to jump in and say one
14 thing.

15 HON. SMITH: Okay. Three is then
16 agreed to as a draft recommendation.

17 MS. GOLDBERG: I feel remiss in not
18 having acknowledged General Schwenk's tremendous
19 work in connection with this project. He's not
20 here to speak for himself. And I just felt the
21 need to acknowledge that as a General -- and I
22 certainly don't have authority to speak for him.

1 But reflecting conversations that were had in the
2 subcommittee, I think he was generally very
3 favorable toward these recommendations.

4 Again, I'm not speaking for him. And
5 if he were here, he might disagree with me. But
6 he had some strong supportive views, at least in
7 some of the conversations is that here I would
8 like to record to reflect that my colleagues are
9 nodding.

10 HON. SMITH: Thank you for that. I
11 should've said that at the outset that he worked
12 hard with staff to come up with these
13 recommendations. And I don't think any of us
14 were expecting to carry his water today. But
15 here we are. So maybe I should make fun of Mr.
16 Kramer because I think that's General Schwenk
17 normally does.

18 (Laughter.)

19 MR. KRAMER: That's what he does at
20 our meetings. I really miss that.

21 HON. SMITH: All right. Draft
22 Recommendation 4 is to amend Article 25 to

1 explicitly permit convening authorities the
2 authority to determine whether randomly selected
3 servicemembers are available prior to being
4 detailed to a court-martial panel and retain the
5 authority in Article 25 to exempt or excuse
6 individuals after being detailed for operational
7 requirements or personnel reasons -- or personal
8 reasons. And then, of course, we would be adding
9 the Recommendation 5. I guess we could talk
10 about these at the same time.

11 Draft Recommendation 5, which would be
12 an amendment for the rules for court-martial to
13 provide a transparent method for convening
14 authorities to document availability and excusal
15 determinations. So let's look at Draft
16 Recommendation 4. All those in favor, yea.

17 (Chorus of yea.)

18 HON. SMITH: Any nays?

19 MS. BASHFORD: Yes.

20 HON. SMITH: Ms. Bashford, okay. So
21 Draft Recommendation 4 is adopted. Draft
22 Recommendation 5, I read already, to amend the

1 Rules for Courts-Martial. Can I get the yeas for
2 Draft Recommendation 5?

3 (Chorus of yea.)

4 MS. GARVIN: Sorry, this is Ms.
5 Garvin. May I ask a question?

6 HON. SMITH: Sure.

7 MS. GARVIN: And I may have missed
8 this, so I apologize. Is there a reason why this
9 is just a general statement of amend the rules
10 for court-martial as opposed to attaching it
11 somewhere specific?

12 HON. SMITH: I don't know the answer
13 to that.

14 MS. GALLAGHER: The RCM number, is
15 that what you're asking, Ms. Garvin?

16 MS. GARVIN: Yes, yes. And just
17 because the items are -- the amends for Article
18 25, it shows the specific -- I notice the
19 recommendations that are less specific.
20 Sometimes it's super useful to have a
21 conversation on it. But sometimes when you're
22 less specific, we get lost. And so I assume

1 there was some strategy that maybe there isn't a
2 current RCM and it makes sense to attach. And so
3 I just wanted to understand the strategy behind
4 the broadness or the lack of specificity aware on
5 this.

6 HON. SMITH: All right. Thank you for
7 that question. I think Ms. Tokash is looking to
8 see where. Okay. So is there anything that --

9 MS. GALLAGHER: Yeah, I'm not clueing
10 in to any specific rule that it would be amended
11 to because right now there's no requirement that
12 they do this. And the thought was leave it a
13 rule and not an amendment to -- a statutory
14 amendment. It's more suitable to the rules. And
15 they do have to devise the method which would be
16 transparent, but yet it also needs to protect
17 privacy interest and not to into any military,
18 sensitive information.

19 MS. GARVIN: Thank you. That does
20 make sense to me. And it doesn't change my vote.
21 I was an eye. I just was curious. Thank you.

22 HON. SMITH: Okay. All right. So Ms.

1 Bashford said no. Everyone else --

2 MS. TOKASH: Is this Recommendation 5?

3 HON. SMITH: Five, sorry.

4 MS. TOKASH: Yeah, sorry. This is Ms.
5 Tokash for the record. I'm going to change my
6 vote for Recommendation 4 to a no and also for
7 Recommendation 5 to a no just for the reason that
8 I think it's still creates the perception problem
9 that the command is still somehow involved and
10 that they can make a determination.

11 And I think at its purest, we want to
12 believe the commander that they're making an
13 honest determination. But I think to some
14 members of the public, it may raise the specter
15 of unfairness. And so for that reason, I'm going
16 to vote no for Recommendations 4 and 5.

17 HON. SMITH: Okay. So -- yes?

18 MS. GOLDBERG: I thought our last vote
19 was on 4, but it was on 5. I have a comment to
20 make on 5.

21 HON. SMITH: Okay. Go ahead. No, we
22 haven't -- So just go ahead. Now I'm confused.

1 We voted on 5. Okay. We did vote on 5. But go
2 ahead. Make your comment, yes.

3 MS. GOLDBERG: I apologize that I
4 wasn't tracking properly. Given that we are
5 awaiting the decision in the Jeter case which
6 might bear directly on the consideration of race
7 and ethnicity, I wondered if we might consider as
8 a committee putting off a vote on 5 so we could
9 be informed by that ruling if I'm understanding -
10 -

11 (Simultaneous speaking.)

12 MS. SAUNDERS: You may be thinking of
13 2.

14 HON. SMITH: I think you're thinking
15 of 2. Two talks about diversity of members
16 focused on race, ethnicity and gender. But
17 that's for amending the rules. It's not for
18 amending Article 25. So it's not statutory.

19 MS. GOLDBERG: Sorry. I'm looking at
20 the wrong --

21 MS. SAUNDERS: We had actually handed
22 out a new modified recommendation list.

1 MS. GOLDBERG: Please withdraw my
2 comments from the record.

3 HON. SMITH: All right. So 5 is
4 passed or agreed to as a draft recommendation
5 with the nay votes of Ms. Bashford and Ms.
6 Tokash. All right. Draft recommendation 6, the
7 requirement in Article 25(e)(1) that, when it can
8 be avoided, no accused servicemember may be tried
9 by a court-martial in which any member is junior
10 to the accused in rank or grade should be
11 retained. So that's already -- that is already
12 in Article 25(e)(1) just saying that we agree
13 with that proposition or that part of the
14 statute. Yeas on Draft Recommendation 6?

15 (Chorus of yea.)

16 HON. SMITH: Any nays?

17 (No audible response.)

18 HON. SMITH: All right. So that's
19 unanimous agreement, all right, as the adoption
20 of Draft Recommendation 6. Draft Recommendation
21 7, amend Article 25 to add a two-year time in
22 service requirement for court-martial panel

1 member eligibility. For service academy cadets
2 and midshipmen, the two-year time in service
3 would commence upon commissioning. All those in
4 favor, yea.

5 (Chorus of yea.)

6 HON. SMITH: Any nays?

7 MS. BASHFORD: Nay.

8 HON. SMITH: Okay. Nay from Ms.

9 Bashford, but Draft Recommendation 7 is adopted.

10 We -- let's come back to 8 a little bit more,

11 flesh it out. Draft Recommendation 9, amend

12 Article 25(e)(2) and (3) to remove the

13 requirement that the convening authority detail

14 panel members at the time the court-martial is

15 convened. Instead, provide that the convening

16 authority must detail panel members within a

17 reasonable timeframe prior to commencement of

18 trial --

19 MS. GALLAGHER: If I may just

20 interject on this one. To Ms. Bashford's points,

21 this really is something that is somewhat

22 separate than the members. This is a timing of

1 the court-martial, and it's whether or not there
2 is any reason to keep -- reason not to decouple
3 the referral and the convening with members and
4 allow referral and convening to occur without
5 identification of the members at the same time.
6 It just builds flexibility into the system.

7 HON. SMITH: Thank you. Okay. So all
8 those in favor, yeas?

9 (Chorus of yeas.)

10 HON. SMITH: And I don't think I hear
11 any nays. That was an aye, right? Okay. All
12 right. So the only thing we have not -- well, we
13 haven't discussed Draft Recommendation 2, really,
14 and Draft Recommendation 8, recognizing that both
15 of those deal with rule changes, correct? And so
16 those would be sent to the President eventually,
17 right, for an executive order, which is -- well,
18 I'll let you guys take over from here.

19 MS. GALLAGHER: Ms. Goldberg, I think
20 you had a suggested amendment to Recommendation
21 2, and that's on the recommendation.

22 MS. GOLDBERG: Thank you. I have

1 maybe two to three thoughts on Recommendation 2.
2 The first is that I do think that because there
3 is a pending case that is directly -- it's my
4 understanding we're going to address this issue
5 fairly directly that we benefitted by holding on
6 the vote until we at least know what the CAAF
7 opinion is. That way, this could be appealed
8 further.

9 But second, I think there is concern,
10 and A.J. and I were discussing this, that a
11 requiring modification of randomized selection
12 may be a strong way of putting -- too strong of a
13 way of putting the point that the committee
14 recognizes the value of the diversity on panels
15 and the value of diversity in connection with
16 perceived legitimacy of panels, or of veneers.
17 And so one possible rephrase would be keep number
18 1 as is and then having something like an in
19 addition, the diversity of members based on race,
20 ethnicity, and gender can be taken -- may be
21 taken into account. But I'm actually not wed to
22 that phrase.

1 And I agree with Ms. Tokash that there
2 can be some concerns related to perception that
3 come in on the other side and may make this kind
4 of assertion difficult. My own personal view is
5 that given Jeter, it feels hard to weigh in on
6 this in this way right now. And I think there's
7 a lot we did move forward on that will be very
8 helpful without coming to a position on this
9 provision. So that's really all I've got here.

10 HON. SMITH: Go ahead.

11 MS. GALLAGHER: If I may recommend
12 this, I would recommend splitting Draft
13 Recommendation 2 into two parts. Leave Draft
14 Recommendation 2 to say amend the rules for
15 court-martial to provide for modified randomized
16 court-martial panel member selection process,
17 utilizing the military service's personnel and
18 pay systems to select the members. This system
19 should preclude the convening authority or other
20 members of command and judge advocate office from
21 hand selecting members.

22 The convening authority should retain

1 the authority to detail the panel members and
2 leave that as Draft Recommendation 2. The
3 following language would be amended to be a
4 separate draft recommendation for voting purposes
5 because there seems to be some discussion still
6 with regards to building in specific factors for
7 the randomization process and vote separately on
8 the specific factors.

9 HON. SMITH: So I recall yesterday
10 when the -- just to kind of fill everyone in on
11 this -- when the subcommittee was discussing
12 this. Part of the reason we went with a rule --
13 amendment of the rules versus a statutory --
14 recommending a statutory change was because it
15 would be left to the President ultimately to
16 handle. And part -- we didn't know where the
17 Jeter case was going to go, whether it was going
18 to -- they were going to basically affirm
19 Crawford and say you can continue to consider
20 race, ethnicity, and gender. If I'm
21 understanding you correctly, the concern is that
22 if Jeter goes the other way, this will mean

1 nothing, right?

2 I mean, we could consider it the way
3 it's written now. We know Jeter is going to come
4 out at the end of September. If it goes the
5 other direction, then we strike that language and
6 maybe say something. Or we just say now a cross
7 section of the military community or something
8 like that.

9 MR. KRAMER: So I was talking with Ms.
10 Goldberg. But having filed many motions at our
11 office about the makeup of juries not being fair
12 to defendants. It pains me to talk about this,
13 this way. But you have a randomized system and
14 yet you want to modify it to take account of
15 something that may well be unconstitutional in
16 Supreme Court law, which really pains me.

17 And I'm not sure. The point of the
18 law as I understand it right now on juries,
19 you're entitled to a pool of -- cross section of
20 the community, which in civilian court means they
21 use voter lists and driver's license and all
22 kinds of -- as many lists as they can. But the

1 actual panel you get, the voir dire, you're stuck
2 with.

3 You can't claim there was
4 discrimination in that if there was a randomized
5 process that two things are inconsistent. Yet,
6 we want to add something. We want to modify the
7 randomized process in a way that I'm not sure is
8 constitutional.

9 And I'm not sure we want to go that
10 far right now. So it's not just Jeter that
11 bothers me. I mean, even if Jeter affirms
12 Crawford, I assume somebody is going to take that
13 to the Supreme Court.

14 HON. SMITH: Yes, we discussed that.

15 MR. KRAMER: And I'm not sure we want
16 to get ahead of the game on what's constitutional
17 and what's not.

18 HON. SMITH: So do you want to just
19 leave in the rank issue because we have to have
20 the rank --

21 (Simultaneous speaking.)

22 MR. KRAMER: Yeah, I understand the

1 rank obviously, yes.

2 HON. SMITH: And do you want to use
3 any language at all about -- well, I mean, I
4 guess it doesn't really matter because -- I
5 wasn't going to say anything about cross section.
6 But if it's random, it's random in theory. And
7 rank would be one thing. Anything else? Yes?

8 MR. CASSARA: My recommendation is
9 that we have a Draft Recommendation 2 to vote on
10 now which is -- I'm sorry. My recommendation is
11 we have a Draft Recommendation 2 which we vote on
12 now, first page.

13 HON. SMITH: He's looking at the first
14 page.

15 MR. CASSARA: There would be a Draft
16 Recommendation 2 Alpha that we don't vote on yet,
17 and that and that we just wait on.

18 HON. SMITH: Okay.

19 MR. CASSARA: We wait until Jeter is
20 decided. We wait until we have an opportunity to
21 fully discuss it. I would agree with you, Judge.
22 I think that -- and that really pains me to say I

1 would agree with you, Judge. But --

2 (Laughter.)

3 MR. CASSARA: If we got a random panel
4 selection, it's going to be diverse based on
5 rank. So I'm not sure we need to do any of that
6 at this point until we see with Jeter.

7 HON. SMITH: So there was the -- I
8 thought yesterday on the panel, didn't they say -
9 - or I heard this somewhere. I'll just say, I
10 thought it was a panel, that making it diverse
11 based on just rank and having this randomization
12 process would make it less diverse.

13 MR. CASSARA: Right.

14 MS. BASHFORD: These are being brought
15 now. They're not really a big standing panel
16 from which people are being selected for each
17 court-martial because that gets you right back to
18 the selection process. Your officers got an all-
19 officer panel with nobody junior to them in rank.
20 And your members of the enlisted get, at least,
21 if they want, a third.

22 I don't know how truly random -- how

1 you accomplish that if it's being done case by
2 case. You won't know until you get to a
3 courtroom, right, whether the accused, if he's
4 enlisted, wants a third enlisted. I don't know
5 when that decision was made.

6 MR. CASSARA: I think you will know in
7 advance. I mean, it's fairly easy. The accused
8 makes a -- even if the accused decides on the day
9 of trial. So we've got a veneer of available and
10 enlisted and officer members.

11 And in terms of if it's an officer and
12 accused, then the court administration officer or
13 whoever it is that's doing it says I need 20
14 panel members in a rank of O-5 and above. And 20
15 panel members' names are spit out, and that's who
16 the convening authority details. I think it's
17 actually easier this way because it's just a
18 computer AI doing the thinking instead of human
19 beings.

20 MR. KRAMER: I completely understand
21 the rank part of it because it's required. What
22 gets more complicated and difficult to me is the

1 race, ethnicity, and gender and whether that's
2 going to be a percentage formula or how it's
3 going to be done. That gets very tricky.

4 MR. CASSARA: I agree wholeheartedly.
5 And that's why I think we can hold off on voting
6 on 2 Alpha completely --

7 HON. SMITH: So --

8 MR. CASSARA: -- because I think the
9 diversity of members based on rank is de facto
10 going to happen. And the other one, I don't
11 think we should be -- we can deal with till Jeter
12 is decided.

13 MS. GOLDBERG: Is it certain that the
14 diversity of members based on rank is de facto
15 going to happen? Because my understanding, which
16 could be wrong, is that prevents the highest you
17 can go up, unless diversity based on rank is
18 accounted for in the algorithm, there may
19 actually not wind up being much diversity based
20 on rank.

21 And that has been recognized by at
22 least some of those who testified before us that

1 would be important. But I see General Anderson
2 looking quizzically at me, so I'm wondering if
3 I've gotten that wrong. I think they are
4 distinct issues. And if we manage to put them
5 off or to put them on the diversity based on
6 rank. But either way, I think we ought to vote
7 on them separately.

8 HON. SMITH: I think we maybe should
9 keep the diversity of rank in 2 and keep the rank
10 piece in 2 and then hold off on the race,
11 ethnicity, and gender part. Does that sound --
12 everyone is in agreement with that? Okay. So
13 let's vote on Draft Recommendation 2, which would
14 be the whole paragraph including diversity of
15 members based rank, leaving out diversity of
16 members based on race, ethnicity, and gender.
17 All those in favor, say aye.

18 (Chorus of aye.)

19 HON. SMITH: All right. All those not
20 in favor, say nay?

21 MS. TOKASH: Nay.

22 MS. BASHFORD: Nay.

1 HON. SMITH: Oh, who said nay? You
2 two? Okay. Ms. Bashford and Ms. Tokash voting
3 against it. But Draft Recommendation 2 is
4 approved with that change. Let's move on to 8.
5 You want to brief everyone on 8 a little bit
6 more?

7 MS. SAUNDERS: So Draft
8 Recommendation 8 was -- the intent for this was
9 -- from the subcommittee was as they're preparing
10 the rules that would implement some of the
11 changes to Article 25, they would come up with
12 the Joint Service Committee or corps putting this
13 together would come up with an objective list of
14 criteria that might make a member ineligible for
15 service. Some examples of that could be having a
16 federal conviction, having received non-judicial
17 punishment or being under investigation. So the
18 intent of this recommendation wasn't to prescribe
19 exact criteria but just to sort of list these as
20 examples but to throw it to the Joint Service
21 Committee to actually make that determination.

22 And where that would come into the

1 process would be after the randomization would
2 take place, you could determine, okay, this guy
3 is under investigation. You would have your list
4 of objective criteria. And you could remove
5 people from the randomized list based on those
6 criteria at that point. But I think earlier we
7 had talked about perhaps adding some language in
8 here to make it more clear that these are some
9 examples of criteria that the Joint Service
10 Committee may come up with. But really it's up
11 to them to determine what the criteria are.

12 MS. GALLAGHER: For example, there's
13 current a rule, and it essentially restates the
14 Article 25 disqualifications, even an accuser,
15 then -- Article 32 officer. It restates some of
16 those Article 32 disqualifications. And I think
17 it adds something like or you're in confinement.

18 But that's the only one. And General
19 Schwenk had indicated, look, all these
20 disqualifications that people are kind of
21 applying here and there, it needs to be in one
22 location so everyone can easily find it and it's

1 spelled out uniformly. And so the intent of that
2 is to throw it to the executive order system to
3 come up with these are the disqualifications and
4 let them figure it out militarily what is
5 necessary.

6 HON. SMITH: Shall we take a vote on
7 Draft Recommendation 8? All those in favor say
8 aye?

9 (Chorus of aye.)

10 HON. SMITH: All those not in favor,
11 say no, nay.

12 MS. BASHFORD: Nay.

13 HON. SMITH: All right. Ms. Bashford
14 is saying nay. But otherwise Draft
15 Recommendation 8 is approved. All right. Thank
16 you very much.

17 MS. SAUNDERS: Thank you. And we will
18 redraft some of the language on that. And we'll,
19 of course, have the report drafted for review and
20 vote in December. So thank you.

21 HON. SMITH: All right. Thank you.

22 MS. GOLDBERG: I'm sure if General

1 Schwenk was here, he would speak at length about
2 how wonderful the committee -- subcommittee staff
3 has been in gathering speakers and organizing the
4 materials and assisting the subcommittee. And
5 so, even though I'm not fully authorized to speak
6 on his behalf, I will let myself out -- to say
7 thank you on behalf of all of us. It was
8 tremendous work. He would've done it with more
9 humor, but I just --

10 (Simultaneous speaking.)

11 MR. YOB: I'm going to ask Eleanor
12 Vuono and Meghan Peters to come on up to the
13 presentation table. They're going to talk about
14 victim access information as a form of committee
15 deliberation on this topic.

16 MS. TOKASH: Good afternoon. Today's
17 discussion with the Special Project subcommittee
18 will present its findings and recommendations to
19 the DAC-IPAD's statutory tasks regarding access
20 to information by victim's counsel. This
21 subcommittee is led fearlessly by staff attorneys
22 Meghan Peters and Eleanor Vuono. We thank you so
much for your wise counsel and help in all

1 regards and aspects of this particular topic.

2 As you know, Congress has asked this
3 committee to submit a report on, quote, the
4 feasibility and advisability of establishing a
5 uniform policy for the sharing of information
6 with a special victims counsel, victims legal
7 counsel, or other counsel representing a victim
8 of an offense under Chapter 47 of Title 10,
9 United States Code, the Uniform Code of Military
10 Justice, unquote.

11 Congress asked whether a policy is
12 needed with respect to the sharing of three
13 specific categories of information: one, any
14 recorded statements of the victim to
15 investigators; two, a record of any forensic
16 examination of the person or property of the
17 victim, including the record of any sexual
18 assault forensic exam of the victim that is in
19 the possession of the investigators or the
20 government; three, any medical record of the
21 victim that is in possession of the investigators
22

1 or the government. In February and June of this
2 year, this committee heard from multiple
3 stakeholders on this topic, including defense
4 counsel, special victims counsel, military
5 criminal investigation agencies, and military
6 trial counsel.

7 The military services also gave us
8 their existing policies on providing these
9 categories of information to the victims counsel.
10 And they responded to requests for information
11 from the DAC-IPAD. Those narrative responses are
12 in your materials for this meeting with the title
13 May 1, 2023 Service Responses to DAC-IPAD RFI
14 Regarding Victim Access to Information.

15 The subcommittee also considered
16 similar rules in the federal-civilian criminal
17 courts and state courts on sharing information
18 with victims and their counsel. Our research,
19 the service's RFI responses, and the comments
20 from distinguished speakers in our public
21 meetings have helped identify important concerns
22 and considerations. I'll also note some of what

1 we heard raised additional concerns that may not
2 be right for deliberations and votes today.

3 So I want to assure the full committee
4 that other corollary issues that we heard with
5 concerns to access to victim information is a
6 potential avenue of further study that the
7 subcommittee will continue to look at. And of
8 course, any input by you as the greater committee
9 would be helpful to us so that we can continue
10 down this study of those particular areas. But
11 for today, we have a very focused and targeted
12 task.

13 The issue of access to information, in
14 a broad sense implicates concerns about trust in
15 the system and a need for uniformity and
16 transparency for victims about how these
17 important cases are handled. Before we dive into
18 the recommendations, it is worth noting that
19 Congress asked us to weigh in on whether a
20 uniform policy is needed. But Congress also
21 asked the committee to identify the possible
22 effects on the investigation and prosecution of

1 sexual assault crimes.

2 The issues before us are particularly
3 timely, especially with the advent of the offices
4 of the special trial counsel now that they are
5 fully operational. And they are currently
6 developing best practices on special victim
7 cases. So, we now turn to the work of reviewing
8 and voting on the Special Projects Subcommittee's
9 recommendations.

10 After your deliberations and vote, the
11 staff will draft a report for your review and
12 comment with a due date to Congress of December
13 2023 this year. So I'm first going to read the
14 Special Projects Subcommittee's findings and
15 recommendations to you now. We have provided you
16 with a printed copy so you can follow along.

17 I believe Ms. Peters has just handed
18 those out. Thank you, Ms. Peters. These
19 findings and recommendations reflect our
20 consideration of the potential effects of a
21 uniform policy for sharing of information as
22 tasked by Congress with a victim and their

1 counsel on the following categories in accordance
2 with our statutory tasking: one, the privacy of
3 individuals; two, the criminal investigative
4 process; and three, the military justice system.

5 Now I'm going to turn to what you have
6 in front of you with respect to the findings.
7 So, the Special Projects Subcommittee consider
8 how to address each of these elements that
9 Congress identified in this tasking. Overall, we
10 found that a uniform policy for the three
11 categories is both feasible and advisable.

12 And while the three categories of
13 information are provided to victims and victims
14 counsel within each service, the timing of
15 release is not consistent among the services.
16 And current service practice does not fully
17 address disclosure of the results of forensic
18 examinations of the person or the property of the
19 victim. We also found that existing DOD policies
20 address disclosure of the three categories of
21 information listed in the statutory tasking.

22 But the current DOD instructions do

1 not provide clear guidance in some areas. The
2 three categories of information should be shared
3 with the victims regardless of whether they have
4 retained counsel. The three categories of
5 information should be shared with victims and
6 their counsel if represented upon request.

7 Prosecutors should be responsible for
8 responding to requests for these three categories
9 of information in consultation with the criminal
10 investigators. Prosecutors must consult with
11 those criminal investigators concerning whether
12 disclosure would impede or compromise an
13 investigation. And finally, that prosecutors
14 should seek protective orders where appropriate.

15 In making these findings, we
16 considered the potential effects of a uniform
17 policy for the sharing of information with victim
18 and their counsel in the following: again, one,
19 privacy of individuals; two, the criminal
20 investigative process; and three, the military
21 justice system. So I would now go through the
22 recommendation. The DAC-IPAD recommends that the

1 Joint Service Committee amend the Rules for
2 Courts-Martial.

3 So again, we're not recommending a
4 congressional or statutory change. This is a
5 rules change that would be done through an
6 executive order. To establish a uniform policy
7 with respect to the sharing of the following
8 information with the victim and their counsel if
9 represented, one, any reported statements of the
10 victim to investigators. Two, the record of any
11 forensic examination of the person or property of
12 the victim, including the record of any sexual
13 assault forensic exam of the victim that is in
14 the possession of the investigators or the
15 government.

16 I will have a brief pause here to call
17 out some very important information that Dr.
18 Markowitz provided to the subcommittee in our
19 deliberations and that is there is certain
20 medical information that as a victim patient, the
21 patient would be notified of well in advance of
22 any type of litigation process. For example --

1 and please correct me, Dr. Markowitz, if I am off
2 the mark here. For example, if the victim
3 patient has tested positive for a sexually
4 transmitted infection, the treating physician
5 would make that known well in advance of any
6 legal discussions that we are deliberating on.

7 So I just wanted to note that as an
8 example if that was a concern for any committee
9 member. And three, any medical record of the
10 victim that is in the possession of the
11 investigators or the government. Additionally,
12 the Special Projects Subcommittee recommends that
13 the uniform policy should include the follow
14 parameters for sharing information in these three
15 categories.

16 First, these three categories of
17 information including copies of statements,
18 recordings, or documents should be made available
19 upon request by a victim or their counsel.

20 Second, the prosecutor will disclose the three
21 categories of information requested in
22 consultation with the MCIO unless the prosecutor

1 determines that disclosure would impede or
2 compromise an ongoing investigation. And third,
3 disclosure of these three categories of
4 information may be subject to a protective order
5 if sought by the prosecutor.

6 And finally, fourth, the uniform
7 policy should include a provision that ensures it
8 does not interfere with patient medical care.
9 Would you like to discuss and deliberate and vote
10 on that recommendation first, Ms. Goldberg?

11 MS. GOLDBERG: Thank you very much for
12 this. It's important, and I appreciate all of
13 the work that went into this and generally agree
14 with everything that's here. I have one question
15 which is whether the subcommittee considered what
16 information should be provided to an
17 unrepresented person that they can obtain these
18 records if they would like. It seems to me that
19 while counsel might know to ask for them, an
20 unrepresented person would be unlikely to know
21 what they can ask for. And although this gives
22 permission to provide the records to the

1 unrepresented person, it does not do anything to
2 help that person actually know they can access
3 the information.

4 MS. TOKASH: Yes, we did make that
5 particular finding. So you are correct, Ms.
6 Goldberg, that the three categories of
7 information should be shared with victims
8 regardless of whether they have retained counsel.
9 I think you have appropriately identified an
10 issue that warrants further study, perhaps, in
11 that how could a victim-centric prosecution
12 assist those victims who do not have counsel in
13 understanding what support systems are available
14 to them and what choices they have. Is that my
15 understanding?

16 MS. GOLDBERG: Actually I was speaking
17 very specifically to access to the recorded
18 statements that forensic examiner puts in the
19 medical records. This policy proposes that the
20 information is provided on request. Another
21 version of this policy could be the information
22 is provided automatically to victims counsel

1 which seems to me to make some sense, why not
2 have an automatic disclosure.

3 And then the question as I was
4 thinking about that came to whether it's provided
5 with an opt out, right, so that -- so who doesn't
6 want the information, doesn't get it. But
7 otherwise, prosecutors are habituated to and
8 required to turn it over. And I think there are
9 arguments on both sides. But my particular
10 concern was that an unrepresented victim would
11 likely not know what they can ask for. And so if
12 accessing the information depends on an
13 affirmative request from that person, this is not
14 likely to have much of an impact on an
15 unrepresented person.

16 MS. TOKASH: Thank you. We did hear
17 concerns about an automatic dissemination. But I
18 think Ms. Vuono will speak to that.

19 MS. VUONO: Yeah, you raise a really
20 good point that was discussed in the
21 subcommittee, and it actually ties in to
22 Recommendation 3. Because one of the ways that

1 victims -- unrepresented victims find out about
2 their rights to information such as this, are
3 through the victim-witness programs, as well as
4 the DD forms that are given to the victims once
5 they enter the system, or make an unrestricted
6 report, or probably even a restricted report.

7 And so the third recommendation is to
8 align the DD forms and the instructions with this
9 new rule. Currently DD Form 2701 lays out every
10 right of the victim to this information, and so
11 we need to be aligned with this recommendation,
12 say you have a right to this information, and if
13 it's -- you can request it from the prosecutor.

14 So it's an information sharing
15 requirement that currently exists, and it just
16 needs to be updated to make sure they understood
17 these rights.

18 MS. GOLDBERG: Thank you. That
19 information is very helpful. I am sensitive to
20 the point that unrepresented --

21 MS. TOKASH: Sorry, Ms. Goldberg, I'm
22 just showing you the DD 2701 form that Ms. Vuono

1 highlighted, just so that you have a connection
2 to what she was talking about.

3 MS. GOLDBERG: That's very helpful.
4 Thank you. Through other work that I've done
5 related to access to justice, you know, I am
6 familiar with that, as I'm sure many other
7 colleagues here are, that people who are
8 unrepresented, even if they're given a checklist,
9 can find it very difficult to ask for the
10 information, to know how to do that, even if you
11 show up.

12 So I think if we go forward in this
13 way, where the burden is on the victim, rather
14 than on the prosecutor, to turn over the
15 information, we have to understand that the cost
16 is that the victims probably, in many cases, will
17 not access the information.

18 I understand that there are concerns
19 on the other side about having an automatic
20 disclosure requirement. And that wasn't part of
21 the conversation that led you to weigh, you know,
22 to decide against that, but want to note for the

1 record that I think it's quite important to make
2 it very clear that people know how to ask the
3 prosecutor for information, and that the process
4 for asking for the information is easy.

5 Because if it requires the creation of
6 an affidavit or something like that, I think that
7 is a fairly significant barrier, and looking at
8 this initial information for victims and
9 witnesses of crime information sheet which looks
10 valuable and usable and important, I see an
11 overview of crime -- of victim rights which is --
12 looks extensive, and it is in small print, it
13 doesn't necessarily let a person know how to get
14 the information that they're entitled to get --
15 or get -- may let the person know that, how to do
16 that, but doesn't do the kind of hand-holding
17 that is often necessary for a person to actually
18 exercise their rights.

19 MS. TOKASH: Thank you. I see that
20 Ms. Garvin also has something to say.

21 MS. GARVIN: Yeah, thank you. And
22 just for the record, I'm keeping my camera off

1 for health reasons right now (audio
2 interference). Two things. One, I share Ms.
3 Goldberg's concern about upon request. Having
4 done this work as a victim attorney for a very
5 long time, when survivors come to me partway
6 through their case, they often, despite having
7 been given the brochure that says you have these
8 rights upon request, they don't quite understand
9 that.

10 And so -- and I do understand the
11 arguments on both sides. This has been a
12 longstanding discussion in the victim services
13 field about whether upon request or automatic
14 rights are more appropriate for systems, and
15 victim-centered, and all of that gets argued
16 back-and-forth. The upon-request, I just want to
17 echo the concern though that in practice, that
18 generally results in non-request, because of a
19 lack of understanding.

20 And so the recommendation to align the
21 DoD instruction, and particularly the Form 2701,
22 doesn't wholly resolve it. And so I think, just

1 want that on the record. I understand that the
2 committee debated it a bit, but that is a concern
3 of mine.

4 My second comment is that it goes to
5 a different part, and -- it is that the
6 opportunity to non -- for non-disclosure, if it
7 will determine -- if it can be determined that
8 will impede an ongoing investigation.

9 I am curious about whether there was
10 discussion about whether that would be
11 documented, and if so, whether the documentation
12 of refusal to disclose would be disclosed.

13 Because in practice, in the civilian
14 side at least, I have not encountered this in my
15 military work, but on the civilian side what
16 happens is a determination of non-disclosure of
17 certain information including information akin to
18 what's at issue here, and then a non-disclosure
19 of the reasoning for the non-disclosure. Or a
20 blanket statement of it will impede, and I have
21 no opportunity to show that analysis or to ask
22 the court to do a review of that analysis.

1 And so in practice in certain
2 jurisdictions, and I would imagine this will
3 translate to the military with certain
4 prosecutors, it will result in a non-disclosure,
5 and no ability to challenge that. And so I'm
6 wondering if there was discussion with regard to
7 that, whether it could be -- documentation for
8 reasons for non-disclosure shall be disclosed.

9 MS. TOKASH: This is Meghan Tokash
10 speaking again. We did not talk about
11 documentation of non-disclosure. We did talk
12 about perspectives that we heard from some
13 stakeholders regarding concerns over automatic
14 disclosure in terms of the investigation, or in
15 terms of trying to influence other witnesses, or
16 just the specter of trying to influence other
17 witnesses by being in possession of your own
18 statement.

19 We also heard some concerns with
20 respect to safety of the victims who are in
21 possession of their own statements, whether that
22 be a domestic violence situation or otherwise.

1 So those were some of the things that
2 we heard, Ms. Garvin. But we did not talk about
3 documenting non-disclosure. And it's an
4 interesting point. I'm seeing head nods here
5 from some committee members.

6 MS. GARVIN: Yeah, I would recommend,
7 like, a friendly amendment that (audio
8 interference) that includes that that gets
9 documented, so that it can be challenged. Just,
10 again, for some of the same reasons we would want
11 things documented so an accused person could
12 challenge them.

13 And I'm not on the subcommittee, and
14 I respect all of the work that's been done. And
15 I also -- any time -- I just want to put this on
16 the record, any time we raise concerns about
17 information going to the victim, I hope you're
18 raising identical concerns about information
19 going to the accused.

20 And what I mean by that is, you know,
21 health concern, concern about dissemination, all
22 of those things. These are -- there are two

1 human beings impacted by crimes, the accused
2 person and the victim. And we should not presume
3 one or the other is more prone to dissemination
4 of information, or prone to violation of a
5 protective order, or prone to not being able to
6 get themselves self-care.

7 And so for me, alignment of disclosure
8 of information is the gold standard, and
9 alignment of dissemination of information with
10 the same protections is the gold standard for a
11 fair system.

12 So I know we offered a lot of
13 evidence, and I just kind of wanted to put that
14 on the record too.

15 So bottom line, my recommendation
16 would be that we amend this to include
17 documentation of reason for non-disclosure, and
18 that that be available.

19 JUDGE GRIMM: This is Paul Grimm.
20 Could I ask a question about that? I don't
21 disagree with requiring that the basis for non-
22 production needs to be stated.

1 But documentation, I worry about you
2 get one of those conclusory, it would damage the
3 investigation. And that documents why it was not
4 disclosed, but it gives you no information as to
5 whether that's a justifiable conclusion, or
6 whether it's just a knee-jerk reaction.

7 When you were talking about
8 documenting, Ms. Garvin, were you talking about
9 an explanation for the underlying facts as to why
10 the conclusion not to disclose was made?

11 MS. GARVIN: Yeah, something more than
12 a conclusory comment so that a court could make a
13 decision. And if a prosecution needs to ask for
14 that review to be in camera, that could be an
15 option, so that the detail -- if the detail
16 itself compromises the investigation, that seems
17 appropriate then to say -- I'd ask for an in
18 camera review of my rationale.

19 JUDGE GRIMM: Thank you.

20 MS. BASHFORD: The forensic
21 examination of the person or property of the
22 victim, you've got to have something in there

1 that says unless otherwise prohibited by law,
2 because the DNA Identification Act of 1994
3 prohibits the disclosure of DNA profiles to other
4 than law enforcement and defense.

5 It doesn't say to victims or victims'
6 counsel. So I think that's a federal -- it's a
7 federal offense to do that. And it is a forensic
8 examination of the person or the property, so
9 something has to be put in there.

10 I don't understand what we're trying
11 to address with number four, the not to interfere
12 with provision of medical care to the victim.

13 And with respect to the protective
14 order part of that, is that so something
15 disclosed, say, to Victim A, the protective order
16 could say don't disclose these details to
17 Victim B? I'm not quite sure what's envisioned
18 by those two things.

19 MS. TOKASH: Okay, so the first thing
20 with respect to number four, the uniform policy
21 should include a provision that doesn't interfere
22 with patient medical care. May I ask you,

1 Dr. Markowitz, to comment on that?

2 DR. MARKOWITZ: Yeah. And correct me
3 if I'm wrong, Meghan. I think one of the things
4 we're concerned about is that if there was any
5 protective order, or anything like that, that you
6 couldn't ask someone to not be able to disclose
7 medical records, like if they had their own
8 medical records they could not use them in order
9 to seek other care, right? You can't -- that's
10 not a reasonable thing to be able to ask a victim
11 in a case to be able to do.

12 So I think that was -- is that what we
13 were referring to in four? Ultimately? That
14 sort of thing?

15 MS. PETERS: Yes, that's what we were
16 referring to. And another example is seeking VA
17 benefits, for example. Need to be able to go
18 carry your records to go do that.

19 And we didn't want anything in the
20 policy to be construed to prevent something like
21 that that a victim or a person needs to do.

22 DR. MARKOWITZ: And we may just need

1 to -- sorry, we may just need to add an example,
2 because I recognize that if you weren't in the
3 room having the discussion, that is not
4 inherently intuitive as people read that.

5 But that's essentially what we're
6 talking about, to make sure that people still
7 have use of some of those things that have other
8 applications that go beyond the military justice
9 system.

10 MS. BASHFORD: And what was envisioned
11 by the protective orders to help you stop that
12 prosecution?

13 MS. TOKASH: The protection order
14 sought by prosecutors was so that if a victim has
15 a statement, and they are -- in their possession,
16 and they have other witnesses who they may want
17 to fall into line with certain aspects of what
18 they told investigators, the concern was that a
19 prosecutor could seek an order of protection to
20 limit the victim from being able to talk with or
21 show that to other people. And so that was what
22 we were thinking.

1 Also, just to address Ms. Garvin's
2 concern about treating equally the dissemination
3 of information to both victim and accused, we
4 actually had a very robust discussion about how,
5 especially from the civilian practitioners, if a
6 defendant and their counsel wanted to see
7 protected information within the criminal
8 investigative file, they may be, for example,
9 invited to come to the FBI or to the U.S.
10 Attorney's office to see that information, but
11 they may not reproduce it, take notes, copy it,
12 take it with them.

13 So they can review it upon inspection
14 one time, multiple times, but it doesn't leave
15 with them in their possession. And that's fairly
16 a routine practice across the board. A.J.?

17 MR. KRAMER: Thank you. I think we
18 also talked about if there were multiple victims,
19 and the prosecution might not want them sharing
20 their reports with each other, and so they might
21 also -- that would be another scenario, I think,
22 that we thought a protective order --

1 MS. BASHFORD: But in none of this was
2 the protective order, we'll give the information
3 to victim counsel, but we don't want them to
4 share it with the victim. Right?

5 MS. TOKASH: Correct. Correct. Ms.
6 Goldberg?

7 MS. GOLDBERG: And just for the
8 record, when you talked about a protective order
9 limiting who the victim could share their records
10 with, you talked about, I think in a general way,
11 about limiting them from sharing records at all.

12 And I think my understanding was that
13 a protective order wouldn't foreclose any sharing
14 at all, say, for example, of a medical provider
15 or some other advisor, but would foreclose
16 broader sharing. Is that what the --

17 (Simultaneous speaking.)

18 MS. TOKASH: Correct.

19 MS. GOLDBERG: Just wanted to be sure.

20 DR. MARKOWITZ: I also want to be
21 clear that I don't think we suggested that a
22 protective order be in every single case, but be

1 at the discretion of the prosecutor.

2 MR. KRAMER: It was more the exemption
3 than the rule, I think. We thought in most
4 cases, the prosecution would have to -- because
5 it would have to come from some authority, and
6 there would have to be some showing made about
7 why it was necessary in a particular case.

8 MS. VUONO: It might be worth
9 mentioning that the reason was the Special
10 Project Subcommittee Recommendation 2 came into
11 effect was to recognize that there is an
12 authority in the UCMJ under Article 30A to have
13 these sort of investigative subpoenas and all
14 sorts of other powers to a judge before a trial.

15 The suggestion was if this
16 recommendation is approved by the DAC-IPAD, there
17 would need to be a process created to seek a
18 protective order before a judge. And that's what
19 Recommendation 2 would then do to enable that.

20 MR. YOB: Ms. Vuono, I just point out
21 for clarification, also that's a judge or a
22 magistrate, because they could use a magistrate

1 program for that.

2 MS. PETERS: If I could comment on the
3 statutory framework for this task, the committee
4 was asked to look at these three categories of
5 information and discuss whether a uniform policy
6 should be established. And it's at your
7 discretion how far you want to go towards
8 prescribing the policy.

9 But what was asked was that you all --
10 your collective expertise weigh in on important
11 considerations. And so these details will be
12 fleshed out. These issues and concerns the staff
13 will collect into the supporting report for the
14 committee's recommendations.

15 And so we use this recommendation, and
16 numbers one, two, three, four, to sort of itemize
17 broad concerns. And then the report itself can
18 sort of analyze where these issues might go and
19 what interests are at play.

20 And that's also what we did with one,
21 two, three, and four, is say who has equities in
22 these decisions about disclosure in the military

1 system.

2 And then that also led us to
3 Recommendation 3. All of the services' responses
4 in front of you, the military justice policy
5 offices for each service supported the
6 establishment of a uniform policy in the Rules
7 for Courts-Martial, so that these services can
8 account for their interests and their concerns,
9 and develop it through their own -- their process
10 with the Joint Service Committee on Military
11 Justice.

12 And I think when the subcommittee
13 discussed protective orders, the fact that there
14 is an authority in the UCMJ existing to have a
15 judge weighed on matters, regardless of whether
16 charges are preferred, it could be in -- during
17 the investigation, it could be prior to referral.
18 And this is relatively new. It's been in place
19 since 2019.

20 But that authority can be used to
21 develop a mechanism for protective orders as
22 needed. And it was discussed as an exception

1 rather than the rule. But it made it feasible,
2 presumably, to do this. And it also seemed to
3 me, all told, between the service responses, the
4 existing authorities in the Manual for Courts-
5 Martial, it seemed to counsel in favor of an
6 opportunity to carve out policies in the Rules
7 for Courts-Martial, where, on individual case
8 scenarios, to Ms. Garvin's point, someone can
9 discuss, or have reviewed, a disclosure or a non-
10 disclosure, and the reasons for such.

11 So all of these three recommendations,
12 together, reflect a framework for, I think,
13 accounting for these various interests, rather
14 than prescribing the specific policy itself.

15 MS. TOKASH: Yes, Ms. Goldberg.

16 MS. GOLDBERG: Thank you. And, again,
17 I only got to see these recommendations. I
18 wanted to propose for consideration in
19 Recommendation 1, point three under the -- the
20 uniform policy should include the following,
21 which currently says disclosure of these three
22 categories may be subject to a protective order

1 sought by the prosecutor.

2 I wanted to propose for consideration,
3 is sought by the prosecutor under the conditions
4 set out in point 2 above, or some other
5 appropriate way of making that point. I think my
6 concern is the way that point 3 reads, like it's
7 read -- although it shouldn't be read in the
8 abstract, but if it's read in the abstract, it
9 could suggest that a prosecutor can get a
10 protective order any time they ask for one.

11 And I think in light of the
12 conversation we were having earlier, it seems
13 like reinforcing that protective orders are
14 available only if it's determined that the
15 disclosure would impede or compromise an ongoing
16 investigation.

17 So I think making sure that that is
18 very clear would be useful. A second point, just
19 in relation to what you said, is I think this is
20 a nice opportunity for alignment across the
21 services, you know, which has a lot of value, it
22 seems to me, in a variety of cases, but in

1 particular in this area where there may be cross-
2 service cases, and the idea that a victim would
3 have to do one thing to get their records from
4 one service and another, if there in -- you know,
5 if the prosecution's being handled by another
6 service --

7 (Simultaneous speaking.)

8 MS. TOKASH: Could somebody please
9 mute their mic?

10 (Audio interference.)

11 PARTICIPANT: Can you mute your mic,
12 please?

13 There we go. Okay.

14 MS. TOKASH: So one comment,
15 Ms. Goldberg, and then I would like you just to
16 point out specifically, or propose language with
17 respect to that.

18 In federal civilian practice in
19 district courts where I live, most protective
20 orders have to be filed jointly, so the defense
21 and the prosecutors usually have to come to an
22 agreement of the terms of the order of

1 protection. That may not happen. Sometimes the
2 prosecutors will ask the judge to sign an order
3 of protection in a vacuum, but most often the
4 judge will then ask me, Ms. Tokash, have you
5 talked to the defense about this?

6 So there is that -- typically a built-
7 in mechanism where the practitioner should be
8 getting to yes on the terms of an order of
9 protection before they go to the judge.

10 MS. GOLDBERG: Thank you. I
11 appreciate that. I think with respect to
12 protective order regarding the victim's access to
13 his or her or their records, the concern might be
14 that that victim's interests are not represented
15 in that negotiation between the prosecutor and
16 the defendant and the defense counsel.

17 And -- but what I was really focused
18 on was that -- was in -- was on inventing the
19 standard under which disclosure would be
20 problematic, which is set out in two above, the
21 three where I was concerned.

22 In Recommendation 1, there are the

1 three declarations -- the three types of evidence
2 covered in the uniform policy should include the
3 following, and I was only suggesting that three
4 be revised to add the standard under which the
5 protective order could be sought by the
6 prosecutor. I wasn't trying to change anything
7 substantive, just ensure clarity around that.

8 MS. TOKASH: Thank you. Judge Walton?

9 HON. WALTON: I could be wrong, but I
10 thought we talked about the issue of a protective
11 order for the purpose of protecting the victim
12 from his disclosure, not designed to in some way
13 inhibit the victim of having access to the
14 information. I thought that's what the context
15 in which we discussed the issues of a protective
16 order.

17 MS. TOKASH: That was -- this is
18 Meghan Tokash speaking. That was my
19 understanding as well, that the victim will still
20 have full-fledged access to it. It's just what
21 he, she, or they can do with it is the point.

22 MS. GOLDBERG: And I'm sorry, maybe

1 I'm misunderstanding. But in light of the
2 conversation, we also made the point that
3 Dr. Walton and others made, that protective
4 orders shouldn't be granted automatically,
5 protective orders that would restrict the
6 victim's disclosure of the information of the
7 victim's personal records to others, that the
8 protective order could be granted restricting the
9 victim's decisions about who to disclose the
10 information, only if disclosure would impede or
11 compromise an ongoing investigation.

12 And to make a very narrow point, that
13 three, which says, disclosure may be subject to a
14 protective order estopped by the prosecutor, that
15 estopped by the prosecutor sounded like a general
16 authorization that the prosecutor could seek the
17 restrictions on disclosure if they don't have his
18 or her records.

19 And I was only trying to add clarity
20 that the standard in two applies to three. So,
21 it's a very small point.

22 MS. TOKASH: A.J.

1 MR. KRAMER: Thank you. One of the
2 main reasons I think we'd heard about it -- a
3 domestic violence case -- is there was a worry
4 that a victim would be pressured to release it to
5 somebody else, and may or may not appear to
6 compromise an ongoing investigation. So, maybe
7 things were not clear to compromise an ongoing
8 investigation.

9 So, it was intended more to protect
10 the victim, than anything else. So, it may be
11 broader than, or not even in that category.

12 MS. GARVIN: I'm not sure folks can
13 see my hand got raised. Check in when it's
14 appropriate.

15 MS. TOKASH: Go ahead, Ms. Garvin.
16 And then Ms. Bashford after you.

17 MS. GARVIN: So, one question and a
18 comment. The question is, if we do not have that
19 part 3, which is disclosure of these parameters
20 of the protective order, is there a prohibition
21 on C to a protective order?

22 Or is that unfolding over all

1 disclosures, projects, the prosecutor, or any
2 comment, they can seek a protective order without
3 number three?

4 And I ask that question because I
5 think sometimes when you include, you may seek a
6 protective order and get fought, and often. And
7 this trades within authority without this, where
8 prosecutors seek a protective order.

9 And if there is, whether any of that
10 was all some of this, and were under kind of a
11 standard practice?

12 And my second is a question to the
13 comment, and I deeply appreciate when there's an
14 outside-looking systems trying to put in place
15 protections for survivors.

16 And I am a firm believer of respecting
17 survivor's choices, and not having a system that
18 is overly parental saying what's most protective
19 for them. And so, assuming a prosecutor can ask
20 about a protective order in place about loan
21 disclosure, without it actually being
22 initiated -- I think there was something that it

1 a little problematic for my understanding and
2 practice, and also their agency.

3 I just want to say on the record that
4 my question is about -- what's the authority of a
5 prosecutor without number three in place?

6 MS. PETERS: Ms. Garvin, this is
7 Meghan Peters. Currently, a judge is not
8 relegated until after referral of the case, and
9 they would typically be the ones to issue a
10 protective order.

11 But what has developed since I guess
12 at least 2019, and this law has evolved, is that
13 there is an authority under the UCMJ to bring
14 matters to a military judge or magistrate prior
15 to referral, and prior to preferral.

16 So, for example, prosecutors and
17 defense can seek an investigative subpoena. And
18 the way the law works is the President has to
19 prescribe rules for the matters that will be
20 heard under this Article 30A authority -- what
21 the recommendations suggest is that the existing
22 Rules for Courts-Martial have a place where

1 procedures for protective orders could be placed
2 if an existing statutory authority for a military
3 judge to be involved during the investigative
4 phase of the case, or after charges are filed.

5 So, there are, in theory, tools there.
6 They have to be amended and built out, but the
7 framework is there, was the subcommittee's
8 position on discussing the viability of
9 disclosures with protective orders, if needed.
10 Thank you.

11 MS. GARVIN: So, if I understood that
12 correctly, the device does exist right now, but
13 they just are not detailed? Am I understanding
14 that correctly?

15 MS. PETERS: Correct. And by placing
16 any policy in the Rules for Courts-Martial would
17 allow for the needed procedures to be built into
18 the rules, they would need to presumably carve
19 out a rule for court-martial that has a process
20 for seeking protective orders.

21 MS. GARVIN: And so -- there are no
22 further comments?

1 MS. PETERS: No, I apologize. That is
2 my comment.

3 MS. GARVIN: So, just a practice
4 question, and I'm sorry for not knowing this. Is
5 there no other information that's disclosed
6 between the prosecution and the defense that a
7 protective order might be issued under, at this
8 juncture?

9 And if there are protective orders
10 that could come in play like non-disclosure, it's
11 your clients, and you asked that earlier. Non-
12 dissemination, and non-disclosure of other
13 witnesses.

14 If they're all pretending that that
15 happened now in process, how do those happen?

16 MS. PETERS: That's something I would,
17 as a staff, take back to the services. I'm not
18 able to speak to that right now.

19 MS. BASHFORD: In our practice, you
20 get protective orders. Say there's a sexual
21 assault out on the street and the detective wind
22 up interviewing the victim and doing the photo

1 array in her apartment.

2 We would get a protective order for
3 the disclosure, so it doesn't say where the
4 statement was taken, or where the photo ray was
5 viewed. Because otherwise, the defendant has no
6 access to where she went. So, we get a
7 protective order for something like that.

8 I think two and three, though, are
9 slightly different. One is ongoing
10 investigation, but the other one that just says
11 protective order, I think goes back, I think what
12 A.J. had said, when you have multiple victims, or
13 a victim and at least an outcry witness, you
14 might not want them trading their statements back
15 and forth.

16 So, the investigation is over, you're
17 getting ready for trial, but you might want to do
18 a protective order, you might not care. But you
19 might want to ask for the service assistant.

20 MS. GOLDBERG: Would that be covered
21 by revising DoD 203 to cover the investigation
22 and integrity of the process, the integrity of

1 the prosecution or something? Because I take
2 your point, right, that the investigation and the
3 prosecution are distinct and they both may be
4 relevant. However, whatever it is - I mean
5 first of all, adding the integrity of the
6 prosecution may make sense. But, that concept
7 should land in three also, because right now
8 three reads very broadly. But I take your point,
9 we need a good measurement.

10 HON. SMITH: So, I think -- I mean,
11 it's very possible I'm being dense. It wouldn't
12 be the first time.

13 But I don't see a real problem with
14 three, because it says, may be subject, which
15 doesn't mean it has to be, and the only way
16 you're getting a protective order is if you go to
17 the court and you seek a protective order.

18 So, there's still going to be
19 oversight over whether or not a protective order
20 is issued. Plus, if there's a concern that this
21 is kind of highlights to prosecutors -- hey, you
22 can get a protective order -- I don't think

1 that's so much a concern.

2 They know that they can do that, and
3 they do it when it's appropriate. And more times
4 than not they don't do it, would be my experience
5 way back when.

6 But I don't necessarily see such an
7 issue with this language.

8 MS. GOLDBERG: So, maybe I'm being
9 hypersensitive. This is the last comment I have
10 about this provision, which is, if I'm the
11 prosecutor and I share this provision with the
12 judge, then this provision contains no standard,
13 and I'm coming in as in, look, I'm just
14 authorized to get a protective order.

15 Full stop, rather than I'm authorized
16 to get a protective order under these conditions.

17 And to me, the under-these-conditions
18 part is useful because it reflects the
19 government's position that there is some sort of
20 a standard set of conditions under which
21 authority should be granted.

22 HON. SMITH: So, I'm the judge and I'm

1 looking at it. And I don't think that there
2 needs to -- I'm hanging my hat on, it says, may
3 be.

4 May be subject to a protective order
5 and I'm thinking, yeah, I don't think this needs
6 any protective order. Explain to me why it does.

7 So, I think that this is one of those
8 provisions probably I would just say, we'll trust
9 for the court to make the call about whether or
10 not to issue it.

11 And keeping in mind that presumably
12 the other side's going to have a lawyer,
13 hopefully, who's arguing that. Maybe not if it's
14 a victim seeking it on their own behalf. I don't
15 know.

16 JUDGE GRIMM: Paul Grimm. May I have
17 a moment, please?

18 HON. SMITH: Sure, go right ahead.

19 JUDGE GRIMM: I mean, it might be, to
20 Ms. Goldman's concern, the impetus to say, for
21 good cause. So, if you have good cause, I think
22 I'd be, I'm not sure, if the judge actually is

1 pretty clear that what he has been called and
2 what is not, it's just a blanket request because
3 I outline it, it's not likely to have too much
4 traction.

5 But simply saying, good cause, doesn't
6 define it. Where's the whole set of criteria?
7 You run the risk that you left something out, or
8 included too much.

9 But if it is standard for the court to
10 say, no, what's your good cause, and why should I
11 give this to you. That is a common phrase to use
12 in some of these things, and I just wonder
13 whether that might -- maybe that's the concern
14 that has been raised.

15 MS. GOLDBERG: Thank you, Judge. That
16 addresses my answer. And I see everyone shaking
17 their heads saying, yeah, that's the problem.

18 DR. SPOHN: Also, the second
19 regulation is that the JSC should modify the
20 rules for the courts-martial, to provide a
21 process for the issuance of a protective order.

22 So, the second recommendation seems to

1 address, at least partially.

2 MS. GOLDBERG: It does. I'm just
3 thinking -- having for good cause here and even
4 in three -- excuse me. A recommendation for
5 issuance of a protective order for good cause or
6 something, is an important guide to the standard.

7 Not that it is not obvious to judges.
8 The judges are not the only audience for this,
9 and I think it is useful to have some sort of
10 schedule. But again, I've said earlier I would
11 say nothing further on this part.

12 MS. PETERS: This is Meghan Peters.
13 As the staff putting this together, the mindset
14 was that the tasking was to decide whether a
15 policy should be developed and identify the
16 concerns.

17 And so, I want to finish up. If not,
18 it's part of him drafting the policy, rather
19 framing that issues to factor into the policy.

20 So, we will make the changes and bring
21 all of your concerns and every member's concerns
22 into the report that supports this. That the

1 report is the guidance to the services, the core
2 duty to develop the policy.

3 Any illustrative examples and language
4 we can also simply include separate and apart
5 from the recommendations, sort of like we did in
6 the June report. Here's our recommendation, and
7 the illustration of important pieces can
8 accompany the report, if that works for you all.

9 DR. MARKOWITZ: Can I make one
10 slightly different point that I feel like I would
11 be remiss if I didn't make, and that is this.
12 Patients in these cases have other ways of
13 accessing their macrofronts (phonetic) exam
14 report and their medical records.

15 I would hate for anybody to be left
16 with the idea that this is the sole avenue for a
17 victim in these cases to be able to access that
18 information.

19 Victims in these cases have a right to
20 their own medical records. This is not the only
21 avenue.

22 While I absolutely believe in the

1 importance of their ability to be able to
2 understand what the government has in their
3 possession and the ability to access it should
4 they so choose, through this avenue I do want to
5 be very clear that they also have a right to get
6 that information after the exam has been
7 completed, and that they should have access to
8 their medical records, and that this should never
9 be the sole avenue by which they have access to
10 these records.

11 So, I just want to make sure no one is
12 ever left with the impression that this is the
13 only avenue by which they victims in these cases
14 can get access to these records.

15 I don't think anyone on this committee
16 actually believes that. But I just want to, for
17 the record, make that very clear that this is not
18 the only avenue in which some of this information
19 is available to victims.

20 MS. TOKASH: Okay, any other members
21 that want to chime in virtually?

22 HON. SMITH: Judge Grimm.

1 MS. TOKASH: Judge Grimm?

2 PARTICIPANT: You're muted, Judge.

3 MS. TOKASH: We can't hear you though,
4 Judge Grimm.

5 JUDGE GRIMM: And indeed I was. And
6 that may be the best way for me to be (audio
7 interference). But I get the points from staff
8 that we're just simply recommending policy, and
9 it's up to the services to implement how that
10 policy would be done.

11 I think it's an important point, I see
12 it consistent with a recommendation of policy
13 that we say, that the services should prepare
14 procedures for permitting the issuance of a
15 protective order, by a showing of good cause.

16 Now, they can come out and say
17 whatever they think good cause should be, but the
18 good cause requirement in there is, I think, the
19 discomfort that it can't be concluded, I think
20 even if there was an investigation or a
21 prosecution.

22 And I don't think that that's

1 dictating what would constitute good cause, or
2 how to show me, and then how to do that. And I
3 do think it gives guidance that there has to be
4 something more than just come up with whatever
5 rules you have for these (audio interference). I
6 think that's an important point.

7 MS. PETERS: Yeah, so we captured that
8 suggested change to read that into the record,
9 where the rule is up for deliberation.

10 JUDGE GRIMM: Thank you.

11 MS. VUONO: And, Ms. Tokash, do we
12 want to take, like, a five-minute break where we
13 clarify the language before a vote? Or we might
14 just move into the vote, whatever unknown.

15 MS. TOKASH: I think if we have it, so
16 all else remaining the same under Recommenda-
17 tion 1.

18 Point number two, those are the
19 additional points that were set forth that we
20 have, starting with one of these categories of
21 information, including copies of statements,
22 recordings, documents, should be made available

1 upon request by the victim of counsel.

2 Two, the prosecutor will disclose the
3 three categories of information requested in
4 consultation with the MCIO, unless the prosecutor
5 determines, with good cause, that disclosure
6 would impede or compromise an ongoing
7 investigation, I have concluded from the data.

8 If so, the government shall seek the
9 reason for non-disclosure, and they do so in
10 camera, if the government has concerns.

11 Three, disclosure of these three
12 categories of information may be subject to a
13 protective order, estopped by the prosecutor with
14 good cause.

15 And finally, the Uniform Policy should
16 include a provision that ensure it does not
17 interfere with patient medical care. For
18 example -- and Dr. Markowitz, do you have an
19 example that we can hook in there?

20 DR. MARKOWITZ: Yeah, do you want me
21 to send you language now?

22 MS. TOKASH: Yeah, or --

1 DR. MARKOWITZ: Or if you want it off-
2 the-cuff right now.

3 MS. TOKASH: That's okay. I'm putting
4 you on the spot. I'm sorry, Dr. Markowitz.

5 DR. MARKOWITZ: Yeah, so I have to say
6 to everyone, provision of medical care, to
7 include the use of records for follow-on health
8 care. Of course, now my brain is just like --
9 put follow-on medical care related to the
10 assault, or --

11 PARTICIPANT: Related to the alleged
12 conduct?

13 MS. VUONO: I think it was to related
14 to the use of records from medical care, or
15 access to veteran funding.

16 DR. MARKOWITZ: That's what we talked
17 about. Thank you for capturing what was much
18 more articulately further on.

19 MS. GOLDBERG: And just quick
20 question. You stated, and for care. Would that
21 exclude --

22 (Simultaneous speaking.)

1 DR. MARKOWITZ: We can absolutely get
2 healthcare. Take it healthcare and keep it
3 broad, is absolutely what included all three.

4 MS. BASHFORD: And I do have a
5 friendly event though, of what it is.

6 MS. TOKASH: Please.

7 MS. BASHFORD: There's some to the
8 results of the forensic exams variant. I must
9 otherwise forget it in firewall.

10 MS. TOKASH: So, that is statutory
11 language. Am I correct, Ms. Vuono, Ms. Peters?

12 MS. VUONO: Yes. I'll talk loudly.
13 Yes, I thought because the top section is just
14 the statutory tasking, your point about, unless
15 otherwise protected by law, could actually go
16 into number two, whereas to disclose the
17 information, unless the prosecutor chose, or the
18 information is protected by law, you could put it
19 in two. Or otherwise protected by law.

20 MS. BASHFORD: I just want to remind
21 people who aren't aware, that it's actually a
22 felony to disclose a DNA profile. And I want to

1 make sure that -- I don't know if the services
2 people know that.

3 MS. VUNNO: Yeah, so recommend putting
4 that clause -- unless otherwise protected by
5 law -- in number two of the list of policy
6 considerations, not in the top, where that's just
7 the statutory tasking.

8 MS. TOKASH: Right. So, number two,
9 the prosecutor will disclose that the categories
10 of information requested in consultation with the
11 MCIO, unless the prosecutor is prohibited from
12 disclosing such information under law, or the
13 prosecutor determines, with good cause, that
14 disclosure would impede or compromise an ongoing
15 investigation. If so, the government shall state
16 the reason for non-disclosure, and they do so in
17 camera, at the government's request.

18 Okay. Does anybody in virtual land
19 and here in Arlington, Virginia, feel comfortable
20 with the language that we amended after our
21 deliberations, for Recommendation 1? Does
22 everybody feel comfortable calling a vote for

1 Recommendation 1?

2 Okay, with respect to Recommenda-
3 tion 1, as amended, as I read it into the record,
4 and we will pass copies out to you as well, do
5 all members agree with Recommendation 1 from the
6 Special Projects subcommittee?

7 (Chorus of aye.)

8 MS. TOKASH: Okay, I think the ayes
9 have it. With respect to Recommendation 2, that
10 the Joint Service Committee should modify the
11 Rules for Courts-Martial, to provide a process
12 for the prosecutor to request a protective order
13 to accompany disclosures to victims in counsel,
14 and in accordance with Article 30 Alpha, UCMJ,
15 all in favor?

16 (Chorus of aye.)

17 MS. TOKASH: Okay, the ayes have it.
18 I'm hearing no nays. And finally, Recommenda-
19 tion 3, the secretary of defense should modify
20 DoD instructions to align with both the earphone
21 policy for sharing these three categories of
22 information, and revise Rules for Courts-Martial.

1 All in favor?

2 (Chorus of aye.)

3 MS. TOKASH: The ayes have it.

4 MR. CASSARA: I thought we were in
5 Rosslyn. Are we in Arlington?

6 PARTICIPANT: Arlington?

7 PARTICIPANT: It's Arlington.

8 MR. CASSARA: Okay.

9 MR. KRAMER: Can I say, since you want
10 to -- the incredible amount of work you did
11 behind this in this subcommittee, the role of the
12 staff, thank you very much. It would not be
13 possible without your great staff. Thanks.

14 PARTICIPANT: It's hard to believe
15 Meghan has a day job as well.

16 (Off-microphone comments.)

17 MR. YOB: Ms. Smith?

18 HON. SMITH: Yes.

19 MR. YOB: I suggest that we take a
20 fifteen-minute break now. We'll follow the
21 fifteen-minute break with a revised schedule,
22 which is still keeping us on track, with a report

1 on the Case Review Subcommittee Report from Kate
2 Tagert.

3 That will be followed by Julie Carson
4 and myself, talking to you about the Collateral
5 Misconduct Report that's due after tomorrow. So,
6 we'll get to that, and maybe on track, include
7 that by 3:30, and then at 3:30 we'll open the
8 public comment period, as scheduled, and conclude
9 after that. I suggest we take a break.

10 (Whereupon, the above-entitled matter
11 went off the record at 2:23 p.m. and resumed at
12 2:41 p.m.)

13 MR. YOB: Okay, I'm going to turn it
14 over to Kate Tagert.

15 MS. TAGERT: Good afternoon. The good
16 news is you don't have any deliberations to do
17 right now, I'm just providing a group update of
18 the work pieces on the interview subcommittee,
19 and we're going to be talking about the two
20 projects that we're actually going to be doing,
21 in a lot of the work that we're doing that we're
22 accomplishing in the insight committee.

1 And the first part is the feasibility
2 and advisability of a conviction integrity unit
3 within DoD. As you remember recently this year,
4 we have had several servicemembers provide public
5 comment on the lack or inadequacy of post-
6 conviction relief. Additionally, due to the
7 recent changes to Article 66, the courts of
8 criminal appeals will no longer conduct a de novo
9 review of the courts-martial record when
10 assessing factual sufficiency.

11 Given these changes, as well as the
12 OSTC that's going to be coming on here soon, the
13 case review subcommittee felt it was an
14 appropriate time to review the issue of
15 conviction integrity units within the DoD. On
16 one day this week we held a meeting and received
17 testimony from four experts.

18 The first speaker was Ms. Julie Caruso
19 Haines, which thank you to Mr. Cassara, who
20 recommended her to speak, she was lovely and very
21 informative, she represents servicemembers on
22 appeal. She discussed post-conviction relief in

1 the military and the current state of appellate
2 rights, and when discussing post-conviction
3 relief, she specifically cited a recent D.C.
4 District Court case involving the servicemember
5 Bergdahl, for a comprehensive review of post-
6 conviction relief of servicemembers.

7 We then had the opportunity to hear
8 from Ms. Lindsey Guice Smith, and Ms. Bonnie
9 Sard. Ms. Smith is the director of the North
10 Carolina Innocence Inquiry Commission, and this
11 commission is the first of its kind in the
12 country, in that it is a state funded agency,
13 which is neutral, whose mission is to review
14 cases for actual, factual innocence.

15 We also heard from Ms. Bonnie Sard,
16 who served as the chief of the New York County
17 District Attorney's Office of Conviction
18 Integrity Program, which was also one of the
19 first in the nation. In this type of unit that
20 the New York Manhattan DA's Office has is what
21 members may be more familiar with, is the unit
22 within the DA's office, and not a neutral agency

1 like the one described from North Carolina.

2 And finally we heard from Mr. David
3 Shanies, who is a New York civil rights attorney
4 whose firm specializes in wrongful conviction.
5 And he has been involved in a number of high
6 profile cases, including the exoneration of two
7 men convicted of killing Malcolm X. These
8 speakers all share their insights on the best
9 practices for post-conviction review, including
10 how to establish an office with maximum
11 independence and transparency.

12 The case review is going to hear
13 testimony on this subject, and also receive input
14 from DoD on the feasibility and advisability on
15 this type of agency within DoD. And the second
16 project that the case review subcommittee is
17 currently working on is the panel selection
18 study.

19 The staff is currently reviewing all
20 contested courts-martial tried before a military
21 panel from fiscal year '21 and '22 involving an
22 Article 120 offense. This study is examining the

1 panel form, the location, the trial, the outcome
2 of the case, and the race and ethnicity of the
3 judge, prosecutor and defense counsel.

4 Additionally the study is capturing
5 the race, ethnicity, age and gender of every
6 panel member detailed to the courts-martial, or
7 essentially the jury pool, and comparing those
8 detailed members against the demographics of the
9 personnel that are actually selected for the
10 panel.

11 For the Army alone, we've collected
12 and put it close to 50000 data points, and I'd
13 really like to thank our Army representative
14 Janet Mansfield, who has actively assisted our
15 team in gaining access not only to the cases and
16 information, but also to the offices that have
17 been providing us with the race, gender and
18 ethnicity of this personnel, it's a huge lift for
19 them and we really appreciate it.

20 As to the progress, we've completed
21 the first phase of the project for the Army, and
22 we've also been working very closely with Dr.

1 Wells on analyzing the data. And preliminarily,
2 we can tell you for the Army, and only for one
3 fiscal year, that the personnel that are being
4 detailed to the courts-martial on the convening
5 orders are representative of the Army
6 demographics, they're reflected.

7 In other words, the members who are
8 detailed, broadly speaking, are diverse. However
9 once the process goes forward, the people that
10 are actually empaneled are less diverse, so there
11 is something going on there. The diversity
12 lessens as the cases go to trial. So, that's
13 where we're at. We're actively trying to finish
14 the other services, but we have to listen to all
15 the audios of the panel selection, which is very
16 time consuming.

17 So, we're just kind of trying to fill
18 out that information before sending it to the
19 Personnel Office, and then of course working with
20 Dr. Wells to get the data analyzed and
21 understood. And with that I'm going to -- Ms.
22 Bashford, if you have anything you'd like to add?

1 MS. BASHFORD: First thing I'd like to
2 add is it's always been my policy never do
3 yourself something you can delegate. And I mean
4 the staff has been doing an amazing job, and the
5 acquittals aren't transcribed, so that's why they
6 have to listen to the audio of the voir dire and
7 try to make out phonetically the names of the
8 people who are being questioned. It's a very
9 large task, and they're doing it admirably.

10 MS. TAGERT: Okay, that's my update.

11 MS. GOLDBERG: One question, a
12 comment, not being on the subcommittee, but thank
13 you, and it is striking what you just said. That
14 at least in the sliver of data you've analyzed so
15 far that the details reflect the diversity of the
16 service, and then the actual people empaneled
17 don't. so, I think that all of this work will be
18 very worthwhile as we think about a foundation
19 for next steps in this project.

20 MS. TAGERT: Thank you.

21 MR. YOB: So, up next we'll have
22 presentation from me, for the record, Pete Yob,

1 and Ms. Julie Carson, our deputy director. We're
2 going to talk about the DAC-IPAD commentary on
3 the biennial report on collateral misconduct from
4 the services. I'm going to turn it over to Julie
5 to start.

6 MS. CARSON: Good afternoon, Chair
7 Smith, and distinguished members of the DAC-IPAD,
8 it's lovely to speak to you today. The biennial
9 collateral misconduct study, I'll just start by
10 giving you a little bit on the background. This
11 was in the FY '19 NDAA, a provision that required
12 not later than September 30th of that year, 2019,
13 and then every two years after.

14 The secretary of defense acting
15 through the DAC-IPAD shall submit to the
16 congressional defense committees a report
17 including three data elements related to
18 collateral misconduct. Number one, the number of
19 instances in which a covered individual, which is
20 an individual who is either defined as a victim
21 of military sexual assault, and is a
22 servicemember.

1 Accused of misconduct or crimes
2 considered collateral to the investigation of
3 sexual assault committed against the individual.
4 The number of instances of adverse action being
5 taken against that individual, and the percentage
6 of investigations of sexual assaults that involve
7 an accusation or adverse action against a covered
8 individual as described.

9 So, the first report that came out in
10 2019 was with no specific guidance beyond that,
11 which sounds like it's pretty easy until you bear
12 down on all of these different terms, and how you
13 define them. So, each of the services produce
14 their own data, and they were all over the place
15 because there were so many inconsistencies from
16 some included cases that were finished.

17 Some included cases at different
18 stages, investigations that weren't closed, some
19 included reservists, some didn't. So, I mean the
20 data was not really comparable. So, the big
21 recommendation of the committee at that time, and
22 that was pre-ZBR, so some of our new members

1 wouldn't even have been here then, was that
2 there's got to be standardized definitions and
3 methodology first before you can really do much
4 of anything.

5 Well, the DoD general counsel
6 responded, and came out, issued a memo to the
7 services for the next report that was due in
8 2021, and in that report the general counsel had
9 definitions that were standardized for sexual
10 assault, adverse action and one of the other
11 terms, and also methodology about what population
12 is selected, is studied, and the timing of the
13 case.

14 So, in 2021 when the next report was
15 due, there was not a DAC-IPAD, because that
16 happened to have been the beginning of a new
17 administration, and a new secretary of defense
18 who decided to review all of the federal advisory
19 committees at that time. So, the report was
20 still prepared by the services and it still went
21 to Congress.

22 It was a better report because it did

1 follow the standardized definitions, and then
2 there had also been an NDAA that had come out
3 from Congress that had included additional
4 definitions. So, for the 2023 report, definitely
5 the best data that's been collected thus far on
6 the collateral misconduct. However, there was
7 another provision in 2021 that related to
8 collateral misconduct.

9 Which was a new policy for victims of
10 alleged sexual offenses called the Safe-to-Report
11 policy. So, having come from the victim's legal
12 counsel, victim's appellate rights area, Mr. Yob
13 is quite an expert on that. So, he is going to
14 explain the Safe-To-Report Policy, and how that
15 relates to this job that the DAC-IPAD is tasked
16 to do.

17 MR. YOB: Okay, so in terms of the
18 Safe-to-Report policy, I think you have to start
19 by talking about what was the precursor to it
20 coming into existence. And I remember back in
21 the 2018 and 2019 time frame when I was working
22 with the Army's Special Victim's Counsel Program,

1 seeing legislative proposals coming up that
2 effectively would implement, if passed, these
3 statutes would implement a statutory immunity for
4 certain types of collateral misconduct.

5 So, basically these proposals listed
6 offenses and said if these were committed by a
7 victim of sexual assault, or someone who reported
8 that they're a victim of sexual assault, and it
9 was considered collateral to it, then they would
10 have immunity from prosecution from that. And
11 there was a lot of push back on that as being
12 sort of a blanket policy that didn't allow for
13 any exceptions.

14 That could be perceived as a
15 motivation for people to report in order to avoid
16 prosecution or disciplinary action. So, those
17 never really got any traction during that time
18 frame. But what we saw come out in late 2020 as
19 part of the FY 2021 NDAA was Safe-to-Report
20 legislation that now exists.

21 And that legislation effectively took
22 a different approach than what I just described.

1 Where the legislation mandated that DoD produce a
2 policy, and that the services produce policies
3 that would deal with collateral misconduct by
4 victims of sexual assault. And they sort of set
5 forth the broad guidelines of how to do that, and
6 as the policies developed, those got more
7 specific in what the policy would be.

8 So, the statute itself applied to
9 military members, that included members of the
10 active and reserves who were sexual assault
11 victims, and who were suspected of collateral
12 misconduct related to that sexual assault. The
13 way that the statutory scheme envisioned it was
14 that commanders would assess the offenses that
15 were collateral.

16 They would look at aggravating
17 factors, the gravity and the impact on good order
18 discipline from that collateral misconduct. And
19 then decide whether based on that whole analysis,
20 whether it was minor collateral misconduct, or
21 not minor collateral misconduct. The statute
22 said if the commander, who made that decision and

1 decided that it was minor collateral misconduct
2 then no disciplinary action could be taken in
3 that case.

4 So, it gave a lot of discretion to the
5 commander, but if that commander made the
6 decision, there'd be no action on the collateral
7 misconduct. A key provision on the statute as
8 well is that it required DoD to track incidents
9 of collateral misconduct to which the safe to
10 report statute and policy would apply. So, that
11 mandated reporting so that DoD could track it.

12 And that's kind of where it blends
13 into what we're doing. So, that was the statute,
14 and that was in 2020. DoD released a policy in
15 October of 2021 which set forth the DoD policy on
16 safe to report in terms of collateral misconduct.
17 The DoD policy applies to all collateral
18 misconduct related to sexual offenses whether
19 it's a military offense, or whether it's a
20 civilian offense.

21 It has to be a military member to
22 which the collateral misconduct applies, but it

1 doesn't have to be a military case. So, for
2 instance if you had someone in the military who
3 was assaulted by a civilian, and is going to
4 civilian court, if the military member engaged in
5 collateral misconduct associated with that sexual
6 assault, the same policy would apply to them as
7 it would if it's being prosecuted in the military
8 system.

9 The DoD policy did not preclude
10 investigation of collateral misconduct, but it
11 did preclude any commander's action on that
12 collateral misconduct which is deemed minor, so
13 that's the key feature of it, is it minor. But
14 also required, the DoD policy required every
15 service to produce its own policy on top of the
16 DoD policy about how they were going to implement
17 it.

18 A key thing is that the commander's
19 determination of what is minor in terms of
20 collateral misconduct is based on several
21 factors. One of them is something we discussed
22 earlier, and that's the part five of the courts-

1 martial, which deals with non-judicial
2 punishment. And as we said earlier today, NJP is
3 for minor misconduct.

4 So, if you use that phrase minor, and
5 apply those same principles, and as we discussed
6 earlier, those principles are those offenses
7 which carry a penalty which is less than a
8 dishonorable discharge, and less than one year
9 confinement as a possibility of a maximum
10 punishment for that offense. So, that same
11 principle is a starting point for collateral
12 misconduct to determine whether it's minor or
13 not.

14 And that's only -- it's not
15 dispositive, and it doesn't have to fall within
16 that category, but it's just a guideline for the
17 commander to use in determining whether it's
18 minor. The DoD policy provides examples of
19 specific offenses which would normally be minor
20 collateral misconduct. But those include
21 underage drinking, unprofessional relationship,
22 violations of legal orders involving curfew, off

1 limits locations, school standards or birthing
2 policies, those kind of things.

3 So, those would typically be
4 considered minor misconduct, and minor collateral
5 misconduct in terms of the DoD policy. The DoD
6 policy also set forth aggravating factors. Those
7 included whether the collateral misconduct
8 threatened a military mission. So, if there's an
9 important military mission that was directly
10 threatened by that collateral misconduct, that
11 would be an aggravating factor.

12 Did the collateral misconduct threaten
13 the health or safety of another person? That
14 would be an aggravating factor. And did the
15 collateral misconduct risk or result in
16 significant damage to government or personal
17 property? Unless that damage, or the threat to
18 damage was the result of the person engaging in
19 self-defense, which would not apply.

20 So, those are some of the aggravating
21 factors. They also set forth in the DoD policy,
22 mitigating factors that a commander should use in

1 considering whether collateral misconduct is
2 minor. Those mitigating factors included the
3 youth, the lack of experience of the person who
4 was the victim who engaged in the collateral
5 misconduct.

6 Whether the suspect in the case was in
7 a position of authority or higher rank over the
8 victim. Whether it involved stalking, hazing,
9 coercion, or whether the collateral misconduct
10 was related -- perhaps not directly to the
11 offense, but as the result of trauma that the
12 victim experienced from the offense that led them
13 to commit the collateral misconduct at a later
14 time.

15 So, those are all mitigating factors
16 that would say that's minor misconduct that is
17 related to the offense. The DoD policy concluded
18 by saying if a commander determines that the
19 collateral misconduct is minor, that precludes
20 them from taking any disciplinary action or
21 adverse action against the victim in the case.

22 However, even if the commander

1 determined that it is not minor misconduct, this
2 commander still would have discretion if it's
3 above that level of minor misconduct in not
4 taking action, because commanders always have
5 discretion in taking or not taking disciplinary
6 action or adverse action against people.

7 So, it wasn't a green light red light,
8 it was just a red light in terms of if it's minor
9 misconduct you could not take action. The other
10 important part to kind of conclude on is that DoD
11 policy and the service policies require reporting
12 of collateral minor misconduct. And that
13 included if there's collateral misconduct that
14 was not deemed to be minor, what were the factors
15 that went into that decision, and how was that
16 decision made?

17 So, that's a reporting requirement
18 that's on services that is supposed to be made to
19 DoD SAPRO. Now, the service policies didn't come
20 online until late last summer of '22. So, that's
21 why our figures that we reported go through
22 September of last year. So, these policies

1 didn't come online until that moment in time, or
2 approximately that moment.

3 So, that's why the safe to report
4 figures aren't really included in this. But from
5 that point on the services were required to
6 report to DoD SAPRO on a continuing basis. So,
7 at this point I checked with DoD SAPRO, and there
8 has been no report made at this time, but we
9 expect that to start in the near future.

10 So, because that reporting is a
11 requirement, one of our recommendations is going
12 to be that DoD SAPRO reports, for the report from
13 the services that pertain to Safe-To-Report
14 Policy also be made in the next two years when
15 the next report comes to us. They're already
16 reporting, so they should include those figures
17 in that report, in the report to us.

18 So, that's kind of a synopsis of safe
19 to report. Is there any questions about that?
20 Okay, and I'll turn it back over to you.

21 MS. CARSON: Okay, thank you. And let
22 me go back, and tell you that it is tab L in your

1 materials where you will find the slide
2 presentation, and since this has been a really
3 long day, I'm trying to accelerate it a little
4 bit for you. So, I'm just going to point that
5 out, and behind the slide presentation are the
6 2023 reports we received from each of the
7 services.

8 Plus a letter from the Department of
9 Defense identifying that this was for your
10 review, and requesting that we return the DAC-
11 IPAD's, any comment on it to Ruth Vetter, who is
12 the deputy general counsel for personnel and
13 health policy by September 21, which happens to
14 be tomorrow.

15 So, what we did, and this is what we
16 did the first time when we had the strange
17 language in the statute that said DAC-IPAD
18 working through the Department of Defense,
19 working through the DAC-IPAD is going to study
20 collateral misconduct. So, what we decided back
21 then in 2019 was the services collected data
22 because they have it.

1 And then they provide it in whatever
2 form they are going to, to the DAC-IPAD to
3 review, assess, and make any comment that the
4 DAC-IPAD wishes to, and provide that back in a
5 letter. And there were five recommendations in
6 2019, and most of them have been implemented,
7 because it was largely about making better
8 definitions and more clarity.

9 And then the big one was the language
10 originally said incidents of collateral
11 misconduct where the victim was accused of
12 collateral misconduct, which had an extremely
13 confusing meaning, because some cases I think in
14 the Army, that means you've had charges referred.
15 And so, the DAC-IPAD suggested in that
16 recommendation that accused of be changed to
17 suspected of.

18 So, that if collateral misconduct is
19 what is deterring victims from reporting because
20 they fear being punished for it, then it doesn't
21 matter whether they actually are being punished
22 for it, it matters whether they committed it or

1 not. And so, looking for evidence that there is
2 some kind of misconduct in the fact patterns in
3 the case is really the best way to find out
4 whether there was indeed collateral misconduct.

5 And so, that's why we also think
6 better data. I'm going to link you to slide ten.
7 Do you have the clicker? I do, okay. Anyway,
8 slide ten shows you the data that was recorded in
9 2019. The whole purpose for this is to show you
10 that the slide after it that is number 11 has the
11 types of collateral misconduct, and the adverse
12 action that was taken, broken out by percentages.

13 Which the DAC-IPAD found to be very
14 useful in identifying what's actually going on
15 with collateral misconduct, and what kinds of
16 punishments are being received for it. But that
17 was not required by statute. And so, that is not
18 being prepared again by the services. And so
19 it's something that's being tracked by the
20 services, because it is required in the Safe-To-
21 Report Policy.

22 And so, one of the recommendations we

1 potentially may want to make is those two
2 provisions, the DAC-IPAD reviewing collateral
3 misconduct report, and the services reporting the
4 data to Congress, and then there's the Safe-To-
5 Report Policy that requires more extensive data
6 collection, but only asks it be provided to
7 SAPRO, not to Congress.

8 And so, combining the two statutes
9 might be a more effective way of getting more
10 information to Congress, and publicly that is
11 already being collected through the Safe-to-
12 Report policy. So, now we go to slide 30, and
13 that's the data that matters for this report.
14 That's the 2023 data. And so, you will see the
15 accused of has been changed to suspected of.

16 What the statute asks for is the
17 number of servicemember victims suspected of
18 collateral misconduct. So, you see it gives you
19 the total number of victims identified who are
20 servicemembers. For the Army it was 5356. Total
21 number suspected of collateral misconduct, 272,
22 and the number of instances adverse action was

1 taken, 231.

2 So, you go down to the green row that
3 says percentage of servicemembers suspected.
4 It's actually quite low, five percent Army, six
5 percent Navy, nine percent in the Marine Corps,
6 six percent in the Air Force. So, that appears
7 to be telling you either that it's very rare in
8 the services that there actually is collateral
9 misconduct involved.

10 Or could be telling you that the fear
11 of reporting when you've committed collateral
12 misconduct is keeping people who have committed
13 collateral misconduct from reporting. So, that's
14 something that will be interesting for the DAC-
15 IPAD to be looking at in the future when the
16 Safe-To-Report Policy is implemented, does that
17 increase the number of reports, and does it
18 change the amount of adverse action taken against
19 these victims.

20 The other data point that was asked
21 for in the statute is the percentage of all
22 servicemember victims who receive adverse actions

1 for the collateral misconduct. That's even a
2 smaller number than the amount who are suspected,
3 but that doesn't tell you anything. The more
4 important statistic, and what is going to tell
5 you whether the Safe-To-Report Policy is
6 meaningful is the percentage of those who were
7 suspected of misconduct who then actually
8 received adverse action for misconduct.

9 And you'll see that greatly varies
10 across the services, but the Army is in
11 particular, an outlier on that. And if you flip
12 back to slide ten, when the Army gave the data in
13 2021 they had a very low -- that was a very low,
14 ten percent, and this year it's jumped to 85
15 percent.

16 And so, that immediately to us,
17 indicated when we looked at the methodologies by
18 the Army, that it was -- this methodology was
19 picking up the major misconduct or victims who
20 were accused of misconduct. And so, that is
21 probably missed the victims of the more minor
22 misconduct, and misconduct that was not

1 investigated.

2 So, the first thing to do for the Army
3 is to suggest that the methodology that was
4 employed by the other three services, which was
5 to ask their MCIOs for all sexual assault cases
6 with servicemember victims, those victims, it
7 went to the victim local command, and had the
8 local command send feedback to them whether they
9 were engaged in collateral misconduct, and
10 whether they received any adverse action for it.

11 So, we find that to be an extremely
12 reliable data collection method, and feel fairly
13 confident that the numbers that are going to be
14 reported for the Navy, Marine Corps and Air Force
15 are closer together as well, are probably
16 reflective as far as that percentage of suspected
17 members who are actually receiving adverse
18 action.

19 So, the letter that we prepared, the
20 body of the letter just sets out, explains what
21 we identified. It commends the DoDGC for
22 implementing standardized definitions and

1 methodology, and makes three observations. We
2 can end -- the options for you are to not make
3 any recommendations, and make the observations
4 either that are here, or anything else you want
5 to say about the data.

6 And so, that is a letter that we can
7 do. Or you can consider the proposed
8 recommendations, and any others that you might
9 want to offer. So, the observations, the first
10 one is the data for 2023 is 2021 and 2022
11 numbers. And so, that is pre Safe-to-Report
12 policy, so this is a terrific base line here to
13 look at in the future to see whether the efficacy
14 of the Safe-to-Report policy, how effective it's
15 been.

16 The second thing observed was the Army
17 as an outlier, though we think we see why. And
18 so, we suggest that a methodology more like what
19 was implemented by the other services be employed
20 for the 2025 report. And the third observation
21 is that overall, the number of -- the percentage
22 of servicemember victims who appear to be

1 engaging in collateral misconduct is quite low.

2 And for the reasons for that, we hope
3 to see the Safe-To-Report Policy, if that gives
4 us some indication of why. Then the
5 recommendations, recommendation one was made in
6 the 2019 report for DoD to report the collateral
7 misconduct by offense, and the adverse action.
8 And the DoD didn't do it because they were not
9 statutorily required to do it.

10 So, you could potentially recommend in
11 this letter that Congress require them to report
12 this data. And the second recommendation is that
13 the Safe-To-Report Policy actually has some more
14 detailed guidance in definitions and methodology,
15 and that there could be a -- instead of kind of a
16 conflicting statute, which is what we have, they
17 first passed the biennial misconduct to get an
18 idea of the collateral misconduct issue.

19 But before they even got their first
20 report, they implemented, or proposed the Safe-
21 To-Report Policy in the next NDAA. So, they now
22 have these two different statutes both relating

1 to collateral misconduct. So, allotted nodes
2 would probably be less confusing.

3 And because the Safe-To-Report Policy
4 has the more thorough data tracking requirements,
5 being able to look at that information when you
6 make your assessment of what is happening with
7 collateral misconduct, it would be a good idea.
8 So, we can potentially recommend that that
9 happen, to Congress. And that wraps up
10 collateral misconduct for 2023.

11 HON. SMITH: All right. So, we're
12 being asked to sign off on this letter today.

13 MS. CARSON: And it is under such time
14 crunch that we kind of laid it out for you, but
15 yes.

16 HON. SMITH: Did everyone have the
17 opportunity to read the letter? Yes, okay, good.
18 So, anyone have any comments that they want to
19 make about the presentation, the letter, and or
20 the two recommendations? Yeah.

21 MS. GOLDBERG: I didn't get the chance
22 to read the letter unfortunately, I just wanted

1 to be sure I'm understanding where they got the
2 data comparing slides ten and three. Because it
3 looks, from this data, like the Army flipped, and
4 is that as a result of it's a different way of
5 calculating the incoming in the second -- I mean
6 not only the Army flipped. Everybody flipped.

7 Sort of where the percentages in their
8 percentages of accused servicemembers who
9 received adverse action, those percentages were
10 much higher for Navy, very high for Marines, and
11 somewhat high for Air Force, and the U.S. Coast
12 Guard had some, and those are kind of the reverse
13 in 2023, where the other services, other than the
14 Army, are very low.

15 So, it's just an unusual flip. And
16 then the Coast Guard had said N/A meaning no, and
17 I wasn't sure if N/A meant no collateral
18 misconduct, or they just didn't report it. And
19 if this isn't useful for shedding light on what
20 we should do with the recommendations, I'd like
21 to just note the question, and we can talk about
22 it later. But I was struck by that change.

1 MS. CARSON: So, there's another chart
2 too, and if you want to look at slide 29, it has
3 the 2021 data, and you'll see it's completely
4 different as well. And so, the thinking on the
5 data is the 2023 report is really the most
6 reliable data we've seen. The Army did change
7 its methodology from what methodology it employed
8 in 2019.

9 I didn't do a direct analysis of what
10 it was, only that the methodology employed in
11 2023 seemed to be not capturing all of their
12 incidents. So, I think this is probably the best
13 data. At least from what the services indicated
14 in their individual reports, a pretty high degree
15 of confidence in the way they did it.

16 It was managed by the NCIA, it was not
17 through the legal interfaces, and then sending to
18 the local commands. So, that seems to be the
19 best practice in collecting this information.
20 And then I think for the Safe-To-Report Policy,
21 that's how they are collecting it at the local
22 level. So, I think that just the one outlier

1 really is the Army.

2 And they use their military justice
3 online. So, I went back and said, are you
4 punishing all those victims, or is this not
5 capturing everyone? And it's their sense, they
6 use the military justice online database to
7 identify any who, I think in addition to what the
8 MCIO has identified, and so I don't think that's
9 captured in the database, their legal database.

10 And so, it was definitely more
11 effective for the Army to use the Safe-to-Report
12 tracking, which is going a completely different
13 way at the local level. Not through the legal
14 organization, but through the victim's services.
15 And I'm not sure if it's that way for the other
16 services.

17 But it does have the -- but I do want
18 to -- they're all collecting the information by
19 offense, and by the adverse actions because they
20 have to explain in the Safe-To-Report policy why
21 they considered the misconduct minor, or not
22 minor.

1 MS. GOLDBERG: Thank you, that was
2 helpful, I think I understand. Just, since the
3 Coast Guard didn't report, does Coast Guard not
4 report, or their numbers are zero? And I guess I
5 wondered, either way should we be noting some
6 concern related to that?

7 MR. YOB: I'll just note that the
8 statute, and the DoD policy is not typical to the
9 Coast Guard, which it says in there. So, that
10 could be the reason why they're not reporting
11 through those channels, they may be reporting
12 through their own internal channels but not
13 sharing that, because it's not required by
14 statute or DoD policy.

15 MS. GOLDBERG: If that's the case,
16 would it be useful, maybe it's already in here,
17 to make a recommendation that like the other
18 services, they also report this data?

19 MS. CARSON: I think this is a matter
20 of confusion. There is an obscure place in the
21 NDAA where they went ahead and added the Coast
22 Guard to this. And that's why, I think the Coast

1 Guard did report in these previous two, and I
2 think that somehow got confused, because DoD did
3 not put the data call out to the Coast Guard, and
4 that's because the Coast Guard was not a DoD
5 service.

6 And so, a suggestion is we go back to
7 the Coast Guard and ask for it. I think they
8 were not asked for it this time, and we can
9 certainly go back and ask for it, to get the data
10 in there.

11 MS. GOLDBERG: Do you think it makes
12 sense to make a recommendation related to this,
13 to avert the confusion, or not necessarily?

14 MS. CARSON: It's up to you, it's
15 going to be a small number, but we typically do
16 include the Coast Guard in the studies that we
17 do. So, for consistency sake, you could
18 definitely make that a recommendation either
19 formally or informally.

20 MS. GOLDBERG: Is that something we
21 would need to put in this letter, or could that
22 be done separately?

1 MR. YOB: Yeah, I think we could do
2 that separately. I think that could be done.

3 MS. GOLDBERG: Okay.

4 HON. SMITH: So, since there is a time
5 crunch on this, with respect to recommendation
6 one, is everyone in agreement? Indicating that
7 this was requested, or recommended, you said in
8 2019, but now it's the same recommendation that
9 was made in 2019, but instead asking that
10 Congress require it?

11 MS. CARSON: Yes, because we asked for
12 it, the DAC-IPAD asked for a response from
13 general counsel in 2019, and the response was DoD
14 is not requiring this because it's not
15 statutorily required.

16 HON. SMITH: Okay, so all those in
17 favor of recommendation one, say aye.

18 (Chorus of aye.)

19 HON. SMITH: Any opposed? Did I hear
20 a nay? No, okay. All right, so recommendation
21 one is adopted. And with respect to
22 recommendation two, any questions before we vote?

1 No? All those in favor of recommendation two?

2 (Chorus of aye.)

3 HON. SMITH: Any nays? No, okay, so
4 it's adopted.

5 MS. BASHFORD: Do we vote on the
6 observations? I can't remember.

7 MS. CARSON: You don't need to vote on
8 the observations, you could just edit them if you
9 liked them, or didn't like them, but we didn't
10 make them formal recommendations.

11 HON. SMITH: Okay. Does anyone have
12 any evidence for the letter? If not, I'm going
13 to sign it so they can get it out now. All
14 right, thank you.

15 MS. BASHFORD: I do have one
16 observation though. I was struck by your
17 presentation how many small recommendations we
18 have made just in this one area that were
19 accepted either by Congress, or by DoD, and we're
20 now on our fifth director, and we have members
21 who are new to the DAC-IPAD.

22 And I think it would be really

1 valuable if we put together DAC-IPAD's greatest
2 hits, and staff could do that. I mean we have
3 made so many recommendations that the services
4 have adopted, that DoD has adopted, that Congress
5 has taken up and followed or enacted in various
6 ways.

7 And I just think it would be sort of
8 to look back, I mean all the way from racial
9 classifications, some of it's not that big,
10 getting chronology to track data, and I think if
11 we could just get that together, and sort of have
12 something in the annual report of how many things
13 we recommended that have been accepted would be
14 helpful.

15 MR. YOB: We will follow up on that.

16 HON. SMITH: Okay, so are we ready
17 then, for public comments, or did you have some
18 additional things?

19 MR. YOB: I think we can take like a
20 two or three minute break in place just to get
21 that setup, and we can go into the public
22 comments. And then we'll follow it up with

1 basically a sort of synopsis and a preview of
2 what's next, and call it a day after that. As a
3 precursor to the public comments, I'll just note
4 that there are five people who have come to speak
5 today.

6 They've each been allotted five
7 minutes to speak, the first two people will speak
8 together because they're related, but they will
9 be allowed ten minutes total time to speak. It
10 means we have to deal with individual cases, and
11 we don't deal with individual cases, but to the
12 extent that the listening to people talk about
13 individual cases could influence our policy
14 perspective is helpful to us. So, we'll start
15 that in just two or three minutes.

16 HON. SMITH: Okay.

17 (Whereupon, the above-entitled matter
18 went off the record at 3:26 p.m. and resumed at
19 3:32 p.m.)

20 MR. YOB: Okay, I think we're ready to
21 start the public comment period of this committee
22 meeting. We welcome the people who have taken

1 the time to come here and share their comments
2 and experiences with us. We'll start off with
3 Ms. Holly Yeager, and Mr. Harold Pflager. So,
4 whichever one of you would like to start.

5 MR. PFLAGER: She told me age before
6 beauty.

7 MR. YOB: Yeah, that's the policy,
8 thank you, sir.

9 MR. PFLAGER: Good afternoon, my name
10 is Harold Pflager. I am a military veteran who
11 is grandfather to Sergeant Robert Andrew Condon.
12 I am a veteran of the Korean War, and I was
13 honorably discharged. In my civilian workplace,
14 I was required to train young men and women in an
15 apprentice program which was under a union
16 constitution, and all state and federal laws.

17 I worked as an administrative manager
18 for the union press program for the union in the
19 State of Ohio. When Andy was young, he spent a
20 lot of time at our house because my parents were
21 both police officers, and my grandmother and I
22 were available as caretakers. I received a call

1 from Andy, and he asked me to notify his mother,
2 my daughter arranged for us to visit Andy, who
3 was being held in a civilian jail.

4 We could only see him at 10:30 p.m.
5 the following evening, which I thought to be
6 unusual. The only other visitor who Andy
7 identified as an airman that he had charged with
8 selling drugs on the base on Herbert Field. Why
9 would an investigator of a crime be held in the
10 same place as someone who he had charged with the
11 crime?

12 In early of 2015, Andy's commanding
13 officer asked him to do more criminal work state-
14 side to help him in future advancement. He soon
15 had uncovered nine Air Force members being on
16 drugs. Before he could even get to trial, Andy
17 was deployed again, out of schedule to Africa.
18 When he returned, the sexual assault charges
19 began to appear.

20 The colonel of the base demanded that
21 the nine charges filed by Andy against these
22 individuals dealing drugs be thrown out, maybe

1 because he was seen by other inmates. While
2 there was only one primary accuser, the
3 investigator seemed determine to find three, so
4 that they could call him a serial rapist.

5 But the intent to start this police
6 report he was a serious threat. When asked why
7 he returned -- the third accuser, investigators
8 convinced her to change her written statement.
9 When it did not describe actions that constituted
10 a crime, placed him in pre-trial confinement
11 holding up Jenna's statement.

12 When asked why he returned, he stated
13 he was trolling, no military personnel made such
14 a move without orders to do so. Who gave the
15 orders? The investigator out of OSI rules when
16 he was only present when this interview was with
17 the third person.

18 They went back to Andy's ex-wife, who
19 had previously signed an affidavit while he was
20 being vetted to become an OSI agent. That there
21 was never any violence or sexual assault during
22 their marriage. She was interviewed three times

1 by two agents that maintains this. However when
2 interviewed by only the prosecutor regarding the
3 witness, she became a present witness.

4 There are many violations, but the
5 ones that I really resent most are the
6 prosecutors and loss and destruction evidence.
7 The prosecutor failed to tell the defense all
8 background checks. The prosecutor created two
9 trial transcripts, giving the flawed one to only
10 the defense attorney.

11 Some of the unjust activities during
12 this case, the judge was a chief judge of the Air
13 Force, insisted on handling this case himself.
14 Two, he also was found to be in violation of
15 procedures in another sexual assault case.
16 Three, he has prior causes of delays in Andy's
17 trial, causing time in confinement another two
18 months before trial.

19 The judge had responsibilities at
20 Guantanamo Bay for trials concerning terrorism.
21 He was found to be improperly handling himself,
22 and all cases that he presided over for failure

1 were overturned. It amazes me that the legal
2 system used for terrorists is more
3 constitutionally sound than for dedicated members
4 of the military.

5 It is clearly plain to anyone with
6 common sense that this was for the good and order
7 rather than justice for Andy in this case at the
8 highest level. The proper results are as
9 follows: Andy gets paid the entire time he spent
10 incarcerated. He retains all his benefits lost
11 during incarceration.

12 I am reimbursed for all funds that I
13 need to use defending a case, and I will be
14 reimbursed for the anxiety put on myself, my
15 family, and my family's reputation by allegations
16 illegal conduct by the military justice system.

17 MR. YOB: Thank you, sir. Ms. Holly
18 Yeager?

19 MS. YEAGER: Hi, I'm Holly Yeager.
20 I'm the mother of Tech Sergeant Robert Andrew
21 Condon, a decorated combat veteran. I'm also a
22 Toledo Police Officer, retired, I worked for the

1 police department 30 years. If you're willing to
2 commit cheat, you can make anyone guilty of a
3 crime.

4 Andy was denied legal representation
5 when the military intentionally and repeatedly
6 geographically separated him from his privately
7 hired attorney, keeping him from being able to
8 assist in his own defense. He spent 77 days in
9 solitary confinement in a civilian facility later
10 charged with starving prisoners. Andy lost 40
11 pounds.

12 His pre-trial rights were denied
13 because he spent 344 days confined before trial.
14 His presumption of innocence until proven guilty
15 was denied to him when the convening authority
16 threw out the nine drug cases that Andy and his
17 partner had discovered and charged 120 days
18 before he himself was charged with any crime.

19 Even though two of the drug defendants
20 had already been found guilty at courts-martial.
21 Unlawful command influence, the primary accuser
22 described a brutal rape which included bruising

1 on her legs, marks on her neck from being choked,
2 and a bite wound. The SANE nurse found zero
3 evidence of any injuries. She also found zero
4 evidence that the accuser had sexual intercourse
5 of any kind with Andy.

6 She used a Wood's lamp to see even the
7 slightest injury, nothing. The OSI interviewing
8 officer was also unable to see any bruises. OSI
9 ordered a special subdermal camera from Quantico,
10 Virginia, to look for trauma under the layers of
11 skin for the severe bite to her shoulder. Zero
12 trauma seen, but they knew the camera was working
13 because they saw the layers of her tattoo.

14 The investigators began searching for
15 a credible accuser. They forced Andy's work
16 partner, who had a consensual romantic
17 relationship with him to become an accuser. They
18 took her phone with an illegal search warrant,
19 and then used her own minor misconduct to claim
20 victim status against Andy. She repeatedly
21 stated that she was not a victim, and an OSI
22 agent herself that had just finished the advanced

1 course in sexual assault investigation.

2 Shouldn't she know? She felt so
3 strongly that this was wrong, that she wrote a
4 three page letter to the convening authority
5 begging not to be any part of this trial, and was
6 ordered to testify as a victim against her will.
7 Defense attorneys requested background checks on
8 everyone involved in the case.

9 The prosecutors and investigators did
10 not disclose the prior felony conviction of the
11 original accuser. Her felony conviction meant
12 she had fraudulently enlisted in the Air Force.
13 The request for this information was filed by the
14 Air Force defense attorney on 16 October, 2013,
15 almost a year before Andy's trial.

16 General Rebecca Vernon, deputy JAG of
17 the Air Force, stated in a letter to
18 Congresswoman Kaptur that the defense had felony
19 conviction information one day before a post-
20 trial clemency report, 29 January, 2015. I have
21 proof that we never received it from the Air
22 Force at all.

1 It was only found out by us because we
2 hired a private investigator in 2017, too late
3 for the trial, too late for the first Air Force
4 appeal, and rejected by CAAF because we hadn't
5 used it at trial. Here's the affidavit. After
6 spending 250000 dollars of family savings to
7 defend my son, who here believes that I would not
8 -- if I had received that information one day
9 before my son's post trial clemency hearing that
10 I wouldn't have presented it?

11 She also stated in this letter that
12 Andy's first request for parole was denied two
13 months before it was even sent to her. Will he
14 ever receive parole if they are denied without
15 even being viewed? Andy's friend was confronted
16 by two OSI agents bearing false evidence accusing
17 her of having an affair with him.

18 They threatened to tell her deployed
19 husband of this affair, this was untrue. But how
20 does that align with the Air Force creed, a
21 tradition of honor and a legacy of valor? Andy's
22 phone was destroyed while in the hands of the

1 prosecution. 55 days of communication between
2 Andy and the original accuser was destroyed.

3 This valuable evidence to support Andy
4 was lost. This evidence should have been
5 retrievable on the accuser's phone, it was noted
6 that she had two phones. The investigators did
7 not collect it. He's had an unfair appellate
8 review because the prosecutor created two
9 different records of trial, and provided the
10 wrong one, 66 pages missing, to just his
11 appellate attorney.

12 I want this case overturned, and my
13 son returned to us immediately. I want him to
14 receive his military pay for every day he's been
15 away from us. I want him to receive his 20 year
16 military pension that he was eligible for in
17 April of this year. I want Major General Rebecca
18 Vernon courts-martialed for conduct unbecoming an
19 officer, for lying to a member of Congress.

20 I want an investigation done into this
21 case, and anyone else responsible for this
22 miscarriage of justice, and the pain caused to my

1 son and family punished. Thank you for your
2 time.

3 MR. YOB: Thanks for the -- we'll give
4 you a minute.

5 Now welcome Dr. Deborah Jenks.

6 DR. JENKS: Ladies and gentlemen, my
7 name is Dr. Deborah Jenks. Based on almost 40
8 years of experience in healthcare specifically
9 focusing on trauma victims, I'm here today
10 knowing a thing or two about this topic. I,
11 however, today, am a mother seeking justice for
12 my son.

13 Including myself, generation after
14 generation, my family has served our country
15 honorably all the way back to the Revolutionary
16 War. Please take a moment to imagine a tapestry,
17 it's intricately woven with threads of honor,
18 service, and dedication. And now picture a
19 single misplaced thread unraveling the entire
20 fabric.

21 Caleb's case is that thread,
22 threatening the very trust we place in our

1 military justice system. During my time in the
2 Air Force, I faced sexual harassment and sexual
3 assault, as did my daughter. So, believe me, I
4 understand the gravity of these allegations. If
5 I believed Caleb was guilty, I would not be here
6 in his defense today.

7 The facts are Caleb and his accuser
8 went to a concert and agreed to share a hotel
9 room. In that room, his accuser asked him to
10 kiss her, and she initiated sexual contact. They
11 fell off the bed and laughed together. After the
12 fall, Caleb decided that they should not
13 continue, and just go to bed. She wanted to
14 continue, and got frustrated when he said no.

15 The next morning she noticed passion
16 marks on her body for the first time, and for the
17 first time that weekend, she mentioned her
18 boyfriend. She and Caleb went to breakfast at a
19 Cat Caf,. They laughed, joked, ate breakfast,
20 and interacted with the felines at the caf,.
21 After breakfast, using her car, she drove Caleb
22 two hours back to the base, and they happily

1 conversed the entire trip.

2 After the return, Caleb's accuser
3 reported that he raped her. However, the accuser
4 said that she was too drunk to consent, and had
5 no memory of the incident. Yet she told a friend
6 that she only had one alcoholic beverage, and she
7 alluded to the fact that she was drugged, but the
8 SANE report did not find any drugs in her system.

9 She later said that maybe she took a
10 Prozac, and that's why she didn't remember what
11 happened. The accuser's own supervisor said that
12 she was unreliable, and that she had questionable
13 integrity when the military police interviewed
14 her. Yet Caleb was found guilty of sexual
15 assault, sentenced two months in jail, and
16 received dishonorable discharge.

17 He was also forced to register on the
18 sex offender list in North Carolina for 30 years.
19 Ladies and gentlemen, equal rights also mean
20 equal responsibility and accountability. We
21 fought for equal justice, and this is not it. If
22 we allow our military justice system to be

1 corrupted without fixing things, then no parent
2 should ever trust the military with their child
3 again.

4 It's said that we should beware of
5 when fighting monsters you yourself do not become
6 a monster. Caleb's trial was during the peak of
7 the pandemic, so he was restricted to the base,
8 and therefore unable to meet with his civilian
9 attorney until the week of the trial. They did
10 not converse on the phone due to cell phone
11 issues.

12 Key evidence like the SANE report
13 substantiating Caleb's side of the story was
14 pushed to the background. Caleb did not have
15 access to the SANE report until the civilian
16 attorney presented it to him the day before the
17 trial. The report clearly refuted the accuser's
18 claims of bite marks and bleeding. Yet
19 astonishingly it was never placed in the
20 spotlight it deserved.

21 The SANE nurse when questioned
22 admitted vital clarifications, and an incomplete

1 understanding. Furthermore, crucial testimony
2 from the accuser's ex-boyfriend were entirely
3 excluded from the trial. We channeled our life
4 savings into Caleb's defense, but worse, Caleb
5 feels hopeless for his future.

6 He does not date, he is socially
7 isolated, he's gained 50 pounds, and he only
8 leaves the house to go to work. Caleb's required
9 to be on the sex offender list, and it's a
10 federal one, not a civil one. Under civil law it
11 would not apply. This prohibited him from
12 getting suitable housing, forming relationships
13 and dating, career opportunities, and the ability
14 to work for my own family practice.

15 My grandchildren are too innocent to
16 even comprehend, so they're broken hearted
17 because their beloved uncle cannot attend their
18 life events and their milestones. He was unable
19 to go on our family vacation this year, because
20 we went to a theme park. He has suffered
21 harassment, and fallen prey to scams targeting
22 those on the list.

1 Furthermore, Caleb's dishonorable
2 discharge isn't just the loss of a career, but a
3 tarnishing of his very identity. Our entire
4 family shares Caleb's pain and relentless fight
5 for justice, but the crushing, lingering
6 heartache is watching Caleb deal with this
7 undeserved fate. Service to our nation is an
8 honor.

9 But when the military justice system
10 falters, I cannot in good conscience recommend it
11 to anyone. Our trials must be as honorable as
12 our service. I humbly request that this
13 committee reexamine Caleb's case, and I
14 appreciate the opportunity to speak today.

15 MR. YOB: Thank you, Dr. Jenks. We
16 now welcome Mr. Ricardo Morales.

17 MR. MORALES: Members of the
18 committee, my name is Ricardo Morales, and I am
19 father of Madeleine Morales. Because of this
20 injustice, we haven't been part of each other's
21 lives for the last eight years. My on and off
22 again relationship with my accuser began in March

1 2013.

2 She claimed that I sexually assaulted
3 her by ejaculating inside of her during a March
4 encounter. Even though we both consumed alcohol
5 separately and met up, she never claimed that she
6 was too drunk to consent. I was told by my
7 lieutenant that military policy is that if a
8 woman has one alcoholic beverage that she can't
9 consent to sexual intercourse.

10 Which is why I didn't testify in my
11 own defense. I asked how can you legally drive
12 your vehicle after one drink, but can't consent
13 to sex? The military needs convictions. What
14 happened to equal rights between men and women?
15 If the system is unfair, but tilted toward only
16 one direction, then how is that justice? The
17 military needs convictions.

18 Again, my accuser never raised issues
19 of consenting to sex, and she never gave me any
20 instructions with regards to finishing. My
21 accuser believes that I should have assumed what
22 she wanted. So, to punish me for my

1 transgression, my accuser and I had unprotected
2 sex more than 15 times between March 2013 and
3 October 2013.

4 My accuser filed sexual assault
5 charges the day I made the rank of sergeant, and
6 discovering that I was being engaged to another
7 woman. During the prosecution investigation,
8 they uncovered my accuser not only continued
9 going to my barracks after the allegations were
10 made, she tortured with me late night dinner
11 dates asking me if we might get back together
12 multiple times.

13 I can't prove to you that she was
14 using this allegation because she was angry with
15 me for not forming a long-term relationship with
16 her. But my fellow soldier stated that he
17 overheard the accuser talking about me with
18 another sergeant, and she said how frustrated she
19 was that I wouldn't commit to a long term
20 relationship with her.

21 I have provided that attachment to the
22 committee with those details. We intended to go

1 to a concert together, where we were together for
2 four nights alone in a hotel, and our leadership,
3 Sergeant Rogers had signed off on our pass.

4 People in the unit would poke fun at us trying to
5 figure out if we were still having consensual
6 sex.

7 This again, after my accuser's
8 allegations that this, when the prosecution went
9 looking into my past to see if I had some other
10 potential accusers that they could use to benefit
11 their case. Imagine someone went to all your
12 exes, and mentioning that they could be paid if
13 they were victims. Prosecution added two more
14 accusers to my case.

15 They recruited my ex-wife, and a woman
16 who I had had a consensual sexual partner in the
17 past. The prosecution used these additional
18 accusers to argue propensity evidence. They
19 further argued that I was a serial rapist, and
20 that my accusers continued having consensual
21 sexual relationship with me even after allegedly
22 assaulting them.

1 I was able to show that my ex-wife was
2 blackmailing me to restrict my rights as a
3 father. And the casual partner made numerous
4 inconsistent statements about the nature of our
5 relationship. This led to two full acquittals,
6 and one trial for sexual assault against my
7 original accuser. With the help of my family, I
8 hired a lawyer, and after two and a half years of
9 fighting we won on appeal.

10 Thinking that finally this injustice
11 was over, almost a year later the prosecution
12 brings me up on the same charges. The military
13 needs convictions. Regardless of what evidence
14 shows, this time my accuser added to the
15 testimony strangulation. This was never
16 mentioned in my previous trial, and there was no
17 physical evidence that this occurred, because I
18 didn't do it.

19 The judge in my trial also allowed one
20 of the other two accusers to come back to my
21 retrial to speak, and say that I raped her,
22 despite my being acquitted of that charge in my

1 original trial. The prosecution wanted to use
2 propensity evidence in another forum, and was
3 allowed to do so, leading to my second wrongful
4 conviction.

5 I went to prison twice, and I am
6 labeled as a registered sex offender. My life is
7 broken beyond what I can say here today. There
8 are constant threats to my life as a sex
9 offender, and people look on me with shame and
10 disgust, the military took my life. There are so
11 many victims just like me that this happened to
12 in the military.

13 You might not believe that the
14 military would just cover these injustices up,
15 and not have nothing happen. Someone once said
16 that the military has the best system in the
17 world for victims. Well, how does the system
18 help victims like me? When the military has the
19 best system in the world for justice, what about
20 the best system in the world for fairness? When
21 will it be the best system for fairness?

22 Will you be an architect of the best

1 system in the world for victims, or the best
2 system in the world for true justice? I pray
3 it's true justice.

4 MR. YOB: Thank you, Mr. Morales. Our
5 next public commentator will be Mr. Mario
6 Jeffers.

7 MR. JEFFERS: Good afternoon, my name
8 is Mario Jeffers. I was wrongfully accused, and
9 subsequently convicted of sexual assault by the
10 United States Army. As a young sergeant, as so
11 many of my peers did, I went out for drinks to a
12 well-known bar. While I was there, I interacted
13 with my accuser. Later on, we returned to my
14 house and partook in a sexual encounter.

15 Afterwards, everything appeared to be
16 fine, we made plans to see each other later on
17 that week, we were going to hang out the
18 following weekend. I was taken by surprise when
19 the local police knocked on my door. Even more
20 once reasoning had to be understood, I was
21 confused. What I was told was I was being
22 accused of sexual assault.

1 I immediately opted to cooperate
2 fully. I offered waiving of my rights to an
3 attorney. My thinking was I didn't do what I was
4 being accused of, so I had nothing to worry
5 about. The local police force investigated the
6 accusation, questioned my accuser. Where she
7 confessed to having a consensual sexual encounter
8 with me.

9 It was later discovered that she was
10 also in danger of being discharged for failing to
11 uphold the Army's physical fitness standards.
12 The local police later dropped all charges upon
13 her affidavit, and her video recorded interview
14 both corroborating my claims that consensual sex
15 had occurred. Approximately a year later, more
16 or less, of the accusation, the Army CID picked
17 up the charges, hence criminally charging me with
18 the same sexual assault accusation.

19 My attorney then believed the case
20 would be hit out of the park as he explained,
21 over confident that a guilty rendering would not
22 be the result. So true he proclaimed that he

1 would not turn me from the same reasons if we
2 were to lose the case.

3 The judge presiding over my Article 32
4 hearing gave, and I quote, the evidence does not
5 support the findings of probable cause to believe
6 that the accused has committed the charged
7 offense. His recommendation was given little to
8 no consideration, and to add insult to injury, I
9 was prohibited the use of all the evidence
10 collected during the civilian police
11 investigation.

12 Which would have further assisted in
13 proving my innocence. On Saturday I was found
14 guilty of sexual assault, and spent four years of
15 my life in federal prison. During that time,
16 family members to include my mother, brother, and
17 grandmother all passed away. As a result of my
18 conviction, I was forbidden to be in contact, or
19 see my children, or go to any of their games, or
20 any of their events.

21 My accuser later contacted me via
22 Facebook wanting to apologize for their ill

1 intentions as well, for having me go through such
2 an unfavorable process based on a lie. My
3 circumstance also reminds me of the Brian Banks
4 story, where his accuser said let bygones be
5 bygones, and confessed falsely to accusing to
6 him.

7 My accuser was retained by the United
8 States Army despite her physical fitness failure.
9 Whereas I was locked away falsely and unjustly.
10 The Innocence Project does not represent military
11 servicemembers. To be honest, no one really
12 does. To include the ACLU, the American Bar
13 Association, or any group for that matter.

14 Just recently I thought I had found a
15 woman that I could love despite my wrongful
16 conviction. But she later posted all my
17 information on social media, including my contact
18 information where I've been receiving threats on
19 my life. I constantly feel like I have to look
20 over my shoulder. Not a day goes by that I don't
21 wish, and hope, and pray for true justice.

22 I am told that you are researching a

1 conviction integrity unit, that you have a
2 database for all sexual assaults since 2012. My
3 hope that is even though you are only looking
4 into two years of cases, 2021 and 2022, that you
5 understand the problem is much bigger than those
6 two years. That other years matter too. There
7 are people suffering, and the military states no
8 man, no woman is left behind.

9 Myself, and many others like myself
10 have been left behind, and all I ask of you is
11 mercy, grace, and reversing those wrongful
12 convictions, and restoring faith in our broken
13 system. Thank you for your time.

14 MR. YOB: Thank you, Mr. Jeffers.
15 That concludes the public comment period. Did
16 you want to take a one or two minute break just
17 to reset, or are you comfortable?

18 HON. SMITH: Thank you everyone for
19 two days of good work, and thank you to the staff
20 for all the preparation, and hard work that you
21 put into preparing for us in the last two days.

22 MR. YOB: Thanks very much, Chair

1 Smith, and I'll echo those comments, and say I
2 appreciate everything that the staff has done to
3 prepare for this meeting. They've worked very
4 hard, and diligently, and consciously to have a
5 very successful meeting. And I think we've had a
6 very successful meeting. A few reports that I do
7 on what we can look forward to, if I missed
8 anything, I'll turn to staff to see if there's
9 anything to add.

10 I think we'll have upcoming at the
11 next meeting, which I'll go over the meeting
12 dates in just a moment. We'll have probably, we
13 hope, two reports for vote, and the special
14 reports subcommittee will have the victim access
15 information report, and the Policy Subcommittee
16 will have the Article 25 report prepared and
17 ready for vote. So, that's our goal.

18 I think at the next meeting we can
19 also have a discussion of what will go into our
20 annual report, which will be due in the spring of
21 next year. We'll also be able to receive updates
22 at our next meeting from each of the

1 subcommittees as to future projects, and next
2 projects. So, between now and then we'll help
3 develop those projects for future research and
4 reporting.

5 The future meeting dates, December 5th
6 and 6th of 2023 will be our next meeting. The
7 following meeting will be March 12th to 13th of
8 2024. The summer meeting will be June 11th to
9 12th of 2024. And then we'll have a meeting
10 September 17th to 18th of 2024. I think the
11 final point that I've got on my list is a just
12 potential discussion or commentary on site
13 visits.

14 And whether you'd like us to look for
15 some site visits that we could do for any of the
16 committee members who are interested. So, I'll
17 just kind of open it up to that, does anyone want
18 to comment on that from the committee?

19 MS. GOLDBERG: Do you mean site visits
20 for going to the trainings, or was there
21 something else?

22 MR. YOB: I think there's various

1 kinds of site visits you can do. It can be to a
2 training, it can be to meet with select sort of
3 focus groups. I know GAO often does site visits
4 on specific issues or just for general
5 information. And often times military offices,
6 units, installations can prepare a sort of panel
7 of people at the site visit who you can ask them
8 prepared questions.

9 And you can ask follow up questions
10 about their area of expertise and what they do,
11 so that's something you can do.

12 MS. BASHFORD: I think Jim has done
13 site visits with earlier iterations of the
14 committee, and all the people who come here and
15 speak to us are very informative, and give us
16 lots of good information, it is a public record,
17 and I think that might sometimes constrain people
18 in what they say.

19 So, I think the ability to have boots
20 on the ground, and speak to people in a
21 confidential way might provide the information as
22 to the perceptions and what's going on. As

1 valuable as what we do here is, we do have room
2 to improve.

3 MR. YOB: Thanks for the comment.

4 That's a good final comment. I will also
5 reiterate what I just said about there are
6 training opportunities, there are courts-martial
7 observations, there's other site visits we can do
8 that aren't necessarily questioning people, but
9 observing and learning more about processes.

10 Okay, with that said, for the record,
11 I'm just going to put on the record that in
12 addition to the chair, there are seven committee
13 members present at the conclusion of this
14 meeting. There are three committee members who
15 are present virtually. I'm going to turn it over
16 to see if the staff, is there anything that we
17 need to talk about, that I've forgotten, or any
18 points?

19 I see people shaking their heads, no,
20 okay. So, I'm going to turn it finally to the
21 committee, and to the committee chair for any
22 final comments. I just want to say it was a

1 great meeting, and great discussions that you
2 had, particularly today on the deliberations.
3 So, thank you all.

4 MR. SULLIVAN: This meeting is closed.
5 (Whereupon, the above-entitled matter
6 went off the record at 4:06 p.m.)
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In the matter of: Public Meeting

Before: DOHA DAC-IPAD

Date: 09-20-23

Place: Arlington, VA

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