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

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35TH PUBLIC MEETING

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TUESDAY
JUNE 11, 2024

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The Advisory Committee met in Convene Hamilton Square, located at 600 14th Street, NW, Washington, D.C., at 12:30 p.m., Hon. Karla Smith, Chair, presiding.

PRESENT
Hon. Karla Smith, Chair
Ms. Martha Bashford
Mr. William E. Cassara
Mr. A. J. Kramer
Ms. Margaret Garvin *
Ms. Jennifer Gentile Long
Ms. Suzanne Goldberg *
Dr. Jennifer Markowitz
SGM Ralph Martinez
Hon. Jennifer O'Connor *
BGen James Schwenk
Sgt. Lisa Shepperd
Dr. Cassia Spohn
Ms. Meghan Tokash
Hon. Reggie B. Walton

ALSO PRESENT
Mr. Pete Yob, Executive Director
Ms. Meghan Peters, Deputy Director
Mr. Dwight Sullivan, Designated Federal Official
Ms. Theresa Gallagher, Attorney Advisor
Ms. Nalini Gupta, Attorney Advisor
Ms. Terri Saunders, Attorney Advisor
Ms. Kate Tagert, Attorney Advisor
Ms. Eleanor Magers Vuono, Attorney Advisor
Mr. Michael Libretto, Attorney Advisor
Ms. Gina Acevedo, Attorney Advisor
Ms. Jennifer Campbell, Chief of Staff
Ms. Marguerite McKinney, Management and Program Analyst
Ms. Stacy Boggess, Senior Paralegal
Ms. Stayce Rozell, Senior Paralegal
Ms. Alice Falk, Technical Writer-Editor
Mr. Blake Morris, Paralegal *
Ms. Janelle McLaughlin-Ali, Paralegal
Ms. Breyana Franklin, Communication Specialist
Ms. Mya Koffie, Intern
Ms. Abigail Sackett, Intern *

* Present via video-teleconference

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Public Meeting Adjourned

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

1:34 p.m.

MR. SULLIVAN: Good afternoon. I am Dwight Sullivan, the Designated Federal Officer of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, better known as the DAC-IPAD.

This public meeting of the DAC-IPAD is open.

Judge Smith, you have the con.

CHAIR SMITH: Thank you, Mr. Sullivan. And good afternoon.

I would like to welcome the members of the DAC-IPAD and everyone in attendance today to the 35th public meeting of the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, or DAC-IPAD.

Today's meeting will be in person. This videoconference via Zoom, also available for members, presenters, and other attendees.

The DAC-IPAD was created by the Secretary of Defense in 2016 in accordance with the National Defense Authorization Act for fiscal year 2015, as amended, for a 10-year term. Our mandate is to advise the Secretary of Defense on the investigation, prosecution, and defense of allegations of sexual assault and other sexual misconduct involving members of the armed forces.

I'd like to begin by introducing two new DAC-IPAD committee members, Sergeant Major Ralph Martinez and Sergeant Lisa Shepperd.

After serving over 30 years in the Army, Sergeant Major Martinez retired in 2022. Throughout his career with the Army he served in key leadership positions. In 2017 he assumed the duties of the Army Chaplain Corps Regimental Sergeant Major serving in that role until his retirement.

Detective Shepperd is a 12-year veteran of the Prince George's County Police Department. She currently holds the rank of sergeant within her department.

Detective Shepperd has substantial experience investigating, as lead detective, sexual assault cases and working with victims.

Thank you, Sergeant Major Martinez and Detective Shepperd. We look forward to working with you.

In addition, it is with gratitude that I welcome the military justice experts from each of the military services' Criminal Law Divisions who generously serve as the DAC-IPAD's service representatives, and who have joined us for the meeting today.

Welcome and thank you.

To summarize our 2-day agenda, at today's meeting we will hear form three panels. We will begin with two military panels who will share their perspectives on victims' rights litigation and courts-martial.

After a break, the committee will hear from a civilian panel who will provide their comparative perspectives on federal victims' rights litigation.

Our panelists for that session include a representative from Survivors United and our fellow committee member Meg Garvin as the Executive Director of the National Crime Victim Law Institute.

Tomorrow the committee will begin with a discussion of the feasibility and advisability of establishing conviction integrity units in the military. During that session we will hear from organizations that assist individuals impacted by wrongful convictions, and aim to address systemic issues that lead to errors in the criminal justice system.

Next, the DAC-IPAD Case Review Subcommittee will present the results of its studies of the demographics of courts-martial panel members. This study complements the committee's review and assessment of the panel member selection process, published in December of 2023, by analyzing the demographics of the panel members, accused, and other courtroom participants in contested sexual assault cases

tried before a military jury, known as a panel in all of the military services.

After lunch, the committee will deliberate on the Case Review Subcommittee's proposed findings and recommendations that are based on their comprehensive study of panel demographics.

Following deliberations we will receive updates from the Special Projects and Policies Subcommittee.

After a break, the committee will receive public comment from several individuals.

Now for a few housekeeping items.

To those joining by video, I ask that you please mute your device's microphone when not speaking. If any technical difficulty should occur with the video, we will break for 10 minutes, move to a teleconference line, and send the dial-in instructions by email.

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

Thank you for all being here today.

And I will now turn the meeting over to the DAC-IPAD Deputy Director, Ms. Meghan Peters.

MS. PETERS: Thank you, Chair Smith.

Good afternoon, committee members. For the record I would just like to announce that we have a quorum present. We are 14 out of 17 members present either in person or virtually. And I am just going to announce each one for the record.

Ms. Bashford, Ms. O'Connor, Mr. Cassara, Dr. Markowitz, Mr. Kramer, Dr. Spohn, Brigadier General Schwenk, Judge Smith, Sergeant Shepperd, Sergeant Major Martinez, Ms. Tokash, Ms. Gen Long, Judge Walton, and Ms. Goldberg.

As the chair said, this afternoon we're going to lead off with two sessions with appellate counsel first, those representing the Government before the Service Courts of Criminal Appeal, followed by the Defense Appellate Division that represents the appellants before

the Service Courts of Criminal Appeal.

This is going to concern your review of the mechanisms to enforce victims' Article 6b rights, the scope of the psychotherapist patient's privilege, and issues sort of related to your study of the advisability of a conviction integrity unit insofar as post-conviction review procedures are handled at the appellate level. And these project matter experts can speak to the ways in which servicemembers can challenge their conviction, and what avenues might be available if they feel they were wrongly convicted.

Ms. Terri Saunders is the staff lead for these projects and these studies. So, I'm going to turn it over to her to introduce our panels and get the session going.

MS. SAUNDERS: Thank you, Meghan. I'll introduce our panelists.

We have Colonel Christopher Burgess, who serves as the Chief of the Army's Government Appellate Division.

We have Colonel Matt Talcott, who

serves as the Chief of the Air Force's Government Trial and Appellate Operations.

And we have Colonel Joseph Jennings, who serves as the Director or the Government Appellate Division for the Navy and Marine Corps.

And from -- and Mr. Ted Fowles who serves as the Deputy of the Coast Guard's Office of Military Justice.

So, I'll turn it over to you, Judge Smith, for the questions, which are in your day folder.

CHAIR SMITH: So, I guess I'll start with the first question.

In the case of M.D. v. United States, the CAAF held that it did not have jurisdiction to review a victim's petition for a writ of mandamus, as neither Article 6b nor Article 67 provides CAAF that authority.

What are the positive and negatives of CAAF having jurisdiction to review a victim's petition for a writ of mandamus following a denial by a Court of Criminal Appeals?

Who wants to start?

COL JENNINGS: Okay. I think the positive is that it would provide some uniformity in the application of rules across the service courts, which we currently don't have on some key issues, including the applicability of 513.

I think the negatives are that it could lead to more delay in more cases, including some cases where perhaps the victim's likelihood of prevailing at CAAF would be quite low. For example, in a case involving abatement of charges, there really isn't any foreseeable reason why a victim wouldn't pursue an appeal, a write appeal at CAAF despite there being a low likelihood of success.

So, that would, I think, be the main negative is the possibility of longer delay in more cases.

COL BURGESS: I would agree with Colonel Jennings' assessment of the positive aspects.

In terms of negative, I would also

agree to the extent that you do want efficiency, obviously protecting the rights of victims under Article 6b and, of course, the accused's rights, those due process rights to make sure he or she gets a fair trial.

With it going to CAAF, as Colonel Jennings mentioned, these things can take a, not excessive, but a fair amount of time which can cause impacts at the trial level that may not be thought about if you went forward the day of a petition.

MR. FOWLES: Yeah. Good afternoon. I would, I'd concur with my colleagues. I really don't have anything else to add.

COL TALCOTT: Yeah, I, I also completely concur. The positives are uniformity and the drawback might be time.

I'd highlight that H.V.Z., which is a recent case, is still pending with CAAF. The Air Force court decided that case over a year ago. We still don't have a decision from CAAF. So, the delays potentially are significant.

I think a correlative aspect of that that I would ask that we, as the committee, take into consideration, is there's a finite number of judges and a finite number of lawyers at the appellate proceedings. Every case that is being delayed or every case that is being heard on the appellate level is potentially delaying somebody else who may be sitting in confinement or who is also awaiting the disposition of their case.

I'm not sure what the numbers are. But certainly on the CAAF perspective I think the numbers are lower than they have been in the past in terms of the numbers of cases that they are taking. But I think that the number of cases that are coming up to CAAF on petition or otherwise are actually quite high still.

BGEN SCHWENK: So, I just want to, is the entire case stayed while the victim pursues the mandamus relief in the Court of Appeals?

COL JENNINGS: Yes, sir. Typically it is.

BGEN SCHWENK: And is there any sense

of how long is an average that might be?

COL JENNINGS: Well, we would compare it to an Article 62 interlocutory appeal which also, by statute, takes priority over other appellate business. It typically takes us about four to six months to litigate that at the service court level, depending on how complicated the issue is.

If that case then goes up to CAAF, we typically plan on at least another six months.

So, I think Colonel Burgess' estimate of about a year is pretty much right on track.

BGEN SCHWENK: I'm sorry. When you say litigate, and I'm sorry to interrupt it further, when you say litigate it, that's by the time the Court of Appeals issues its decision or is that just a briefing and argument stage?

COL JENNINGS: So, at the service court level we would typically expect to see a decision, a published or unpublished opinion, in about six months.

COL BURGESS: And for the Army, excuse

me, for the Army that's consistent, two to six months for an opinion, probably another six months at the CAAF level.

COL TALCOTT: So, I guess I wouldn't say, for the Air Force the numbers are a little different. This is the Air Force Court of Criminal Appeals not CAAF. At CAAF very little experience because CAAF doesn't have jurisdiction. Only the cases that have gotten there is with a TJAG certification. So, there aren't a lot of writs in that area.

I went back and looked. There were eight writs in the past two years for the Air Force Court of Criminal Appeals. Of those eight, most were in the 2-month range before the Air Force Court could get a decision out. That doesn't mean a case went to trial, like, that day. Typically you've got to reschedule and get everybody back on the page.

Many of those delays actually did not, that two months did not even affect the trial date. It's very common in Air Force trial

practice to have bifurcated cases, so the motions hearing and the trial a few months down the road.

Several of those cases I just mentioned the Air Force Court was able to get a decision out before the trial date arose. It was just a stay of the order as opposed to a stay of the proceedings.

MR. FOWLES: And we don't have a lot of cases that have gone this path. But, roughly, our, our delay is about 10 months. So, it's consistent with the other services. And that was taken by the case at the CAAF. But, so there are significant delays in terms of, you know, when these cases got on this path.

I'm sorry, Jennifer. Go ahead, please.

MS. LONG: Thanks. I was going to ask to follow up on Colonel Talcott, actually, in my mind before you were speaking, how reasonable is it for the rest of the services to follow that same model or to maybe identify a time by which interlocutory appeals or writs have to be heard?

COL JENNINGS: Well, it's a good question.

One of the, one of the questions we were prepared for was with regards to the CVRA practice of making those sort of decisions on a writ within 72 hours.

I'm not in a position to say how well the appellate courts are set up to accommodate timelines like that.

Again, I can only compare it to our experience handling the decision of whether or not to grant an interlocutory appeal under Article 62. As you know, that decision has to be made within 72 hours of an adverse ruling.

My experience of a couple years handling those kinds of decisions, is it possible to make a decision within 72 hours? Certainly. The longer amount of time, the better decision you're going to make.

And, so 72 hours does put a significant strain on the resources of a staff to research those issues, to try and read as much of

the record as they can. And then workshop the recommended course of action and make a decision. And since, you know, at least with Article 62, that 72-hour clock runs on weekends and holidays, it's challenging.

It certainly can be done. And I don't want to speculate about the ability of the judiciary to handle that as we do, but it certainly does, it's a challenge.

MR. CASSARA: Colonel Talcott, you said that the proceedings are bifurcated. When a case is stayed -- and I don't know this is all the time -- but when a case is stayed is discovery still ongoing?

Can depositions be taken?

Can -- or is everything just frozen typically? And maybe that's up to each individual judge; I don't know.

COL TALCOTT: Yeah, I'd say, unfortunately, it sometimes is judge-specific. We try to encourage the judges to continue processing the case.

I was trying to clarify, we do have some cases where there's a stay of the proceedings, and steps, we're not going to schedule anything else until this is resolved. But sometimes it's just a stay of the order. So, the judge might have said, hey, release the mental health records or release the medical records.

The writ is sent to the Air Force Court and the Air Force Court should stay that order, continue with the proceedings as soon as you can. But because it's bifurcated it doesn't really have any effect as far as, like, witnesses being called and, you know, the issue becoming moot.

Does that make sense?

MS. BASHFORD: Forgive me, because I've never been an appellate attorney, but does an accused have a similar right to interlocutory appeals to the appellate court during a trial?

COL JENNINGS: No, ma'am. Not under, not under Article 62. It only covers appeals by

the Government.

And the accused -- I'm sorry, just to follow up -- and the accused does have access to, to a writ of mandamus. But, of course, and as we'll discuss later, that's a fairly limited set of circumstances.

MR. FOWLES: If I can just add to Ms. Long's question earlier, you asked a little bit about the, the ability to, I think, surge for these. And certainly from the Coast Guard being the smallest of the appellate shops, that's a heavy load both on the Government and the defense side. You know, we are minimally manned offices, maybe two or three people.

So, if you have a, you know, an argument pending before a CAAF or an argument already pending before your CCA or other, you know, timelines due where you may not, you know, enlargement may be feasible or granted, truncating the time line just might not be reasonable in our court once a transcript -- so, we contract it out, we don't have an in-house

capability to produce that -- so, you know, you're dependent on a contractor.

So, it's a quite complex scenario to get these cases briefed up and to the CCA. So, I mean, I think any time line must, you know, sort of two months you're really pushing your team hard and probably putting other cases aside that it may not be appropriate to do so.

BGEN SCHWENK: We've been told that when a victim's counsel wants to assert a 6b right at the trial court they're told go to CCA and take it up there. So, the issue is, if you look at CVRA, they're told go to the trial court judge.

What is your opinion of the military following through and saying, having a rule that says go to the trial court judge to start with?

COL TALCOTT: I might be on my own here, but I do definitely think it's peculiar that we, our trial judges routinely do not permit victims to have standing to exercise their 6b rights.

It's, it's not peculiar to trial judges and military practitioners because it's a foreign -- it's really foreign. So, I think that's why trial judges don't have any trouble saying they don't have standing.

But under the CVRA they do. And if you look at 6b, it looks like it's sort of a cut and paste of some important changes. But I don't know if the intent was to say military victims have fewer rights and have more difficulty exercising them than civilian victims, but that has been the effect.

COL JENNINGS: I think the one thing I would add is it's been a while since I've been in a trial billet, but it has not been my experience that trial judges in the Navy and Marine Corps routinely refuse to hear motions from, from victims and victim's counsel.

So, you know, regardless of whether or not there is formal standing to hear that motion, I think many of the judges in the Navy and Marine Corps trial judiciary err on the side of caution

and consider the pleadings from, from victims.

That may not be uniformly the case, but that has been my experience.

COL TALCOTT: I would say, you know, to the extent it made it sound like I was really being hostile to the Air Force trial judges, --

(Laughter.)

COL TALCOTT: -- that I don't mean to be that way at all. So, please don't interpret what I said to be that way.

And if, with regard to 412, 513, 615, 514, those rules, our trial judges are of course hearing from victims that cast some of their decisions very clear. I think, on those issues it's with regard to the specific rights in 6b, so, a right to privacy, a right to dignity, the right to unreasonable delay.

Most of our trial judges are skeptical that they have standing at a trial level to raise those issues and they should go to the Air Force Court of Review.

That's what I meant to say. But not,

not, obviously, all filings and all motions. The ones that are clear, CAAF said you have to do.

One thing I, I would say that might make your jobs harder is it did seem, if you look at the recent decision by the Court of Appeals for the Armed Forces, United States vs. B.M., the majority opinion, although they said they, you know, basically said victim doesn't have the standing to raise or challenge an abatement decision.

If you look at the analysis for how they reached that decision, they do not cite to, for example, the right to be heard. They apply ordinary standing tests that you'd see in a federal courtroom, which might guide our trial judges to have more of an open mind to trial level standing.

But I don't know, time will tell.

Also, the H.V.Z. decision pending, where this exact issue was raised, some of the justices expressed some skepticism as they questioned counsel. Can't read too much into

those questions, but some skepticism about Government's position that victims don't have standing on these issues at trial level.

MS. LONG: Chair Smith, I have another question.

Just following up on the capacity. Do the services use your Reserve Corps lawyers as appellate attorneys or is it simply as trial? And is that an option?

COL BURGESS: I can speak for the Army.

We have seven Reserve attorneys. I know our Defense Appellate Division -- I don't want to get ahead of Mr. Potter back there -- but they have Reserve appellate attorneys as well.

I've been GAD chief for three years. They are highly, highly experienced. We have DOJ attorneys who have been doing it for 20-plus years. While they can't work as many hours, it really augments the team quite well.

From the military judge side of the house, I believe we have 20 Reserve military judges can be surged to a location to help out if

we have extra trials.

COL JENNINGS: The Navy and the Marine Corps has similar capabilities and is employing the folks in the same way.

COL TALCOTT: Air Force the same, similar staffing as well.

MR. FOWLES: We do not.

(Laughter.)

MR. FOWLES: The Coast Guard Reserve analogy doesn't really work out well. We do have reserve trial judges just for scheduling so it will be easier.

But when it comes to the appellate case load it doesn't work out very well for senior officers and how we promote reserve officers in the Coast Guard.

COL BURGESS: And I'd like to add, too, the Appellate Court does have reservists as well. So, at the judge level, the appellate trial or the appellate judge level and the defendant Government Appellate Division level.

MR. FOWLES: And I guess that makes me

think I should clarify the comments.

We do have Reserve reservists on the appellate bench and the trial bench but just not in the Government appellate or defense appellate divisions.

CHAIR SMITH: Can we circle back to General Schwenk's question and allow Colonel Burgess. You didn't answer it, and Mr. Fowles you also did not have the opportunity to answer it.

And the question was related to whether or not the victims should have standing at the trial court level under 6b?

COL BURGESS: I can only speak from my perspective, my current position. So, I don't want to get -- if this is not how it operates in the field, I apologize.

But I think there's value to it. As the program came onboard more than several years ago, a while back, I think the judges are becoming more comfortable with it, sir. And I think the more experienced judges will allow that

voice to be heard for representation of a victim.

I think from an efficiency standpoint and making sure that record comes up to the Appellate Divisions I think there's a value. I think there would be value to clear everything up at the trial level because two, three years down the road victims' memories fade, and that may not be available, et cetera.

Does that answer your question?

BGEN SCHWENK: Yes.

MR. FOWLES: So, at least my experience in the Coast Guard is, as we see victims are being heard through their SVC at the trial level, there's some mechanisms in place, and U.S. v. Fink is an example of the most recent case where that, that came up on a writ to our CCA.

So, I, I at least feel for our service the mechanisms are in place and it's usually addressed in 39(a).

And the typical practice is if it's, if it's actually in the trial case in front of members, then you would see SVC stand up in the

gallery and the judge and counsel know that we're going to have to take a recess and they'll be heard in a 39(a), or pled to members. Usually not people speaking up in the gallery.

But at least our practice, I feel like they're being heard. I'd be a little surprised to feel that they didn't have that opportunity.

And then the trial judge usually gives them an opportunity if they don't want to -- if they don't like the judge's ruling and they want to ask for a stay they'll usually give them a, you know, a finite period of time to talk to or at least file some pleadings with the CCA.

So, that's our current status.

MS. BASHFORD: I can't remember now if it was Colonel Talcott or Colonel Jennings said they looked back and found eight writs over a 2-year period.

Do you recall how many of those writs were granted?

COL TALCOTT: No. I actually don't.

MS. BASHFORD: Do you have a ballpark?

COL TALCOTT: (No audible response.)

BGEN SCHWENK: Let's turn to standard of review.

I think one of the questions was what should the standard of review be given that, I guess, I've been told that Article 6b came along in 2014 patterned on the CVRA, 2015 Congress amends CVRA to have a lower standard, but they don't amend 6b.

And now it's those years later and the question that we'd love to hear you discuss is what do you think it should be?

COL JENNINGS: It's been our position that the higher standard of review, unless or until the statute changes, is the appropriate one to apply.

Just thinking about it logically, we believe that writs should be a rare occurrence, and for all parties.

It's unusual for the United States to seek them, for the accused to seek them. And it shouldn't be, a writ shouldn't be a, you know, a

free do-over for any party just because that party is not satisfied with, with a trial judge's ruling.

And so, we think that the higher standard reflects the unusualness that, that should apply whenever you're talking about writs of mandamus.

COL BURGESS: Yeah, I would agree with Colonel Jennings. I mean, of course it could be changed. And I understand the attractiveness of having a lower standard, especially for victim's counsel.

But just like a Article 62 or a Government's writ, the standard is high for a reason because it is a rare event. So, I think until it's changed, this standard does make sense.

MR. FOWLES: I would concur.

BGEN SCHWENK: So, what do you say, I mean, the thing is to a victim you have a civilian victim if their rapist had been civilian they'd have a lower standard of review. But it

was a military person, so they have a higher standard of review. How do -- how is that explained?

COL TALCOTT: I don't think well.

So, I didn't speak up on the question before. I am of many minds on this. I do think writs should be rare, and that one way to make them rare is to make the standard of review extremely high, discourages stopping the trial midstream, is obviously very undesirable. The reason for 62, the Government is very limited in when we can do them. And the standard of review is very high for us.

With that said, the very high standard is not a particularly good standard for the development of law. This is an unknown area of the law for many of our judges. And practitioners struggle to sort through these issues.

You can just read the recent CAAF decisions in this area. People are really unclear how to do this.

And to discourage appeals when we need clarity in the law may not be the best approach. So, I think it's a really complicated issue and there isn't an easy answer. Because I really am of split minds on this.

I completely agree with my co-panelists here, but I also share -- I know you didn't actually say it, General Schwenk, but how do we say to military victims you have fewer rights than civilian victims?

CHAIR SMITH: Do you think allowing it to be -- allowing them that standing at the trial court level might reduce the likelihood of a writ being filed?

In other words, if they feel, if they think the argument was made and my view was heard, would they be more likely to, to not even pursue that appellate action?

MR. FOWLES: I would say yes.

COL JENNINGS: I would say no.

I don't think standing makes a difference. They -- I think the challenge to the

dynamic is it's a two-party system and the Government is responsible for the strategy and the prosecution of the case on behalf of the United States. And adding a third party, there are times where the Government's strategy and the way that they think best to present the case is the SVC just disagrees.

And I think we really run of risk of kind of learning how does that work? Who -- in my analogy that we talked about before, it's like playing a football game with two coaches. And one coach wants the pass play and one coach wants the running play. Who gets to determine when they disagree on which play to call?

And I think that's, I think the risk is the more the SVC gets basically a say-so and a vote in a trial, you're really stepping on the toes of the Government, who is ultimately the one that we're going to look at for a successful prosecution.

And so that's my concern. I think a writ should be unusual. You know, they should

have to articulate.

I, I get it sometimes that they may not be comfortable. In some of the arguments I've heard I, I just disagree. I know that there are emotion, there are a lot of personal issues at play here. But we have 412 in place. We have the procedures in 513 in place. And it's fair if your argument is that the judge is not accurately applying the rule of evidence. And by 6b we've given the SVC an opportunity to raise that up on appeal.

But I get very concerned that we're allowing an SVC now in the room to just interject any time that they just disagree with the way a case is the case is going.

And when you add in delay, like our case, I mean, it's at least in the Coast Guard we're small, so we've usually flown a whole bunch of people to a location. We don't have major installations. So, there's an enormous amount of cost, and time, and energy that gets, that goes into getting everyone at the location of the

trial.

And then all off a sudden you just delay the trial for 10 months. You know, witnesses memories don't get better with age, that's for sure. You're assuming that some of the witnesses want to continue to participate, both on the defense and the Government's side. You know, they get a snapshot of the 39a in some of those sessions, and they may not want to come back around the second time.

And if they're civilian, you know, sometimes you're hard pressed even if they're military, it's, it's not an ideal situation.

So, I guess those are my concerns, the more we enable an SVC to interfere with a two party system, I just don't think it's good for the efficient resolution of cases.

MR. FOWLES: I think it's a very hard question to answer. I can certainly see it that providing standing at the trial level would, would decrease the number of writ of appeals that we see. I could see the opposite happening as

well.

I just think it's a very difficult thing to predict.

COL BURGESS: If I could add, too, and we see this at the Army, it gets more complicated when you have multiple victim cases. So, two SVCs might see it this way, a third one sees it a different way. And they have to, of course, you know, represent their client.

So, that's just another layer of complexity. We've seen at least that they are on the level.

MR. CASSARA: Have any of you seen a case in which an alleged victim took an appeal from a military judge's decision into federal court?

I haven't. I'm just curious if any of you have?

I'll ask the victims' panel. They might.

COL JENNINGS: Sir. Sir, I'm not, not familiar with any.

MR. CASSARA: I don't know what the standing issue would be or. Okay.

And you may get a chance to decide that then.

CHAIR SMITH: I don't think we heard from everyone. Just curious, how many writs are filed on this issue? You know, if you have a sense of what that looks like?

COL JENNINGS: Just to be clear, are we talking only on 6b issues?

CHAIR SMITH: No.

COL JENNINGS: The Navy and Marine Corps has had a number of writs over the last couple of years, but all of them to my knowledge have been 513 issues rather than 6b.

COL BURGESS: I don't have the number off the top of my head. Single digits, low single digits, if at all.

COL TALCOTT: I don't know. I would say, one thing that is worth considering why the trial level standing, although I completely agree with my co-panelists, I am not confident one way

or the other whether that would increase writs or decrease writs. It may make writ decision better.

You don't have to look any further than the H.V.Z. case, the victim was trying to challenge the production of her medical records kept on base. The trial judge says, you don't have standing because those are RCM 701 records, not 703.

The victim wasn't allowed to file motions, call witnesses, or put on any evidence.

So, then you have the writ. And the court's trying to resolve this appeal about perhaps the key arguments or the key pieces of evidence to help them decide.

So, we might get better decisions on those writs if trial-level standing existed.

Once we have good law, presumably -- and I know how long that takes, I think we're still in the process -- but I mean if there were some very clear rules, maybe we wouldn't need as many writs. But I can't give you a number how

many there are.

And I do -- well, I'm not even going to guess.

MR. FOWLES: I know of one. But I can supplement my answer if I discover more.

MS. LONG: Can we move on to the Mellette case to get their feedback on how that decision has complicated your practice or not comp -- impacted it, I guess, I don't want to, I don't want to taint your, your --

COL JENNINGS: I think "complicated" is the right word.

There's been a lot of confusion just in terms of how to apply Mellette practically at the trial level. And whenever there is confusion, there is additional opportunity for error. And in 513 cases that we've handled recently that's resulted in abatement of some charges.

COL BURGESS: The Army concurs. The court will eventually provide clarity. But in the appellate process, and you guys would agree,

it takes years to develop that, get the right case, the right issue.

But the lack of clarity, defense is aggressive, properly so on filing the proper motions in the right case. It would be nice to have some refinement on the Mellette opinion.

COL TALCOTT: Yeah, no, I 100 percent agree. The Mellette case is extremely complicated.

I also work, I supervise senior prosecutors and worked with some of the OSTC folks. And the Mellette case is just really rough to handle.

I'm maybe not as optimistic as Colonel Burgess that the case law will get resolved eventually. I guess let me know what you mean by "eventually." But, you know, we've had the open question about whether you can write constitutionally required out of 513, or what that means, for a very long time now. The Payton-O'Brien split between the Navy and the Army, still unresolved.

You can read the B.M. decision recently where you could tell the court was struggling to try to provide some help, you know. We don't provide advisory opinions, and then sounded like they gave us 12 pages of advisory opinion.

At one point the chief judge says, I don't even know if this will work, but it's worth a try

I mean, that was pretty remarkable, I thought, to read an opinion. And that's then trying to help us resolve Mellette.

MR. FOWLES: I certainly concur with my colleagues on question one.

Kind of taking in question two, I do think I had an opportunity to speak with the folks that designed and implemented NMHS Genesis, including counsel. And I do think that made me realize what a complex situation this truly is because NMHS Genesis and the continuity of care model that they use allows everyone, nurses, and doctors, and all types to see diagnosis and

treatment, NMHS Genesis.

And then they carve out, they have a special module in there for what would be covered by the 513 privilege to protect those types of records.

And so, I had one opinion on the issue and then I realized this would be, you know, modifying the rule does run counter, potentially, to the entire way that medicine is practiced in the military right now. And so, I think before anyone tweaks the rule we probably need to talk about, you know, how we get after that in this grand new multimillion or billion dollar, you know, electronic health records system that will be rolled out, because it's just not as easy. It's changing.

And one of my supervisors reminded me as well, but, you know, the current military medical model is, even if you go to the ER and you have acute care, you might get sent to a specialist. But likely they're going to stabilize you and then they're going to require

you to follow up with your PCM.

And then you go to your PCM and they may try and, you know, put you on some sort of, you know, treatment and diagnosis regimen, and stabilize you.

And so, there's a patch in the military, it's pretty rare that you would end up to someone countered by the 513 privilege right out of the gate. And so, there's some real practical aspects to our discussion that I think us, as lawyers, need to make sure we're balancing. It's just not as easy as saying that, hey, we're going to extend this privilege. It really runs counter to how modern medicine is practiced.

And so, I think that's kind of taking us into question two, but I think those are really important for us to balance in terms of how, how would you, you know, extend this privilege.

MR. KRAMER: You may have led into the question I have. I have read Mellette several

times. And what, how exactly -- what do they get exactly, and how exactly is it provided, and how is it separated out from the rest of the records?

I don't quite understand that.

But you may have explained a little if they're keeping a separate folder, so to speak, on that. But I, I didn't -- I don't quite understand how it works in practice.

MR. CASSARA: And if I might butt in real quickly. We have a couple of new members who might not even know what the decision is. So, I don't want to assume or --

COL JENNINGS: Okay. So, the MRE 513 privilege covers confidential communications through a psychotherapist.

The Mellette decision essentially excluded information about treatment and diagnosis of a mental health condition from that privilege.

So, practically speaking, at the trial level so long as the trial defense counsel is only requesting, you know, I want to know what

the victim or witness was diagnosed with, and whether or not they were taking any medication at a relevant time, and what their diagnosis was, that that information can't be accessed, produced, discovered without infringing on the privilege.

The problem is, as you I think alluded to, Mr. Kramer, is what exactly does that mean? Who gets those records?

How do you sort out what is confidential communications from the treatment and diagnosis information that might be in those records?

Who gets to see those beforehand?

What procedures do you have to go through before you even produce those records?

All of those are the questions that we've been struggling with, and we continue to struggle with.

MR. FOWLES: And I think just from Mr. Cassara talking to the new folks, the other piece of that that's important, the background was that

previously probably occurred under Military Rule of Evidence 513 where it was a closed hearing, the records were probably sealed. So, it was much more protective environment for the victim.

Now with the new, under the new process, the victim's records are, you know, likely just going to be part of the public record. So, that's, that's probably I would say one of the biggest decisions, taking it out of 513 and putting it under 701 that it really is much more off a public situation.

MS. LONG: I have a question.

I don't know if this is even fair to ask but, I mean, you sort of said it's complicated, so I don't want to put you on the spot, but do you have an outcome that you think is, I mean whether it's expanded or not, or some sort of analysis that would be fair based on all of your experience?

COL JENNINGS: I think the, my sort of short term goal is to get an answer from the courts so that we know what the rules are. And

that, I mean, that is kind of a selfish answer because that's what I'm worried about, that the appellate level is ensuring that trial practitioners are committing reversible error by, by mishandling these sorts of issues.

I mean, certainly thinking back to the pre-Mellette days when I was a prosecutor and a defense counsel, it's not like that these issues didn't come up before that. They did. And, typically, it was the military judge, you know, kind of using his or her common sense to sort through these issues, trying to make sure that the request for mental health information for example, wasn't frivolous, or a fishing expedition.

And then, typically, reviewing the records in camera if they were produced, and deciding what was relevant and what was going to be discovered to defense.

Yeah, Mellette I think, ironically, has kind of thrown all of that into, into a bit of disarray. And at the same time has also

encouraged the request for those records at, at the trial level.

Just, again, anecdotally speaking, I think that, that mental health records are requested in just about every sexual assault case that we -- at the, at the trial level. Because, you know, again, the trial defense counsel are doing their jobs. And Mellette suggests that because the information is not privileged, why wouldn't you ask for it?

And so not only it was a complicated issue before, but one that didn't come up as often. Now, we have it coming up all the time. And, unfortunately, Mellette hasn t provided the level of clarity that, that we might wish. So, it's a multiplying effect.

CHAIR SMITH: So, it was suggested by another panelist at another point that perhaps it should be made clear that when you're talking about mental health records that 513 governs and not 701 and 702. What are -- 703. What are your thoughts about that?

COL JENNINGS: Well, if, if 513 applies to all requests for mental health records, that they will be provided in only a very small number of cases. Because the enumerated exceptions to 513 are very, very narrow indeed.

Is that the appropriate outcome? I mean, it almost certainly depends on what side of the fence you're, you're sitting on. Certainly there are cases in which, in which the accused probably needs to have that information, treatment and diagnosis information, in order to have a fair trial.

At the same time, certainly the victims and witnesses out there have strong interests as well. And probably the current system isn't doing them justice either.

Because it seems like there are cases where their mental health history is being explored unnecessarily in cases where the mental health condition of that person, you know, things that they had in high school, or when they were 12 or 13 years old are being dredged up even

though that's not particularly relevant to, to the allocations or to any feasible defense.

So, I mean, I think the current law probably doesn't serve anybody particularly well, unfortunately.

COL TALCOTT: The only thing I would add, and maybe this is just to make sure you're considering, and maybe I'm saying the same thing that Colonel Jennings just said, in two separate ideas. But one of them is, you know, what is the -- to keep in mind what is the point of this privilege?

I think it's to encourage people to receive mental health treatment that need it and not be discouraged by the fact that the information may be released.

And with that in mind, I don't know what the distinction between your diagnosis is to your communications.

So, I throw that out there, food for thought I guess. The drafters of the rules thought there was a difference. I'm not sure for

a victim there is, or a patient for that matter. This obviously applies much broader than victims, although it's typically the way we discuss it.

The second one is the, the chief judge of the Court of Appeals in B.M. talked in his advisory opinion about -- not his advisory opinion, I take that back -- in his concurring opinion that may or may not have contained advice -- I think I'm going to get in trouble -- he, he discussed the trial judge doing an in camera review of the mental health records and sort of parsing them apart, you know, the non-privileged with the privileged.

But he also assumed that the judge could, at the same time, while doing that review discover evidence that would be required to be disclosed under Brady, which is an enormous obligation to be thinking that a trial judge is doing because I think he's thinking in terms of impeachment.

But how would the trial judge know what's impeachment material? And is that the

kind of review we really want trial judges doing?

So, just, you know, there on the fly, it sort of presumes they're going to be reading the communications, which they're not supposed to be doing. I think we're just supposed to be parsing.

It was an interesting thing. And I think depending on if the panel is considering re-writing the rule, thinking through how that's going to work I think is important because I think the current doesn't work, and the way Mellette works doesn't work. And whatever new rule you consider I think needs to think through all of that.

And I don't have an answer, unfortunately. I've experienced how challenging it is, that's all I know.

COL JENNINGS: I guess last thing, and in order to maybe attempt a proper answer to your question, which I was sort of artfully evading before, again I think the pre-Mellette way that judges handled this was preferable to the system

that we have now in the sense that when I was a defense counsel, if I wanted to get at mental health records or medication records for a witness I had to clear a pretty high bar to convince the trial judge that that victim or witness was suffering at a relevant time, either at the time of the offense, or the time of the report, or the time of trial, from a particular condition that would have impacted his or her ability to perceive, recall, or relay that information.

And if I couldn't do that, then I wasn't getting anything. And if I could do that, then I was going to get the information I was looking for after the military judge did an in camera review to screen out material that wasn't relevant or necessary.

Again, I think although that wasn't a particularly structured and was an ad hoc approach that probably wouldn't be replicable from case to case or one judge to another, and it depended pretty heavily on just good judges using

their common sense, the -- I think it was probably more protective of, of everybody involved, certainly the accused, the victims, the witnesses.

And it gave the Government, I think trial counsel felt a little bit more confident that they weren't screwing something up back then than they do now.

MS. LONG: The prosecutors still have a Brady obligation when they're determining under that old way?

COL JENNINGS: Absolutely. Yes, ma'am.

MR. FOWLES: I guess, Judge Smith, the only thing I might add, since I guess it's more, like, just my personal opinion than speaking on behalf of the Coast Guard. But since the opportunity is there, and if I had a resolution I'd probably rework it for Mr. Sullivan, but I do not.

So, I've often thought personally I don't like 701. I think that bar is too low. I've often thought that there might be a way by

policy to maybe put diagnosis and treatment under 703, at least make, make the defense articulate more than just relevance as to why that they should get to those records. Make a relevant and necessary type of standard, I think it's material now, but something more than, than we have under 701.

So, I actually thought there might be some room to put, put the rule under 703 or just to apply a different standard. But that's just me waxing poetically.

DR. SPOHN: So, switching gears just a little bit to the issue of conviction integrity units, one of the innovations that we've seen in the civilian world, especially from reform-minded progressive prosecutors, is the establishment of a victim integrity unit or a second look sentencing.

And what's your, what are your views on those for the military justice system?

COL BURGESS: From the Army's perspective I already think we have extremely

robust protections. From the convening authority, yes, he or she has less powers than they used to for clemency. Factual sufficiency review that the Army or the service courts can do. CAAF can look at that to a certain perspective, to include post-finality writ. They can go to Article 3 courts.

So, I do think we have a very robust system that protects the rights of, of the accused.

That said, I think the fact that these do exist, the fact that it does give them a chance if something did go wrong. I think that with further study there is value to it. You never want, you never want an accused or a defendant to be wrongfully convicted.

And we all know it happens. It does happen. And I'm sure the services it happens as well. Not, not a lot.

But it's something that I think with further study is not a bad idea. I think it should be service-specific so the Army would have

one, the Navy would have one, the Marine Corps, Air Force would have one, et cetera.

And my final thoughts on that, there's other mechanisms in place for the Army, the Army Board of Correction of Military Records, Parole Clemency Boards. They can throw the convictions.

But I think with the proper study, services-specific, there could be value to that.

COL TALCOTT: Yeah, I tend to agree with Colonel Burgess' comments. Although I would, maybe under the heading of a I don't know a lot about conviction integrity units except for my understanding is a lot of their success come in improper eyewitness identification cases.

Those are, eyewitness identification cases are extremely rare in military courtrooms. And so, I, I do wonder about, although the purpose seems noble, I just wonder if the resources would be worth what we get out of it. Because our cases very rarely are line-up cases or identification cases. They rarely swing on or could be corrected by the presence or absence of

DNA evidence.

COL JENNINGS: Yeah, I think Colonel Talcott makes a really good point.

The other thing that I typically associated with conviction integrity units is reviewing kind of junk science. You know, they have experts who testify who later are found to be, you know, fudging the numbers or testifying to some sort of "forensic science" that isn't particularly valid.

And, again, I think in the military, although we certainly have DNA evidence all the time, we don't see a lot of, of cases that hinge on things like, you know, bite mark analysis or things of that nature. So, perhaps less of an issue.

And I'd certainly agree with Colonel Burgess as well. I mean, servicemembers already get an automatic appeal for qualifying convictions. It's very simple for them to get an appeal by right. Even, even in cases where they get no punishment they get a free military

appellate attorney and the ability to challenge both the factual sufficiency of their convictions and the appropriateness of their sentence.

That, that's a menu of rights that does not exist in any civilian jurisdiction where I'm -- that I'm aware of.

So, I would agree. I think our current system to protect convictions while also looking at hard, at convictions that might be questionable is already pretty robust.

MR. FOWLES: Yes, ma'am. The only thing I'd add to my colleagues is we also have residual clemency at the very end. So, that's, that's one more opportunity in the system.

I agree with my colleagues' comments. And I know we've responded to this in our RFI, so I won't just regurgitate what we put in there.

I would just disagree with Colonel Burgess, at least for our service, if we were going to go this route I think a purple unit across the services. We certainly don't have the court-martial numbers to justify some permanent

body that would do this. But I think if you combine the services, you know, you'd have numbers that could keep a group of dedicated folks gainfully employed.

Thanks.

MR. KRAMER: Sorry. What doesn't exist in the civilian system?

What doesn't exist in the civilian system that's different?

COL. JENNINGS: Well, I just kind of laid out an entire list of protections that military servicemembers enjoy on appeal. And I know that there are very few civilian jurisdictions that do factual sufficiency review at the appellate level. I think there used to be three and now there's only two. But very few civilian appellate courts have the authority to do review on other than matters of law.

MR. KRAMER: Yeah, okay. I mean, I think you can always raise that the -- well, if it was at trial, you can always raise factual sufficiency in any appeals court. And if there

was not a trial, you can raise that the guilty plea didn't establish the facts. So I don't understand the difference.

COL. JENNINGS: Actually, sir, I would respectfully disagree with regards to most state appellate courts. Factual sufficiency is not a basis on which most state appellate courts can overturn a conviction. In the sense that we do in the military where you have a military appellate court that does a de novo review as, for example, an additional juror who can step in and say --

(Simultaneous speaking.)

MR. KRAMER: Well, if you're talking about trials, there's a Supreme Court case that says that factual sufficiency, if it's raised, has to be reviewed in any court as a due process issue. It's Jackson v. Virginia, that in any state court or federal court, the sufficiency of any trial conviction would have to be reviewed if there's an appeal as of right which there is in every state and federal court in the country. As

far as the factual sufficiency of a guilty plea, that would also be under due process standard.

So I don't know of any court, certainly no federal court. You can have that reviewed in any federal court in the country. And I don't know of any state court where you can't claim that the guilty plea did not establish the facts and therefore it'd be a due process violation.

(Simultaneous speaking.)

COL. JENNINGS: I'm sorry. Judge Walton is smarter than me.

JUDGE WALTON: Obviously, it's a factual review but it's not a de novo factual review.

COL. JENNINGS: Yes, sir. And I apologize if I wasn't clear about that. I believe I'm on solid ground saying that the military appellate courts engaging in factual sufficiency review, they do so in a more robust way than most state appellate courts do.

MR. CASSARA: So I'd like to -- I'm

sorry, Judge. Just two quick things. Chris, you said something. I want to make sure I understood. You said clemency and parole boards and BCMRs do or do not affect a conviction?

COL. BURGESS: My understanding is both of them cannot overturn a conviction.

MR. CASSARA: You're right. I wanted to make sure --

(Simultaneous speaking.)

COL. BURGESS: I do believe. I could be wrong on this. In the past, they could.

MR. CASSARA: You're absolutely right.

(Simultaneous speaking.)

BGEN SCHWENK: Except for cases when Bill is --

(Simultaneous speaking.)

MR. CASSARA: That's right. Back when the stone tablets were still used.

MS. BASHFORD: Having sat on a conviction review unit, every case that we ultimately decided to set aside the conviction had been through multiple levels of appeal. The

appeals had all been confirmed. But I'm also concerned with if I understand it correctly, there's a three-year limit on newly discovered evidence that would've made a difference on the verdict or the degree of punishment and could not have been discovered earlier with the exercise of due diligence.

And if there is such evidence out there that couldn't have been discovered, why is there a three-year limit? What if you find it out in four years or five years? Again, keeping mind that in the miliary, it's not going to be DNA or eyewitness. It's going to be witness and victim credibility for the most part. So if something comes up seven years later, why is that barred?

COL. BURGESS: Hey, Janet, check me if I'm wrong on this. But I think you're talking about petitions for new trial, new evidence within three years, ma'am. That is absolutely the rule.

I don't see why we couldn't explore a

study whether it could be a reason, good cause. Hey, it's good cause why this took us five years, to get six years, to get seven years. So the extent that answers your question, I understand that three years is absolutely the rule. But I think a good cause standard for an exception could be something that could be explored and should be explored.

COL. JENNINGS: I would agree. I don't have any experience petitions for new trials. I think they're quite rare in the military. But I don't see any reason why a good cause exception to the time limit wouldn't make sense.

MR. CASSARA: And just to sort of fill in the blank because this is a large part of what my practice is, that's under RCM 1210, a petition for new trial. There's still writs. I mean, you can take a writ of coram nobis or CAAF will tell you they don't have jurisdiction to decide it. But you can at least take a writ of coram nobis to the circuit courts and into federal court.

CHAIR SMITH: We appreciate your time.

(Applause.)

MS. PETERS: All right. Judge Smith, we have a break until 2:45. And I just wanted to announce just for the record Ms. Garvin joined us during that last session. So that is 15 members.

(Whereupon, the above-entitled matter went off the record at 2:38 p.m. and resumed at 2:51 p.m.)

MS. SAUNDERS: Okay. Thank you, again. So for our next panel, we have the appellate defense counsel from each of the military services. And they're going to provide their perspectives on the issues we were just talking about with the previous panel.

You have the potential questions in your day folder. And I'll just briefly introduce the panelists. From the Army, Mr. Jonathan Potter who serves as the senior appellate counsel in the Army's defense appellate division.

From the Air Force, Ms. Megan Marinos who serves as the senior appellate defense

counsel for the Air Force's appellate defense division. From the Navy, Ms. Rebecca Snyder who serves as the deputy director of the Navy-Marine Corps appellate division -- or defense division. And from the Coast Guard, Mr. Tom Cook who serves as the chief of legal assistance and defense services for the Coast Guard. Over to you. Thank you.

CHAIR SMITH: All right. Starting with the first question, in the case of M.W. v. United States, the CAAF held that it did not have jurisdiction to review a victim's petition for a writ of mandamus as neither Article 6b nor Article 67 provides CAAF with that authority. What are the positives and negatives of CAAF having jurisdiction to review a victim's petition for writ of mandamus following a denial by a court of criminal appeals?

MR. COOK: I guess I'll go first. And let me just start up by saying comments I make today are solely my own. As such, they do not reflect the views or opinions of the Coast Guard

or the Army that I retired from some time ago.

I guess a simple response is to this question some of the other ones from the defense bar. There are no positives to extending additional benefits to the victim from the defense bar's perspective. I mean, that would mean that the victim got an unfavorable ruling from the CCA which would necessarily be arguably favorable for the accused.

And now they're going to be able to appeal that to CAAF where now all of a sudden, you're going to snatch defeat from the jaws of victory for the defense side. And now the victim is going to go petition CAAF and get a second shot to now have this evidence suppressed. I'm sure my colleagues have more nuanced thoughts on this.

But that's sort of the simple response. I don't see any positives from the defense part. It would be all negatives.

MS. SNYDER: So I'd like to address uniformity that the last panel did as well as

delay. So I think the advantage of uniformity is a bit illusory. And that's because giving CAAF jurisdiction is not going to resolve in substantive review in most cases.

It's rare that CCA opinions on VLC writs have wide ranging impact. They're typically on garden variety issues that are simply resolved. And in fact, in many cases, the NMCCA does not even issue a show cause order which means that there is no actual litigation at the CCA level.

The case was just remanded for trial and it picks up. And they do that because the petitions are meritless on their face. For the few cases that actually merit CAAF review, there is a process which occurred in, in re: B.M. And that process is that the victim can go to the JAG and ask the JAG to certify the case to CAAF which we just saw in, in re: B.M.

And so I think the status quo balances the rights of the victim and the accused without allowing every alleged victim who does not

prevail at CCA to slow down the process even further by filing routine writ appeals at CAAF. Now the major negative that was discussed at the last panel is it will cause more delay. Trials can be delayed for up to two years on writs that are litigated through CAAF.

So we saw that in the Gilment writ of mandamus. It took two years to get through that process. In, in re: B.M. which was recently decided, that took 14 months to go from CCA through CAAF. And during these delays, witness' memories fade and stories change. Evidence becomes unavailable.

And the accused, even those who are ultimately acquitted, undergo tremendous stress and especially if they are confined while they area awaiting trial. So I think the current process of allowing the alleged victim to directly seek one layer of appellate review is sufficient because that gives them the mechanism to challenge the military judges' ruling while also balancing and limiting the length of delay.

And for those cases that are serious and complicated and do need further review, the JAG can certify them to CAAF.

MS. MARINOS: Shockingly, nothing to add to the answer that was just given by Ms. --

(Simultaneous speaking.)

MR. POTTER: I have a little bit to add, and it's our perspective. Like Tom, I'm speaking from entirely my perspective and not the United States Army. We don't see a lot of 6b litigation.

In fact, I can say in the last two years, we've not had one 6b case that I'm aware of coming to the Army court. Why is that? I think these things are getting worked out at the trial level, the trial participants, the special victims counsel, or working these things out to the satisfaction of all parties.

What else happens? Earlier we heard about release of these documents. And these things don't get released beyond to the parties, at least in the Army. In fact, we have a problem

with oversealing, not undersealing documents in our service.

So I think that it's kind of -- I don't really have the data to comment. But I don't disagree with my colleagues. I think the current standard is appropriate and the way we should keep going. But I am not seeing the cases at my level.

BGEN SCHWENK: Do you think that 6b issues should be litigated first at the trial court level rather than skipping up to CCA?

MR. POTTER: I'll answer that first because, sir, I can't really -- because we just don't see the cases. Probably an appropriate question to ask is why is this difference in the services and why -- or does the Army seem to be perhaps not successfully? I don't know because I only see what comes to me.

But not the Army successfully negotiating 6b right now. That's perhaps a good question to ask why. I'm not the appropriate person to comment on that. As Colonel Burgess

said earlier, single digit cases probably in my entire career regarding 6b and None in the past two years.

MR. COOK: I'll be short. I think we've had one. It was a seminal case, so that was Fink in re: Y.B. So that started in 412 evidence, and then that went to -- the victim appealed because the judge was going to allow in some 412 stuff that the victim didn't want in.

They prevailed at the CCA. And then the accused appealed to CAAF. That was the case for CAAF, said, yes, we now have jurisdiction. So it took them five months to make that decision, and then they deferred on the substantive portion.

So I think that gets to how long these things take. So the CCA actually only took a month which is wonderful, to get a transcript and to get briefs in and to get the decision. So we talk about -- I know I'm skipping around here -- 72 hours, come on.

But to get it done in 30 days and then

for CAAF to take five months to just make the jurisdictional issue, it's, like, I think maybe some speeding up on that end. But we've seen the one. And I think I go back to my initial response which was, okay, so if you're going to litigate at the trial level.

So now the victim gets a shot there. And now they can appeal to the CCA, and now you're talking about appeal to CAAF. I mean, the accused doesn't even get to appeal adverse rulings at the trial level to CCA.

So you've already afforded additional rights to the victim that the accused doesn't enjoy. Now the accused loses at the CCA. Now they can take it to CAAF. And that goes for the government's 62 appeals too is that the government appeals an adverse -- no, only a big loss or classified information decision.

The accused can then appeal that from the CCA to the CAAF. So I think when we're trying to keep the right balance here, it's always been government and accused. And now

we've got this new third entity. And now you start giving them more and more rights. And then how does that affect the overall balance and the fairness of the trial?

MS. SNYDER: Can you repeat the question?

(Laughter.)

BGEN SCHWENK: Should you give 6b rights at the trial level?

MS. SNYDER: Yeah, so in the Navy and the Marine Corps, anecdotally it's happening already like Colonel Jennings said. The military judges are litigating this. We had one case where a VLC filed a motion asking for the victim to sit in a prominent place in the courtroom.

And the military judge made a ruling on it. So it was litigated at the trial level. I think the follow-on question in the questions that were provided was, what impact will this have on delay?

I don't think it will impact it all because if the victims lose, I think they're

still going to file an appeal just like they already do in the Navy and the Marine Corps. So there might be reasons to do it. But I don't think avoiding delay is one of them.

MS. MARINOS: So in the Air Force, we have a significant amount of victims I would say compared potentially to other services. Over the last calendar year, we've had eight with only three of those being truly 6b issues in that they don't fall into one of the 513, 514 type buckets. But even in a case like H.V.Z. where at its core when you read it, you think, oh, this sounds like a 513 discussion because we are talking about treatment diagnoses.

Really it was about DID health records in light of the fact that this was deemed non-513 evidence. And the victim was not afforded the opportunity to -- it was deemed by the military judge that the victim have standing to be heard on that issue at trial. So potentially had this been heard, it would've also sped up the process on appeal because there would've been a full

briefing on the issue then at the trial level.

But this goes back to if we're going to mirror the CVRA, then we should mirror the CVRA. And if they're given the opportunity to litigate at trial, then certainly only one level of appellate review when they don't then get to also petition the CAAF. So again, we're mirroring what's being afforded to civilian victims.

MS. SNYDER: So I would just like to add that I don't we've had any 6b, paragraph A writs ever. If we did, it would come across my desk. And I don't recall one.

So all of our writs are typically 412, 513, that type of thing. And kind of related to this on the last panel, someone had mentioned that civilians get broader rights under the CVRA. I take issue with that.

They don't have the right to litigate issues like 412 and 513 on a writ of mandamus like we do. So I think our victims have broader rights. And I think you have to -- when you're

asking about the standards and the timelines, you have to look at them separately because the paragraph A rights under 6b are very black and white.

Either the victim was able to attend the sentencing hearing or she wasn't, right? Those are things that can be easily resolved in a matter of a few days. Whether something should be produced under 513 is a much bigger, more complicated question that requires briefing from the parties.

And that can't be resolved in a matter of days. Those are also rights that go way beyond what the civilians have. So I would just try to -- I just think it should be reframed in terms of the victims in our system are not at a disadvantage because it's a military system.

CHAIR SMITH: Ms. Goldberg?

MS. GOLDBERG: Thank you. Thanks to our panel. You just said many interesting things that I think will prompt follow-ups from all of us. But I actually want to go back to something,

Ms. Snyder, that you said which is that making this change would allow victims to slow down the process.

And I guess I'm wondering if you or others on the panel have a view that is a priority or important to victims. Is that something that you are seeing as sort of slowing down of the process for the sake of slowing it down on the party of victims? Because often what I've heard is that you can find the process takes a very long time and are more inclined to -- wish it would go faster rather than slower is how I've distilled a lot of comments we've heard over time.

And I guess related to -- maybe adjacent to that is the question, are you finding that the appeals that happen now, I know you said they're small numbers, are frivolous? Is that what -- I don't know if you were saying that or somebody was saying that, sort of raising a question about whether there was any -- whether there now might be appeals without good reasons.

And I was wondering if that is your position or a shared position of all of you on the panel. So I made the question to everybody, but I was following up specifically on something that you said, Ms. Snyder. Thank you.

MS. SNYDER: Yes, so I'm not privy to the motivations of why VLC file writs or appeals. So I wouldn't be able to answer that question. So I didn't intend to imply that they're frivolous but they are meritless.

And that is why the NMCCA denies them without issuing a show cause order. If they think they have merit, they will issue a show cause order. And then they will be briefing from all the parties, potentially oral argument. And there's a full litigation.

So it could be meritless because they haven't met the writ standard. It could be meritless, sometimes they misunderstand the rules. It could be meritless because -- well, I guess back to the first point, they haven't met the high standard that the military judge did a

thorough ruling based on what the court sees in the filing and the judges ruling.

They just don't meet the writ standard. So that means they are meritless and they are not permitted to continue with the appeal, with the writ. Does that answer your question?

MS. GOLDBERG: Yeah, I think it does. And maybe this is just something that I need to look at more on my end. And they're found to be meritless at the initial review stage and at the appellate stage. I mean, I guess what I was not there in terms of the stage at which the appeals were permitted or that's happening at the CCA stage in the initial determination.

MS. SNYDER: Yeah, so I'm talking about when a file or writ at CCA, the first thing that the court has to do is decide whether they're going to issue a show cause order. If the writ has merit, they will issue a show cause order and then they will decide the issue. The victim may lose or the victim may win. But it

has enough merit to get past that hurdle. If it doesn't have merit, then there's no show cause order that is issued.

MS. GOLDBERG: And it sounds like all of you agree that there's no reason to have a check on the determination of the CCA about whether an appeal is -- the writ is meritless?

MS. SNYDER: Correct. I agree with that.

MR. POTTER: Correct.

MS. MARINOS: Correct.

MS. GOLDBERG: And of course, just to add one more thought as the rest of you responded, I think that it'd be helpful to hear your response to what I think victim's counsel would say which is actually the appeals have merit and CCA is missing some of the merit. And so that is the importance of the opportunity for the appeal. So as you respond to that, it'd be helpful to hear your thoughts.

MS. MARINOS: Well, I suppose I would expect that appellate courts on the civilian side

miss things too. But that doesn't mean that those victims are getting another level of appellate review. People believe appellate courts get things wrong all the time. That doesn't mean they get something additional.

MR. COOK: So in our one case, the victim won. So it's hard for me to say it was meritless.

(Laughter.)

MS. LONG: I have one statement but then a question. Just because I heard it in the last panel too, just a little commentary on interlocutory and how the state gets this and not the defense. I mean, just as a reminder that we don't -- I'm coming from prosecution.

But we don't get to appeal a not guilty verdict. So I mean, I think that's why the interlocutory appeals are important to use to be able to manage. I think I'm hypervigilant.

But I heard a little bit of that here and maybe from one of my defense colleagues here. So I just want to make that point for the

prosecution. I have a question on your ability.

I know you said you're not seeing a lot of 6b. But if a litigation was ramped up, do you feel like you have the staff on the defense appellate level to then be able to do your jobs competently? Or would you be overwhelmed by the system?

MR. COOK: We're co-located with the Navy. So I'd be asking Rebecca for help.

MS. SNYDER: So we don't have enough staff now. When Congress gave the right to appeal to everyone, they did not give any money to fund additional appellate defense counsel. We had not been given any additional active duty appellate defense counsel.

I have been begging, borrowing, and stealing reservists. So reservists who are underutilized in their units work on a part-time basis for me. So they're part-time part-timers. I've collected 25 of them now, but they do one case at a time.

And so I don't, though -- even if what

you described comes true, I don't foresee that opening a flood of appeals. So I don't know that would impact staffing. But we already have staffing issues for other reasons.

MS. LONG: We have issues in terms of the --

MS. SNYDER: That's right.

MS. LONG: -- appellate. That needs to be -- okay.

MS. SNYDER: We have higher case loads than we've had in 15 years.

MS. MARINOS: I concur. The Air Force is seeing higher case loads in light of the changes and having every conviction write an appeal. For us with the fairly large number of victor merits, we've been handling them fairly well, even with this lower manning or the manning issue.

But I believe that what does need to happen and this might be getting to a latter question is the timing in which these should be turned and the speed at which these should be

reviewed should be increased. And if that does occur, it will certainly put probably a greater strain on the job because that means we're going to have to take our counsel and say, you need to turn this much faster than originally expected because everyone is going to -- and an abbreviated time line. But that would be an issue we take up as it comes.

We've had requests send for additional manning for a variety of reasons. And hopefully that will eventually come through. And we'll assist with this. But I don't think that should stop us from looking to create that abbreviated time line because I think speedy trial is critical.

MR. POTTER: We too are short staffed. We haven't had the wave yet that's coming because our post-trial processing is slower. That's the problem that the Army seems to have.

But the wave is probably coming. We're already short staffed. We rely on seven reservists to keep us above water right now. So

I imagine it would be quite a hard thing for us to do.

And each one of these cases takes a long time. And especially if the case is going to be argued, that's man hours are the entire office. So it would be quite a hurdle, I think.

MR. KRAMER: So I'm a little unclear. I take it if somebody loses at trial, almost everybody appeals that. Is every guilty plea appealed?

MS. MARINOS: They're appealable.

MR. SULLIVAN: But in fact I guess I'm asking.

MS. MARINOS: In fact? No, not every guilty plea is appealed. You'll see a significant number of people who pleaded guilty elect to withdraw from appellate review in order to speed up their process of getting their DD-214 and process out. Often it depends on if there is a valid issue in the case, we've been seeing some sentence appropriateness issues being raised, even when there are agreed to terms in a deal.

So I think we have been seeing potentially an increase in the number of cases that are seeking appeal which were guilty pleas in light of this new avenue to potentially say, yes, I know I signed off on a deal. However, the judge should've realized that this was too severe of a punishment in light of what I'm pleading guilty to. So it certainly happens. We do see guilty pleas appealed but not all of them by any means.

MR. COOK: I would say a handful, not a lot. I mean, those are usually covered pretty well. The province inquiry, that gets messed up and that's maybe an appellate issue.

We had one case where a guy was charged with murder initially. And then to get to a deal, they had him plea to a made up 134 neg home light. So we appealed that and won at the CCA.

I mean, it was preempted. So I can't think of a whole lot that we've appealed that were guilty pleas? But they come up.

MS. SNYDER: Yeah, so it depends on what the sentence is as to whether they get an automatic appeal. If they get more than two years confinement or a punitive discharge, then they will get an automatic appeal. And so there are three options.

They can probably withdraw. They can file what's called an merit submission which they're not raising any issues. But the court will then do its own review of the case. Or they can file substantive issues.

Maybe, I don't know, 20 percent of the cases raise sensitive issues. Sometimes it's just things like sensitive appropriateness, simple things like that. Clients have a right to raise issues known as United States v. Cross-fund Rights.

So sometimes people file briefs just with cross fund issues. They're basically frivolous issues, but the clients want to pursue them. So they're not uncommon, but it's not every case.

MR. POTTER: I don't know the percentage off the top of my head. But we have quite a few guilty pleas that actually get appealed. And we get relief in a number of those cases.

MR. KRAMER: And so if I can follow up on that one more. Is that because of deficiency in the guilty plea, the sentence, or a sufficiency of the evidence?

MR. POTTER: Deficiency in the guilty plea and the sentence and sometimes some other procedural things. But a lot of times the plea is not provident because the military judge has failed to address something along those lines. And that's probably a majority of our guilty plea. Cases get relief.

MR. COOK: One alibi on that. Post-trial delay, if we get a case where it's a guilty plea and then the government loses the record for a year or something. So we're going to file an appeal on that. So it happens.

MR. POTTER: And if could use an

alibi, we have a lot of that.

(Laughter.)

MS. MARINOS: We actually had a case just recently get relief at the CAAF which had to do with a guilty plea and an issue during providency because the judge actually advised on incorrect elements that the individual was pleading guilty to. So that's an example, a rare case but one that actually made its way -- all the way to the CAAF.

MR. KRAMER: Another follow-up I wanted to ask is I think two of you at least or maybe all said that you had a big increase in caseload. Why is that? Is that just because they're bringing more cases at the trial level? Or is it --

MS. SNYDER: So on December 23rd, 2023, Congress passed amendments to Article 66 that gives every person with a conviction the right to appeal their case. And in the Navy and Marine Corps -- well, so the right -- let me see if I can get this right. If you had not had

Article 65 review done yet, then you get this new appeal process.

Well, over the previous four years from 2016 -- no, 2019 when M.J., 16 went into effect. From January of 2019 until December 23, 2023, there were 409 cases that were supposed to have received Article 65 review. But the Navy told Congress did not receive Article 65 review.

So there is potentially a backlog of 409 cases. There are also some other cases sort of in the crunch that we received. We have not received that backlog yet. So we are already understaffed without even getting into those 409 cases.

MR. COOK: From a percentage standpoint, the Coast Guard saw a 50 percent increase. But since we have about 10 cases a year, so we added 5. So we're at 15.

We call them the nora cases. So everyone who gets convicted who gets a special or a general has the right -- well, we have to look at the case. And then they have to elect within

90 days of getting notice if they want to appeal or not. And I don't know what the other services -- we're running about 50 percent of those guys actually elect. So if more are elected, we'd have almost 20 cases.

MS. SNYDER: And you see a lot of errors in those cases because they're kind of unimportant compared to the larger cases. And so people get sloppy and you see a lot of errors in those cases.

MS. MARINOS: The Air Force, we're seeing a high percentage of the cases that fall into that category, the nora or direct appeal cases that don't qualify for automatic appeal. We're seeing a higher number of individuals elect an appeal simply because the Air Force had a lag in transcribing those trials at first. Some of the other services had started transcribing them sooner once the changes were put into effect.

Air Force delayed. And so we have a backlog and we're still waiting for records of trial. So in order to -- for a while to stop the

clock, we were -- clients were notifying the court. Yes, I do want to seek an appeal because how do I know if I don't yet when my attorney hasn't been able to review my record of trial and provide me any legal advice? So certainly, there's a burden on the counsel to review all of these records. But also we're just seeing an increase in the number that are, in fact, notifying the appellate court of, hey, we are going to be seeking an appeal.

MS. SNYDER: And if I could just add one more thing, there's currently a draft going around to reduce the right of these people to appeal basically. We would not be reviewing the record unless they specifically raise their hand. And I would say that is not good. I think that the current process where they get a review and get to speak to an attorney who's reviewed their record and give them an honest assessment of whether they should appeal is preferable to just saying, no, we're going to leave it up to you to raise your hand at some point down the road.

MR. POTTER: I don't know the percentage of the election appeals. But we're not seeing quite the bump yet of those appeals. I imagine we will in the future.

BGEN SCHWENK: I think the trial defense counsel are helping you guys out with all the acquittals that they're getting. There's always that as a bright side. How about standard of review? For those of you that were here, we talked to the appellate government people about standard of review. What do you think the appropriate standard of review should be for 6b cases?

MS. SNYDER: So I think the standard should be the same for everyone. That puts the victim on parity with the government and the defense. If the government or defense files a writ, they have to meet the higher standard of review.

If the standard of review is lower, there's going to be more writs and more delay. And so if victims are able to delay the trial

every time they want to second guess the military judge and they're able to do it on low standards of review that even the parties don't get, that's going to have secondary and tertiary effects. It's going to give, I think, too much leverage to the victims. And this is particularly true if the accused is confined or if the parties want to avoid delay. So I think if you make it easier for them to prevail on appeal than the other parties in the same type of forum, it's going to cause an imbalance that is going to have effects that I think are hard to predict.

MR. COOK: Yeah, I think you should -- again, based on my previous comments, I think you should keep an eye. I mean, again, the accused doesn't have that ability to appeal to the CCA. These are basically evidentiary rulings, and you're giving that to the victim, the third party arguably. And so why not keep it at a very high standard they have to overcome.

MR. POTTER: I concur, clear and indisputable right. It's something we're used to

dealing with and that should be the standard. It's been used by courts.

I understand the federal courts do that with victims now. But I haven't looked. I've looked but I haven't really found robust appellate litigation on that issue.

But it just doesn't seem to me that we've got the accused having this very high standard. And his or her life is going to be changed forever as well. So that person might go away for a long time. And then we have the victims having a different standard. I just think that strains the system. Just my personal opinion.

MS. MARINOS: Concur. And to this question, as we all know, is directly pending before the CAAF as one of the specified issues in H.V.Z.

BGEN SCHWENK: I'll just follow up with the question I asked the government panel because they had much the same reaction. And it's the issue of a civilian victim, a rapist --

a civilian rapist is military has one standard and one has the other. How do you explain that to the victim?

MS. MARINOS: Well, first I would point out that our servicemembers are afforded different rights that a civilian accused. So yes, the different systems afford different rights. And if different rights can be afforded on an accused, different rights can afforded to the victim in the military justice system.

And the district attorney or the United States attorney or the foreign government was not foreclosed from pursing that case. We often have cases that come to our system after being rejected essentially from a district attorney. They are choosing not to prosecute, and therefore they come to our system.

So the rights presumably could still be there. But the victim has elected to participate in our system for this particular prosecution. And the breadth of 6b is different between the civilian system and in the military

justice system as we've seen in practice.

We see more issues being brought under 6b in our system than under the CVRA, including 513, 514, where they have specific standing below and the ability to come under Article 6b to bring these appeals. So the comparison between the two, it's not a one-to-one. I see it as more apples to oranges. And in our system because there's this greater breadth in opportunity to bring issues, that higher standard is a fair one and one as we've discussed is afforded to all those seeking any sort of extraordinary writ or interlocutory appeal.

MR. COOK: In the military, the person who selects the charges is also selecting the panel. We don't have unanimous verdicts. And this is a quote from U.S. v. Anderson. The military is an inherently coercive environment. So I would say there's big differences between the military and the civilian community.

MS. SNYDER: So I would say that with regard to the paragraph A -- 6b, paragraph A,

right? These are the right to be present, right to be heard, all those very black and white rights. I don't think it matters which standard applies. I think the result is going to be the same.

So I don't think you can paint this with a broad brush. Our victims have rights to challenge 412 rulings, 513 rulings, 514 rulings. Civilian victims don't have those rights. That's a whole different kettle of fish than the black and white paragraph A rights.

So I think you need to treat them separately. For the paragraph A rights, I don't think it matters what the standard is. I think the result is going to be the same. It's a very simple issue.

And quite honestly, it's not a problem in the military. You're not going to see a lot of that. With regard to the substantive litigation, I think it needs to remain like it is for the reasons we've all discussed.

CHAIR SMITH: Okay. We're going to

move on to U.S. v. Mellette. What has been the overall impact of the CAAF's decision in Mellette on trial practice in sex offense cases?

MS. SNYDER: I think it's too early to tell. We haven't see anything on appeal from it. I think that's a question for trial defense counsel. I don't have any visibility on that.

MR. COOK: I agree. I haven't see much of that, if anything, on the 513 after Mellette.

MS. MARINOS: I agree as well. Looking to some of the questions we've been seeing from the CAAF during oral arguments and B.M. or in H.V.Z., we are being told indirectly from the bench that there has apparently been a misunderstanding of Mellette and that Mellette was not clear. But whether we are going to get clarity or what that means, I do not know because we have not seen it yet.

But recognizing the issue of co-mingled evidence and when you're trying to separate out non-513 or non-privileged from

privileged, I do recognize that challenge. And I think each service is sort of taking that up as it comes at the trial level. But again, it's a bit too early for us to see the implications of that because we need to see more cases work their way through appeal.

MR. POTTER: We haven't seen a lot of it either. But I think one of the things that our judges do is they do a lot of in camera review. And somebody has to look at the stuff to make sure it's -- if it falls in the bucket it's supposed to fall into.

And I think our judges are doing robust in camera review. A lot of cases get in camera review, I think. And that seems to solve the problem.

That's why it's not bubbling up to the appellate courts yet. I don't know if the other services have the same approach. And I'm not sure -- I'm probably speaking for military judges here.

I don't know if this is their policy

or not. But it seems to me that they are looking at this information and finding it either admissible or inadmissible. And we're not seeing the problems at the trial level.

We've had one appellate court case that involved Mellette and was actually an issue regarding viewing sealed records. It's still in litigation, so I'd rather not comment too much about it. But our experiences as a result of Mellette and this policy is there's probably oversealing of records by military judges at the trial level of stuff that isn't even victim information. So I think that's another thing to think about is what are the military judges doing with this information.

MS. LONG: Sort of along the lines of what I asked the last panel, do you have a standard that you would think would be helpful other than the Mellette decision standing? Do you think that there is clarity that you would welcome in a rewritten rule, whether it's going back to the way things were? Or if you don't

agree with that, some other way of articulating 513?

MS. SNYDER: Are you talking about, like, the scope of the privilege or the process --

MS. LONG: For the privilege --

MS. SNYDER: -- for reviewing --

MS. LONG: -- and a little bit of the process.

MR. COOK: Well, I think we prefer the current because it was splitting the services as to is it a broad interpretation of 513 or narrow. And now the Mellette case, it's narrow. So that's defense friendly. So I would not change that. I'll defer to you, Rebecca, on that.

CHAIR SMITH: Well, put on a different hat.

MR. COOK: That's my role here.

CHAIR SMITH: I understand. But try and just put on the lawyer looking at it, not defense, not prosecution from a balancing all the concerns in this.

MR. COOK: So from a jurisprudence that we now have a third party now represented, hundreds of years it was government and accused. And now you have the rights of the victim being protected and have attorneys. And now you have this third attorney in there.

I think we got to tread very lightly because the more you change these standards and you give additional rights to this other entity, when do you start to put the thumb on the scale of justice? And in my career and I spent four years on the appellate bench, we had one case where we had a dissent on factual legal sufficiency. Okay. The rest of the time, we're pretty sure the guy was guilty or was not guilty. Okay.

I just wonder if we start doing this, are we going to start convicting more innocent guys? And I know that's the whole goal of the system is better 100 guilty guys go free than one innocent guy. So I would say yes, as a guy that was an SJA, was a defense counsel, was a

prosecutor, was a judge, now on the defense side, I think my -- obviously, it's easy for me to say on defense, I'm going to be against it.

But I think, yes, some of this you've got to be very careful as to how quickly we want to go down the road on some of these issues. And to have higher standards and to limit the victim's ability, I don't think they're a bad thing. The government is still there. The government is still litigating these issues. So they're still having those issues being litigated.

CHAIR SMITH: So less from the victim's rights stance, more from the privileged information stance, in terms of balancing the interest in people seeking mental health treatment, it seems that we've heard from some other folks that there's now been this overbroad disclosure of information. So kind of figuring out where is that sweet spot where people's rights are -- defendants' rights are still being protected but also we're not just saying almost

there is no privilege.

MS. SNYDER: Yeah, so I think the privilege like you suggested are a balance between the public good, in this case, victim privacy, and using all rational means to search for the truth, right? In this case, the kind of truth that is particularly germane to -- this kind of truth, it's particularly germane to issues of memory and perception and memory impairment. And so the more truth you hide, the more trials become unreliable.

I don't see diagnosis and treatment as being a broad disclosure. That seems pretty narrow factual information to me. Diagnosis, yeah, I mean, it's usually one or two, maybe three words, right?

Treatment, it's probably medication. Maybe it's something else. But you're looking at a sentence or two. It's not volumes of information.

MS. MARINOS: And it's not that it would be automatically turned over as initial

discovery in every case. There's still the burden of relevance. There's still 701.

So it's not just, oh, there's a complaining witness. We automatically get this. You still have to show something. So typically, there's a demonstration of we know this person has sought mental health treatment close in time to when the incident occurred. And therefore, we're seeking just that particular information of treatment and diagnoses.

It doesn't become a free for all. It doesn't become a fishing expedition through their mental health records, understanding I think the issue lies not in that piece of 513 in Mellette but in the process. And again, going back to the issue of co-mingling and how are we pulling out the non-513 from the protected and privileged information and communications and coming up with a clearer system and approach for how to do that that could potentially be adopted by all the services as opposed to it being what seems to be a bit ad hoc and service by service at this

point.

MR. POTTER: Speaking as -- it was a long time ago. But as a former prosecutor, what I would fear as a prosecutor was having a trial within a trial. I mean, there are avenues we're trying to -- the defense is here, the prosecution here.

We're putting another party in this trial and it's similar to having too many expert opinions in a trial. It diverts the fact finder from the facts. And that's important for the accused. It's important for the government. And in fact, indeed, it's important for the victim that we get to the truth and we get a just verdict.

DR. MARKOWITZ: So I guess along those lines, I have a question because my experience as an expert at trial is that when the diagnoses is provided, is available, you do end up getting expert testimony then on that diagnosis. And I found that it's not just giving the diagnosis, of course. Then you get an expert opinion about

that that diagnosis means.

And that diagnosis is sort of woven into the proceedings. And so I guess you don't really -- you don't end up avoiding that whole issue of experts. You end up sometimes getting more expert testimony, right, related to the diagnosis and all of that.

MR. POTTER: Perhaps. But a lot of times when you provide the diagnosis and treatment, the issue just goes away. So we're seeing these issues percolate up where the defense, we see the information and used it. But I can't say this for sure, but I bet you a vast majority of the cases.

There's not really anything in there that's useful. So we don't have that trial within a trial in those situations. We don't have that need for an expert. The defense may still need to consult an expert on the side to determine whether there's an issue to pursue there. But other than that, that is probably avoiding more issues than it's creating.

DR. MARKOWITZ: Yeah, I guess my experience has been that in almost every single case it has been an issue. So I put it out there for what it's worth. Now my sample size is relatively small because I can only be in some many trials. But that's just been my own experience, working for both government and defense. But that has been my personal experience.

MR. POTTER: And my sample size is anecdotally.

MR. CASSARA: So Jennifer and I were talking about this offline a minute ago. And I'm offering a comment and then I may follow it up with a question. But I'm remembering a case I did hears ago in which the accused sailor, we had requested the mental health records.

And the night before trial, they were delivered. And in them were comments that the alleged victim had made to her therapist in which she admitted that the allegations were false. And she was seeking mental health treatment for

this problem she had of lying about men.

I have also seen fellow members of the defense bar bludgeon the government and the alleged victim with unnecessary and sometimes repetitive request for very personal records. I think it's really important for us to realize that this is a very delicate and difficult balancing test. Jennifer and I were talking about a case I had in which we found out that the alleged victim had an addiction to Ambien.

And what impact does that have on a mistake of fact defense? It could have a very large impact. It may have no impact like Jonathan said.

The expert may look at it and go, probably not relevant to what you all are discussing. I think as we cull this exception, whichever way we're going to recommend, for the new people and for the rest of us, this is what I've done. I do mostly appellate work.

It's a really difficult decision. Again, that's probably more in the line of a

comment than a question. But Jennifer is smarter than me.

CHAIR SMITH: And we also have Ms. Goldberg.

DR. MARKOWITZ: Can I just --

CHAIR SMITH: Yes.

DR. MARKOWITZ: Just a follow-up on that. And to be clear, one, not all of the cases where I was involved did we actually end up having the case with an expert at trial. They were just all in contention.

But the other thing that I do want to make sure that we as a committee consider is a point that Mr. Fowles made in the previous panel which is to say that in a lot of these cases the mental health records are not going to necessarily be from a psychotherapist, right? We're not going to have those. They're going to be in primary care records.

And I do think that we do have to keep that in mind as we're going forward. So the American Academy of Family Physicians in their

policy position paper, made it very clear that 40 percent of mental health visits in this country and 47 percent of mental health prescriptions are with family physicians. So we know that there are a huge number of patients who are being prescribed medications outside of what is necessarily covered here.

So I do want to make sure that when we're thinking about this issue, we're also considered this. So I just put that out there as something for us to discuss at some point. And with that, I will turn it over to Ms. Bashford.

CHAIR SMITH: Okay. So Ms. Goldberg I think has had her hand up for a while. We ignore her on the screen, and then Ms. Bashford.

MS. GOLDBERG: I won't take that personally, Judge. Thank you. I'm trying to think about where to come in. But I had a question from earlier that I just want to be sure I understand your perspective on this.

We have heard from others that really did change the practice of defense attorneys in

terms of the information they seek and what they are obtaining. And that has raised the sort of significant concerns that you've heard articulated. Do you agree that defense changed practice after Mellette?

MS. MARINOS: I think it depends on the service because prior to Mellette being decided, we had service courts essentially saying the same thing. So in accordance with the service court's authority and the authority over those trial courts, counsel were seeking those records. So I think the disparity comes in play when we're looking at the different services.

So I know I, as a prosecutor, was arguing as hard as I could that my judge should follow what the Coast Guard court had said and go the route of not turning over certain materials. But it was certainly a debate in the courtroom and one now that I guess has been resolved but not necessarily changing the practice. We just now have the authority behind the arguments that were already being made at the trial level if

that makes sense.

MS. GOLDBERG: It does. Thank you. I'd be interested in others as well.

MR. COOK: I would agree with what Megan said that the Coast Guard had a very narrow definition and then Mellette's is broad. So I'm sure they changed their practice and asked for a lot more stuff. But I haven't seen any of those on appeal yet, so I can't -- and I'm not familiar with anything that's going on at the trial level.

MS. SNYDER: I mean, all I can say is that I hope that they would be asking for that after the law now clarifies that they can ask for that. If not, we might have an ineffectiveness of counsel issue depending on the issues in the case.

MR. POTTER: And the Army is not seeing a lot of these cases yet. They may have changed their practice a little bit. I doubt it.

MS. GOLDBERG: So then I guess a follow-up question and then sort of another one. The follow-up would be, is it your view now that

Mellette -- the decision of Mellette cast doubt on prior convictions? Is that how you see the convictions that were obtained prior to Mellette?

MS. SNYDER: So I think generally the more information that is hidden that's relevant, especially on issues of memory and perception when that is usually what's at stake in these cases, the more unreliable the conviction. So I realize everyone is grappling with, okay, where do we draw that line? How do we make sure that we can maximize privacy and maximize reliable convictions?

But if this is -- if the privilege is expanded to include diagnosis and treatment, I don't know what information the defense can get unless it's constitutionally required. That would go to memory and perception for medical records. So I think there will be more unreliable convictions. There may have been some in the past because they didn't have access to relevant information.

MR. COOK: If I recall correctly, we

had one of the seminal cases for CAAF, so they didn't have jurisdiction to hear the appeal. And that one case ended up in a guilty plea. So I don't think we had any other cases that have come up under 513.

MS. BASHFORD: In the one minute we have left, have you seen cases where you've reviewed the record on trial, all the procedures were properly followed, but you think the trier of the fact simply got it wrong? Do you think under current standards of review they simply got it wrong can be handled by the appellate process?

MS. SNYDER: Not in the Navy and Marine Corps. United States v. Harvey, the NMCCA killed factual sufficiency. So the CAAF right now, we argued the case. We're waiting for a decision. We'll see what they say. But right now, factual sufficiency review is dead in the Navy and Marine Corps.

MR. KRAMER: Dead because of the new standard of review? Or it's not allowed?

MS. SNYDER: Dead because of the

Navy's interpretation -- the court's interpretation of the new standard of review.

MR. POTTER: The Army court has taken a different interpretation. And it's upon the appellant to raise sufficient evidence to call into question essentially and then factual sufficiencies before the court. So we don't have the presumption that the Navy court adopted. So I think we have more robust appellate review. But I still would love to go back to the days of old time appellate review.

MS. MARINOS: The Air Force recently chimed in on this in a case called City. And they are more in line with the interpretation it's got from the Army. They did not adopt the rebuttable presumption from the Navy. But still obviously we're all waiting on Harvey because we don't know what the CAAF is going to say with regard to its interpretation.

But if they have chipped away at factual sufficiency to the point where it is now effectively nothing, we need to go back and look

at unanimous verdicts because everyone would point to factual sufficiency as that safeguard we had. And that's why it's okay that we didn't have unanimous verdicts because don't worry. The appellate court can basically be another fact finder and swoop in and fix the conviction. But if we've taken that away, then unanimous verdicts absolutely have to become a part of our system.

MR. COOK: We haven't -- the Coast Guard hasn't adopted the Navy rule. So I think we're like the Army. So I think we can still find something factually insufficient.

CHAIR SMITH: All right. I think that was the last question. Thank you very much for your time and your information.

(Applause.)

(Simultaneous speaking.)

MS. PETERS: Chair Smith, we'll just take a two-minute break in place, Chair Smith, for the panelists to switch out to the next one. Okay.

(Whereupon, the above-entitled matter

went off the record at 3:48 p.m. and resumed at 3:55 p.m.)

MS. SAUNDERS: All right, for our last session today we have actually two folks, Mr. Ryan Guilds, and our very own Meg Garvin will be speaking. So, for the first half we're going to hear from Mr. Guilds, and he is going to speak for about ten minutes or so, and then answer your questions on the topics of psychotherapist patient privilege, and Article 6B rights.

Mr. Guilds is a victim rights attorney who is an expert in these areas, and he has advocated for, and represented sexual assault survivors in both civilian and military proceedings. He's spoken to this committee previously advocating for providing court-martial case materials to victims, and victim's counsel, and has informed this committee in their review of victim impact statements.

So, today Mr. Guilds is speaking on behalf of both Protect our Defenders, and Survivors United. So, we'll start with Mr.

Guilds, if you want to give your statement, or read your statement, and then you can ask questions of him. And then when we're finished with that, we'll transition over to speak with Meg Garvin.

MR. GUILDS: Great, thank you, Terri, it's good to see everyone again. It's once again my privilege to appear before you, and provide my perspective -- is that loud? It seems very loud. Okay, we'll try this, quietly. It's my privilege to be here, is what I wanted to say to start. It's been ten years since I first provided testimony to this committee's predecessor.

I was coming off a well documented trial in which I represented a midshipman who was allegedly assaulted by four of her fellow classmates. As the pretrial proceedings played out in the national media, many were appalled by the victim's treatment, and alarmed by the insular nature of the military justice system as a whole.

Calls for change grew, as did my

optimism that the military justice reforms would lead to a new justice system, a system that empowers victims, while ensuring and protecting the rights of the accused. Since that time, the military has undergone foundational and transformative changes in how it investigates and prosecutes sexual assault.

Dozens of important and meaningful reforms have taken place, many informed by the work of this committee. And yet I am sorry to say the collective experience of victims in the military justice system remains one of revictimization, disrespect, neglect, and more recently, outright hostility.

I appear routinely in courts-martials across this country, across every branch, and I am convinced that the victim experience is at a near all time low. There appears to be a belief that victim focused reforms have gone too far, that somehow there was a rash of innocent military men convicted of sexual assault.

That the system is tilted unjustly in

favor of victims, and that the accused's substantial rights are ignored. That victims are not victims at all, but complaining witnesses. I'm here to say respectfully that these are false narratives. It is victims whose rights are under threat.

It is victims who are suffering. So too under threat is the promise of military reforms designed to protect victims, increase reporting, and empower the women and men who serve our nation. Take first the question of MRE 513 and the psychotherapy privilege. When I testified ten years ago on this very issue, psychotherapy records were routinely reviewed in camera by military judges.

Reforms recommended by this committee, well, the predecessor to this committee, changed that, and victims had a measure of peace. Then Mellette, and now, once again, victims' dignity and privacy are threatened, and threatened in a real way. In courts-martials across the country, victims' private medical information is routinely

sought.

Indeed, if I was the defense counsel in the case, I would seek it, I think they should be seeking it, that's their obligation. But it's also being routinely turned over. Judges are again rummaging through victims' records, and victims are under continual threat of having to reveal confidential, private information, or risk not going to trial.

And why, why is this happening? Is it because there's some ill defined, vague, constitutional right to discovery that I'm just unaware of? Is it because of the unfounded beliefs that accused are routinely denied constitutional rights and a fair defense in the military justice system?

Perhaps it's because somehow sexual assault victims should be treated differently than any other type of crime victim, and have their medical privacy routinely invaded. That victims should expect and accept to have their privacy eroded as a cost of participating in the

system.

I'm sorry to report in my experience, military judges routinely view victims' rights as a nuisance, as something to overcome instead of enforce. And trial counsel, and of course there are good trial counsel, there are good judges, I get it that it's not every single experience, but I'm on the front lines, I'm the one representing survivors in these cases, and I don't have to report to anyone in a uniform.

And I'm here to tell you that trial counsel are collectively failing to adequately inform victims, or respect victim's counsel as part of the process. These trends make it even more important for victims to have a meaningful opportunity to be heard, both at the trial level, and at CAAF.

Take my recent experience with a courts-martial out west. When I first entered my appearance, I asked the court to include me on communications with the parties, and receive non-privileged filings. You probably recall I've

asked for this a number of times. The court denied my request, telling me it had no power to do so.

And informing me that my only remedy was to seek information from the Office of Special Trial Counsel. And when that same court moved the trial date without consulting victims, the court denied the right of the victims to be heard, despite an express right under 6B to proceedings free from unreasonable delay.

And left all communications about the victims' rights in the hands of an over worked trial counsel office. These experiences are not unique. Too often, trial judges do not want to hear from victims, or at least do not believe Article 6B affords victims the right to be heard on issues outside of 412, 513, and sentencing.

And yet trial counsel is not an adequate substitute for court enforcement. Particularly where the new Office of Special Trial Counsel does not appear to have the bandwidth to adequately prepare for trial, much

less inform victims, and protect their rights. Making matters worse, under the current system, victims are not afforded meaningful appellate review.

Instead they face a process that applies an unnecessarily high standard of relief, and that does not ensure a quick outcome. As a result, victims routinely forego enforcement of their rights, because the alternative is a delayed or abated trial. CAAF's refusal to hear victims' petitions for a writ of mandamus is an unfortunate example of the military courts abandoning victims' rights.

This is particularly true, because meaningful and timely appellate review by CAAF is a critical step to ensuring the rights of victims are not ignored. Appellate reform that elevates victims' rights is therefore essential. Victims should have the opportunity to seek relief with CAAF, to have the issues decided in a timely way, and under a normal standard of appellate review.

Rather than the clear and indisputable

error standard currently employed. Until then, victims will suffer, victims will be ignored, and victims will remain vulnerable to a system that does not adequately protect them. I sincerely wish my assessment was rosier. I don't enjoy screaming at the wind, and saying that everything is terrible just for the sake of saying it.

But I've been doing this a long time, and I wish I had the optimism of a decade ago. I wish I could spend more time advocating for victims in front of courts that while they may not agree with me, at least are willing to listen. And I know in talking with other across the victims' rights community, that I am not alone in these goals.

I thank you again for your time today for the opportunity to speak, and for the hard work so many in this room have given over the years to address these important issues. And with that, I look forward to answering any of your questions.

JUDGE WALTON: So, are you saying that

post Mellette, that military judges are now requiring that information about victims be more readily available?

MR. GUILDS: I think, yes, they absolutely are, because there's not a privilege, right? So, certainly more information is being disclosed. Now, from a --

JUDGE WALTON: So, the judges are not still making an assessment of whether there's a good faith basis for believing that the information exists, and once that determination is made, then making a determination as to whether the information is relevant?

MR. GUILDS: So, they're making a 701, I mean in my experience, and as with, I think we've said multiple times, my experience is anecdotal, so I can only talk about the cases I have, but I have several cases currently right now are in the Army. So, with that caveat I'll say the following.

My experiences it's going to get decided earlier. Because if I go in, and I'm

representing a victim, and I already know that I'm going to have to turn over information, I'm going to negotiate that in advance, and it's not going to be a litigated issue. It doesn't mean there's not an issue, it means I know how to read a case, and I know how to follow that case, and I know what the judge is going to rule.

So, I'm not going to object, I'm going to try to find alternative, less intrusive ways to provide the information. For example, perhaps an affidavit as opposed to just going through years worth of somebody's medical history, and medical records, that type of thing. So, I'm going to try to address it without the judge having to give an order, because I know the judge is likely going to turn it over.

If the defense can come up with any semblance of interest in the issue, or goals, or objectives that they think would be helpful, the standard is relevance. Judges are not going to want to be overturned on appeal for denying that right, or that opportunity for discovery. So,

Judge, to answer your question directly, yes.

But also, and most of it is getting decided before hand. But to the panelists who have spoken before, that doesn't mean it's not an issue, right? I mean, I'm still having to tell my clients you don't have privacy with respect to diagnosis and treatment, and that's a real thing. I mean, I was thinking about it earlier today as if it's not a big deal.

I do not feel comfortable in this room sharing my medical history with other people. And there is a lot of people who are in that position. And just because you are a crime victim doesn't mean you should have to turn it over. And just because you're a sexual assault victim, as opposed to a robbery victim, doesn't mean that there should be some sense of entitlement to that information.

Memory is an issue for witnesses all the time. I am not sure why we treat victims of sexual assault different from victims of other violent crimes for example.

MS. LONG: And you sort of answered this, you had said something like this in your opening statements, I'm wondering if you could talk about your anecdotal experience. Are these being sought in sexual violence cases, these records, disparate I guess to other crime victims?

MR. GUILDS: Yes, I mean, okay, in fairness the two types of victims that I typically represent are homicide victims, and sexual assault victims. And of course homicide victims, it's the family or the significant other, there's that representation. So, it doesn't come up candidly as often.

But I, anecdotally, am not aware that we're just routinely turning over people's medical records when they're, say, a robbery victim. I think there is an assumption that somehow, I don't know what the justification is so I shouldn't speculate actually.

MR. CASSARA: Ryan, we've talked before.

MR. GUILDS: Yes.

MR. CASSARA: I'm a defense hack, I freely admit it, that's my background. I don't know if you were here earlier when I talked about the Navy case that I had, where the evening before trial we got the alleged victim's mental health records, and she admitted to her therapist that she had fabricated it. How do we avoid that?

MR. GUILDS: I don't think you, can right? I get paid to be a defense attorney, so that's how I pay the bills. So, I fully appreciate the defense bar's desire to make sure that there are no defendants who are unjustly convicted. I agree, I have walked innocent men off of death row.

I understand the importance of having a robust system that provides those protections, but no system is going to be perfect. So, the idea that we are just going to start piercing these privileges, and limiting this information on the off chance that there might be something

of value, I think does damage to the system as a whole.

Now, there are certainly, I will say this, when I represent a survivor, there will be situations where I will freely recognize that if we don't turn the information over, there is going to be a constitutional issue, and the court is going to turn it over, right? So, I recognize that there are some situations where that comes up, and some measure of production is necessary.

So, as with most things, it's not an absolute rule. What I focus on when I think of those situations is really concrete evidence of an inability to perceive on the day of the alleged offense.

MR. CASSARA: And then I'd like to follow up on Dr. Markowitz' question about probably 50 percent, close to 50 percent of all mental health diagnoses are not by psychotherapists, or psychiatrists, they're by primary care physicians. Under the, I forget the acronym, but the federal standard, is there a

line of demarcation between mental health providers and primary care providers?

In other words, how do we find out whether an alleged victim is taking Ambien, which may or may not impact their ability to proceed, and how do we as a committee look at drawing, covering both, for lack of a better term, psychotherapist consultations, and primary care doc consultations?

MR. GUILDS: Yeah, I mean the civilian system is different of course, right? Because the privilege that exists in the civilian world doesn't exist when you join the military, so I'm saying things I know that you know. And then the system of where the records are housed, and whether or not those constitute government records, it's just an entirely different system.

So, in my experience, on the civilian side, they're not routinely turned over. I mean, as a defense counsel, I constantly would want that information, right? I mean, I would want as much information as possible. And so, there is

no remedy here to say to the defense bar be nicer, because that's not the defense's job, right?

Like if I had been assigned to be in the previous panel, I would have said much of the same things that those defense attorneys said, because ultimately at the end of the day, they want as much information as possible, they don't know what they don't know. But the possibility, the remote possibility of obtaining information that might be helpful doesn't mean that we should ignore the significant impact it's having on victims.

And on the reporting structure, and on the justice system as a whole, because it is having a significant impact. My conversations with victims when I first start a representation, or when someone who works for me starts a representation is not the same as it was two years ago.

Two years ago I could say I can't guarantee it, but your therapy records are going

to be protected, and it is very unlikely that they are going to be turned over. I cannot say that anymore, because once we're in this free for all of going through the records, and the process about how we're actually pulling this information, we see the situations where judges start to identify what they perceive as Brady, and now we're in a whole new world, and that's a real problem.

I will say this question has come up, and the answer that I have seen in terms of how they're actually going through the records is all over the place, and even within individual branches. So, some of my cases, I have seen there's teams that are appointed to review the records in advance, clearing teams that are not associated with trial counsel, so they don't get conflicted out if they see something.

So, some of them have those. Some of them are going to send me the records, and I'm going to review the records. And then in some situations we're trying to -- some within the

victim's legal community, victim's counsel community, are trying to find alternative ways to get the information without having to go through the records. For example through an affidavit, or some short testimony during a hearing.

MR. KRAMER: If the judge goes through the records and discovers there's Brady material, as if that's a bad thing, that's a constitutional right of the defendant, it should be turned over immediately, right?

MR. GUILDS: I'm not suggesting that a judge shouldn't -- a judge should not be going through records, is what I would like to start the conversation by saying. I do not believe that judges are either equipped to do it, nor do I think that they are best positioned to do it, nor am I comfortable with the potential trier of fact going through my client's medical history.

And potentially using information in there in a way that's going to impact their ability to be impartial if they ultimately become the trier of fact. So, I don't believe that

judges should review it. In terms of Brady, if you had something that was in the materials that was Brady, I'm tracking you in terms of the right of the defense to receive that information.

I don't think that they should stick their head in the ground, I don't think that they should be on the field at all.

MR. KRAMER: Well, who makes the decision that something is Brady and turns it over?

MR. GUILDS: Well, that's the thing, it should be the government, the big G government, trial counsel when they have their obligations. But what it doesn't mean is that we're just going to go out and just start reviewing stuff for fun, or on the off chance that there might be something out there, because we are concerned that there's some amorphous piece of information that might be relevant.

That's not how our justice system works on the civilian side, and it's not how our justice system should work on the military side

either. That said, I get the concern about Brady, I definitely understand that if there is some material piece of information that that should be turned over, I understand that.

I just don't believe that -- whether Mellette as a technical jurisprudence matter was correctly decided or not, I have my views on it, it doesn't matter, we follow the court system. But it is wrong to invade victim's private information on fishing expedition, and that's what's happening.

MR. KRAMER: I don't understand how is it -- who decides that something is Brady, the victim, or the victim's counsel?

MR. GUILDS: No, no.

MR. KRAMER: Well, how would the government know whether something is Brady or not if they don't look at the records?

MR. GUILDS: They shouldn't be looking at the records.

MR. KRAMER: Well, then you're saying it's just a blind eye to the situation.

MR. GUILDS: Right, it's a privilege, it should be privileged. It's just like we don't have a system where we say the attorney client privilege, if we could just learn from defense counsel what their clients say, we could get a whole lot more guilty people off the street, that's not what a privilege means.

And so, in the context of the therapy privilege, it's the same thing. It should be the same thing, it should be a privilege, the piercing of which only happens in extreme circumstances. As a result of Mellette, and the diagnosis and treatment information, if you're permitted to rummage through years worth of medical records to try to obtain information, you're both invading the privacy, and then putting the court, if the court's reviewing it, in a difficult position, Mr. Kramer.

Of actually deciding what's Brady, which is not their job. To the point that was made in the first panel earlier today, they're not equipped to make that decision, they don't

know all the evidence.

MR. KRAMER: I don't understand, courts make that decision in the civilian world all the time, they review in camera records and materials, and decide if something is Brady, that's done all the time.

MR. GUILDS: I disagree with you that it's done all the time. I understand that it is done, but it is also done within a briefing schedule. Not some like general here are some materials, you don't know anything about the case, judge, right? I mean, you know maybe a little bit about the case because there's been some motion practice, but you don't have prosecutor's file.

And you're not the one who is obligated to provide them. I mean, I understand courts issue rulings on Brady all the time, of course, as they should. But they're not the ones who should be reviewing these materials to make that decision. Nor are they really equipped to make medical decisions.

The judges that -- judges don't really like me, but the judges that I've heard speak on this issue, many of them have expressed that they don't feel qualified. I've heard them say this to this committee in the past, that they don't feel qualified to make those decisions because they're not doctors, and they're not equipped to make those determinations around the scope and nature of what should be turned over, and what should not be turned over.

So, from my perspective, the privilege -- the Mellette decision should be overturned because the language should be modified under 513, and we should go back to the world that we had three or four years ago, where there were more than enough sufficient protections of defendants to ensure a fair trial. It doesn't mean that every trial is perfect, but that is also not our standard.

MR. KRAMER: So, one last, and then I'll drop it. You're saying that nobody should ever review the records, that privilege is

absolute?

MR. GUILDS: I didn't say it was absolute, I mean it wasn't --

MR. KRAMER: But you just said the government shouldn't review the records, the judge shouldn't review the records, and I take it the defense shouldn't review the records, there's nobody left, right?

MR. GUILDS: What I would say is we should apply the 513 standard that exists, just as it exists for therapy, right? So, this isn't a fundamentally different conversation than we've had multiple times. If you have a privilege, there are exceptions, there are exceptions to the attorney client privilege, right?

I went to law school 100 years ago, but last time I heard, every absolute rule has exceptions, there are exceptions built within 513 for the defense, they are of course much higher than the 701 standard. And what I am suggesting is that we have not had, when we applied the 513 standard, and it included diagnosis and

treatment.

I have seen no evidence to suggest that anyone, or that the statistics resulted in more people facing charges, more accused being unjustly convicted, or anything else that would suggest what I'm perceiving out in the community is this belief that victims are getting one over on defense counsel.

And just my personal experience sitting in trial, that is not what I see. I see very experienced defense counsel, I would like defense counsel to have more resources, but that's a separate issue, and I don't cut the checks. But other than that, everything that I've seen in the military justice system pales in comparison to the 25 years of indigent criminal representation that I have done on a pro bono basis in the inner cities of America.

If we are looking for places where people are being wrongfully convicted, those are the places I would look, and not to the military justice system. Because I do not perceive there

to be anything other than highly qualified, highly motivated, reasonably well financed defense counsel, and a judiciary that is doing everything possible to ensure that they are not overturned on appeal because of a decision that does not favor the accused.

JUDGE WALTON: Well, Brady placed as the obligation of providing exculpatory information on the prosecution, where I think that burden should rest. And I think prosecutors should make a good faith effort to assess whether there is exculpatory information, and make that available to the defense, so the process is fair.

And in my 42 or 43 years as a judge, there have only been a handful of situations where I have had to make an assessment as to whether Brady information should be turned over, and that was the result of the prosecution being ambivalent as to whether it should be produced, and then coming to me and asking me to make the call.

But I agree with you that by and large

I'm not competent to make a determination as to whether information is Brady because I don't know the case, and I'm not an expert in many areas that relate to scientific evidence or mental health issues. But what I wanted to ask is I think it's disturbing, the high number of acquittals in sexual assault cases that take place in the military that ultimately go to court-martial.

And that's, I think problematic from the defense, or accused perspective because maybe people are being charged who should not be charged, and once you get charged, that's going to probably linger with you for the rest of your career. And I think it's also problematic from the victim's perspective, are they not getting a fair shake?

And therefore they're not being treated fairly within the military justice system. But what -- do you have a perspective as to why you think there's such a high acquittal rate in sexual assault cases in the military?

MR. GUILDS: I do, I think it's multiple things. I don't know what's going to happen under the new system, the system we're currently in in terms of what the decision making is going to be from Office of Special Trial Counsel in terms of what their standard for prosecution is, but I have said it before, I will say it again.

Cases went to court-martial under the old system that would not have gone to court-martial in the civilian system, that is my belief. That doesn't mean I don't think they should have, I think that the standard is often too high, and for example, in the District of Columbia, that's my personal opinion.

That said, what I see in the military justice system is several things that are contributing to that. Number one, and I am just going to -- this is maybe for a separate time, I do not believe that trial counsel is adequately prepared for trial. I have mad respect for a number of prosecutors across the military

branches.

But they do not reflect what I would perceive to be the level of background experience, and time on the case to be successful. Even the ones who are the most experienced, and again, the last year for whatever reason has been mostly Army cases, they'll roll in an experienced prosecutor, but she's on the case for like a week.

And she's not able to really focus attention. So, there are some issues, and I've heard others talk about this with this committee in the past, for prosecutors to really be good at their job, they've got to do it for six or seven years. And speaking in this room, there's several current and former prosecutors in this room, so I would defer to their judgment if that number is different.

But from my experience they have to be experienced, and they're not, that's number one. Number two, and this is real, it is a rare circumstance that I have a judge who is victim

friendly. And I started to take it like maybe I'm just not a very good lawyer, just all of the judges hate me, and that's a part of the problem.

But I have asked around, and it is not just me. When I say they're not victim friendly, I don't mean on like Article 6B rights issue, I mean just everything is to the benefit of defense, everything is to the benefit of defense. I had a court-martial at Fort Drum six months ago, and in that court-martial the military judge ordered the prosecutor to call the defendant, the accused sir during her cross examination.

Whereas two hours before, my client was excoriated by the defense counsel without a ma'am in sight. That type of action, that type of behavior is symptomatic of a larger issue that I see in the judiciary, which is a constant, I think it's part of this belief I described before, that we have given victims too many rights.

That they are a third party, that for hundreds of years there has been a two party

system, and victims have not had a voice, that's what I'm seeing happen in the courtrooms across the country, and in military courtrooms across the country. And it's not a reflection of guilt or innocence necessarily.

From my view it's an over course correction that is favoring defendants. I can go on as to other examples, but to me, I understand the concern about the high rates of acquittals, but I also think that this is literally, I don't know when we're going to hear this, but it's my understanding that this committee has itself found systemic gender discrimination in the jury selection process.

All of these things combined are to me, what can help to explain the high acquittal rate, which I agree is high. Yes, thank you. Yes, thank you, sir.

MS. SAUNDERS: All right, Ms. Garvin is up next. Okay, so we do have Meg Garvin up next, she is going to provide you information on the Crime Victims Rights Act. Of course we all

know Ms. Garvin as one of our esteemed committee members, but she is speaking to you today as a nationally recognized victim rights expert, and the executive director of the National Crime Victims Law Institute.

So, she is going to discuss several victims of the Crime Victims Rights Act which relate to the committee's study of Article 6B enforcement rights, and then will be available to answer your questions. Ms. Garvin, were you able to log on okay?

MS. GARVIN: I'm hoping so, can everyone hear me? Can folks hear me?

MS. SAUNDERS: I can hear you.

MS. GARVIN: Okay, great, wonderful. I apologize for the video, a lot of my technology has failed today, but hopefully you can at least see me a little bit on my phone here. So, good afternoon to most of you, good morning to anyone who might be in my time zone right now. Again, my name is Meg Garvin, I use she her pronouns just so everyone has those.

And I am speaking right now in my role as executive director of the National Crime Victim Law Institute, and a law professor at Lewis and Clark Law School, so that's the hat I am wearing right now. My brief background, so everyone has it, in those two roles, the executive director of the NCVLI, and as a law professor, I focus on victims in criminal procedure predominantly on the civilian side.

I work in state and federal courts across the country, not always appearing myself, sometimes co-counseling, but more often than not, supporting lawyers who are on the ground in those states and federal jurisdictions, and then appearing as amicus curiae in briefs that implicate victims' rights from a national perspective.

I have been at NCVLI since 2003, which for those of you that track dates, know that predates the Federal Crime Victims' Rights Act. I was privileged to get to work on the Crime Victims' Rights Act throughout 2004, which just

again, to mark the moment, we have just passed the 20th anniversary of the passage out of the Senate.

It did not pass through the house until October, so we're in the 20th anniversary of the CVRA, and what I'll note, and why that's relevant to this conversation is the law is still murky under the CVRA. It is an emerging area of law, and that matters when we get to standard of review.

And it matters to the conversation of why the standard of review evolved under the CVRA, and why I think that conversation is ripe for the military as well. So, my job here today is to just talk a little bit, and then I'll open to questions about what it looks like to practice, represent victims in the civilian criminal justice system under the Federal Crime Victims' Rights Act.

I will not use state examples, although I do want to note that the same practice happens in approximately 35 states, where there

is clarity of victims' rights, and standing is either explicit or implicit at the trial in appellate court levels. The reason that I believe there is not as much robust case law and discussion on the civilian side as there happens to be on the military side is because there has not been an order to stand up a victim counsel program on the civilian side.

So, victims are left to find the handful of non-profits that will do this work pro bono, or at no cost, or law firms that will do it pro bono. So, at the trial court level, what happens when you're representing a crime victim, because there has been discussion today about can you assert your rights in the military side at the trial court level.

And at the civilian side, that's pretty common practice. You assert your rights not just in response to a violation, but proactively. So, the first step on the civilian side generally speaking is to file a notice of appearance. You are not filing a notice of

appearance to make yourself a party to the underlying criminal proceeding.

You are filing a notice of appearance to put all parties on notice that the victim is a represented person. So that, for instance, communications need to go through you. So that filings get noticed to you when they are relevant to your representation. Back in 2010 this practice was recognized as best practice on the civilian side in a district court case out of Arizona.

That just simply said yeah, notices of appearance is a reasonable procedure in order to ensure you receive filings, and to put everyone on notice. So, that's the practice, and since even pre-2010, but that was the first federal court that recognized notices of appearance as good practice, and in fact best practice.

So, you file your notice of appearance, now everyone knows you represent someone, and you start to be notified of filings. I can go down what are the hiccups with that at a

different time, if anyone wants to know, but there are more technological hiccups than anything else.

You then, when you want to assert a right, if it is pre-violation, you simply do an oral motion or a written motion asserting rights. So, if I anticipate that there could be a scheduling order that impacts my victim, I would file a motion, probably under the right to be present, and to dignify treatment under the CVRA that says we ask the court not to schedule anything during this two week period, which happens to coincide with my client's finals period, something like that.

If it's the right to be present, and I think that they're going to put my client on a sequestration attempt, I would file a motion in advance. If I fact the rights violation has already happened, I file a motion, it can be oral, or it can be written. In those moments the only difference in the way I do things is what is my relief request?

Am I asking the court to undo a violation, or am I asking the court to prevent a violation of my rights? It's relatively standard motion practice, and the majority of a victim lawyer's job on the civilian side is to do motion practice well pretrial. There's very little practice by civilian victims' rights lawyers during trial.

There could be a rape shield issue that comes up, there could be a last minute sequestration that comes up, but because the evidentiary burden lies with government, my job is to make sure their rights are protected in procedural moments leading up to and after court -- after trial, excuse me.

If my right is violated I can take a writ of mandamus up, as has been discussed here quite a bit on the CVRA side, that is under ordinary standard of review. I'm going to come back to that in just a minute, I just realized I didn't flag something that I wanted to, which is my motion practice on the civilian side is not

limited to 18 U.S.C. 3771.

Victims have standing in Article 3 courts, any time there is an injury, causation, and redressability, right? Sorry to give a flashback to law school 101, but right, we all learned that in first year law school, and in fact it holds true for victims' rights. So, back in 1981 a federal court, Doe versus U.S. out of the Fourth Circuit, recognized that victims have independent standing in rape shield moments in a federal court, including appellate.

Because it is their right that is at issue, and no one else can clearly defend that right of privacy. So, this notion that it is wholly new that victims have standing is a misrepresentation, unintentional, I recognize, because we aren't taught these things in law school.

But in fact historically victims have had standing on myriad of issues, very much akin to the media, right? They don't become a party to the case, they just have standing around their

right, they enter the space in order to protect that right, and then they're gone, they're behind the bar again.

So, it's just advance of when are they in front of the bar, and when are they behind the bar, and that is not limited to 3771, it's just that when we crafted the Federal Crime Victims' Rights Act we made it explicit because we had observed courts not getting it when it's not explicit.

So, that's been the evolution of victim law, is if you make it explicit, more courts understand it, even though standing has been a well understood test when it comes to almost anyone else. So, that's what I do at the trial court level. I then, if something is -- my right was violated, I would take a writ of mandamus up.

The standard of review under the writ of mandamus, if you look at the legislative history from 2004, the original CVRA, I believe Senators Kyl and Feinstein, who were the primary

authors, and sponsors of that intended ordinary standard of review from the beginning. And in fact I believe Senator Kyle filed an amicus way back when indicating that.

But they chose a term of art that had a history, and so that history of extraordinary moments, right, that you only get rid of mandamus on clear and indisputable right, the courts ended up split, just so folks know the history. Under the CVRA there was a split of appellate courts leading up to the 2015 change that led to putting in explicitly that you're going to get a clear standard of -- you're going to get the general standard of appeal right.

So, there was an intention from the beginning, I believe, to have it be the general appellate standard, but because a term of art was chosen, the legacy of that term of art prevailed over the legislative history, which you can look up, and so it had to be changed.

The discussion of why it was changed, and why even in the briefing in the split courts

across the country indicated why it should be the standard appellate review, as opposed to the clear and indisputable rights, and extraordinary when in leave is because when you have an emerging area of law you are not going to have a clear and indisputable error, because there's no case law yet.

Now, as a panel earlier said there could be a moment when it is clear and indisputable, and you might get the writ of mandamus, but those are going to be incredibly rare. And yet the intent of the Federal Crime Victims' Rights Act as it was passed, and as it was recognized in the first appellate court case, Kenna versus District Court, was intended to ensure that victims were independent participants.

And so, that's a novel idea, footnote, only novel since the early 1900s, in fact pre-1920, victims were in the well of the court routinely. So, in 2015 Congress changed it. Why didn't Congress change it with regard to the

NDAA? I don't have inside baseball knowledge on that.

What I will say is that in this country there are civilian victims' rights lawyers who advocate around civilian laws, and then there are military victims' rights advocates who advocate around the military. And they do not often, or as often as I believe they should, come together.

There is rare examples, like Mr. Guilds, who is in front of you right now, who straddles both worlds, and can join that conversation. But generally speaking, the NDAA, and victims' rights in the military has trailed the CVRA. The federal, Congress will pass something, and then it moves forward, and then all of a sudden there's a discussion of gosh, we forgot to give military victims these rights.

And then it gets passed in the next NDAA. So, I believe that's what's happened, but again, I have no inside baseball knowledge on that. When we file the writ of mandamus there is

the 72 hour requirement in the CVRA, but again, that was also amended along the way to allow litigants to move the court to suspend the 72 hours, and routinely that is being done, usually by stipulation of the parties.

If the lifting the 72 hour time period is in the interest of justice, it will get lifted. Generally speaking, the 72 hours rule was put in place to ensure that there was not delay that would negatively impact the accused, that's actually where that rule came from, is to resolve victims issues expeditiously so that the proceedings could move forward as smoothly as possible.

But, the 72 hour can be moved to be lifted, courts will, particularly if it's stipulated by all parties, as well as the victim, will agree to that. Every now and then if someone doesn't take a position, the court analyzes it independently, and decides it's in the interests of justice, and will something else be injured if I don't abide by the 72 hour rule.

And I think I'll stop there, just because I know we're really close on time, to see what questions folks have. Fundamentally though, the only thing I'll stop on is that it is relatively routine practice to be a victim's lawyer on the civilian side. And many in the room, or those listening to this may say but I've never seen a victim's lawyer.

It's because there aren't that many, but those that do the work, it has become relatively routinized.

MS. TOKASH: This is Meghan Tokash, thank you, Ms. Garvin. I have a question with respect to, if this committee makes a proposed amendment to 6B, I know that we heard from Ryan that the OSTC counsel are overburdened, so there's nothing in 6B that has the prosecutor responsible for asserting of victims' rights.

And of course, as you know, in federal district court, the prosecutor is, I would say the primary party responsible for asserting the victims' rights, since federal district court

does not have a standing victim's counsel bar. So, my question for you is do you think it is important, if we were to make a recommendation to amend 6B, that the prosecutor, the military prosecutor be included in those conversations?

MS. GARVIN: Ms. Tokash, I think I was following you until the vary last part of your question, when you say those conversations, what are you referring to?

MS. TOKASH: I should be more clear. Should the military prosecutor be able to assert a crime victims' rights inside the trial level court in the military?

MS. GARVIN: So, it's not as simple an answer as I would like it to be. So, the big picture is I would say upon request they should. And what I mean by that, and I have written a law review article on this which you may or may not want to read, it's a long review article, everyone.

Is the rights are intended to be owned by the victim, right, the notion of the

apostrophe around the rights. So, the victim should get to choose whether, when, and how to assert, or with intention knowingly and voluntarily waive their rights. Generally speaking, that requires counsel.

And when they don't have counsel, or they've chosen not to have counsel, if it does not conflict with a prosecutor's obligations, and ethics, and it aligns, then yes, they should be able to upon request, assert those rights. One of the challenges in those moments is when there is a difference of opinion about what the scope, and meaning, and depth of those rights are.

And then prosecutors, and or trial counsel may assert them in a way that is not actually in line with an informed victim. So, in those moments, I actually think in the civilian system there should be appointment of counsel, rather than leaving it only to assistant U.S. attorneys.

That said, there are many great assistant U.S. attorneys who do the work, and

just for the record, Ms. Tokash, you are exemplary across the country in protecting everyone's rights. But I do have concerns about rights being co-opted by trial counsel without it being the victim who gets to knowingly and voluntarily assert or waive those rights.

MS. TOKASH: That's helpful, and what it sounds like you're saying is the systems, Article 3 versus Article 1 courts are so different that including any potential amendment to 6B, the prosecutor piece is not really that essential for Article 1 courts.

MS. GARVIN: I would say that because we have the SVC/VLC program. I think that is the fundamental difference, on the civilian side I wish we had that. I will also note that the military was tasked, and I'm forgetting, but I believe it was two NDAAs ago, I think the staff could find it, with creating more explicit and clear referrals to civilian lawyers if a victim is choosing not to have an SVC/VLC or VC.

And I do not believe that has been

robustly implemented, so I do think there is still a gap in the program in the military, but I do think the Article 1, Article 3 court difference is the best answer to your question.

MS. TOKASH: And I will say just very quickly that at least on the federal district court side, even if I were to go up the next level for mandamus, I would need the solicitor general's approval. So, I would imagine in the military side, they would need some appellate level approval to advance that request.

MS. BASHFORD: It's been suggested that trial counsel inadequately prepare victims of sexual assault for testimony at trial. When you represent somebody on the civil side, or your colleagues, if the prosecutor wants to sit down for multi hour prep sessions over a period of time, do you want to be present?

And if you, or your colleagues want to be present, and can't, does that curtail the prep time, or opportunities?

MS. GARVIN: So, to answer the first

question, yes, I want to be present. And yes, I am present when my victim is prepped for any hearing or trial, any testimonial moment, or even observational moment, I am present during that on the civilian side. I will just footnote, I wish prosecutors would want to, and actually have capacity to spend that much time with my client.

Their caseloads generally don't allow, even at a U.S. attorney's level, let alone on a state level. If I can't be present, or would for some reason waive being present, would that interfere? There are times when I allow, pursuant to ethics rules, my client is now a represented person, so is there constraints on when another lawyer can speak directly to my client, they have to go through me and get permission.

I do give permission for folks, both defense counsel, and prosecution at times to speak directly to my client, depending on what my client is directing me to do. Would it interfere with the preparation? I don't think so, because

I can't imagine not being present in some way. I know on the civilian side, sometimes I'm present by telephone, sometimes I'm present in person, sometimes I'm present in the same way I am during the preparation.

It will all depend on the relationship with the prosecutor, and my client's relationship with the prosecutor, and where they feel safe in terms of being prepared, and what they need to know.

CHAIR SMITH: Ms. Goldberg, did you have a question?

MS. GOLDBERG: Yes, thanks very much, and thank you, Meg. I wanted to shift gears and ask if you had any views on the standard of review question. I mean, we've heard a variety of views today, I think you've been in the meetings, and wondered if you could share your views on that.

MS. GARVIN: Yes. So, on the civilian side, as I said, the standard of review went to regular appellate review, and for good reason.

And I think, again, the military often trails the civilian in terms of protecting victims' rights. And I think it is timely for the military to consider ordinary appellate review for the very same reason.

The clear and indisputable, you are not going to get clear case law issuing from appellate courts when you have an extraordinary writ as the only device when you have an emerging area of law. You are just not going to get it, it will be 100 years, maybe 200 before we get enough cases up.

I mean, that's me being hyperbolic, I'm sure, 100 years, but a long time. But the ordinary standard of review does not guarantee, like for instance we are denied writs even under the ordinary standard of review, I want to be clear about that, it does not mean you automatically get there.

What it means is you don't have this extraordinary moment to get there. And so, I think the military should follow suit. And with

regard to the accused, and even trial counsel don't have that level of interlocutory appeal in response to that, the victim doesn't have a general appeal after the case.

When a victim's right is violated, which it usually is in a pretrial posture, once that ship sails, that's it, right? You're done, you don't have a general appeal after the fact because you don't have -- you're not going to be able to undo a conviction, or undo an acquittal. And so, you have this timeliness of trying to protect your rights, which is why it's interlocutory.

And it should not be an extraordinary moment that you protect my rights, it should be an ordinary moment where you analyze the facts, and the law in the moment.

MS. GOLDBERG: Thank you. If I could just ask a quick follow up to that, I mean we heard from defense counsel a couple of concerns, one was about delay, and one was the observation that most appeals were meritless, and so I wonder

if you have any reaction to those comments that we heard.

MS. GARVIN: So, I'm not going to comment on what happens in the military, because my hat here is really what happens on the civilian side, and I would defer to Mr. Guilds on that. And what I will say is on the civilian side, we are not observing delays in proceedings. In fact, I did reach out prior to this moment to ask one of the lawyers who takes the most appellate moments in the country under the CVRA.

What are you seeing, how often are you having to invoke the five day stay thing under the CVRA? And he said I'm not having to, we move through things pretty quickly, and that's my experience as well. So, we're not seeing significant delays in proceedings on the civilian side.

We aren't seeing -- yeah, so on the military side, and meritless, again, when you're dealing with an extraordinary standard of review, clear and indisputable error, you are going to be

denied a lot. Does that mean they're meritless? If you had a different standard of review, I don't think so.

I think what it means is there isn't clear law, and therefore the court can't find error, and therefore won't grant a writ. Whereas if we start to evolve to understanding this area of law through an ordinary standard of review of appeal, we will likely start to have a body of case law that will evolve, and we'll start to understand better what do the rights mean, what don't they mean.

MR. GUILDS: I'll just add really quickly, I've never had a victim client tell me what I would really like is for this process to take longer, that is not a thing that's happened. Victims and defense may have different views on a variety of things, but I think they both want an efficient process. I mean, as a defense attorney, I actually like my cases older, and witnesses to get gone, and memory to be -- not in a creepy way.

Memories to fade, because I don't have the burden of proof, right? I mean, that's what I would want. But there's no victim that I've ever met, or ever represented who wanted this process to be extended.

CHAIR SMITH: All right, did you have?

MS. PETERS: Before we close, I had a couple administrative announcements. First, for everyone here who wants to order lunch, please do so on the convening website before 9:00 a.m. tomorrow. Jen Campbell has sent you the link to order the food before 9:00. As for this room, it will not be locked, but you're welcome to leave meeting materials here, just no valuables.

Day two starts at 9:00 a.m. with an administrative session. And importantly before, yes, our folks are still here, we just want to take a moment to recognize we learned today Major Klossnor, our Marine Corps service rep is concluding his tour as a service representative for this committee, our liaison.

And so, we just want to thank him for

all the help and assistance he has given us, because when you ask us to bring you information, we then go to him, and it's been, really, it has truly been great working with you. We want to continue the relationship with the Marine Corps, and with your replacement, Major Oakard, who is also here today.

So, taking time to transition in. But really, it's been a great relationship, we really appreciate all your effort, and the communication over time. Thanks. And that's all I have.

CHAIR SMITH: All right, thank you everyone, and we will see you tomorrow morning.

(Whereupon, the above-entitled matter went off the record at 4:52 p.m.)

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