

UNITED STATES DEPARTMENT OF DEFENSE

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

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16TH PUBLIC MEETING

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FRIDAY
FEBRUARY 14, 2020

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The Advisory Committee convened in the Fitzgerald Room of the Westin Arlington Gateway Hotel, located at 801 North Glebe Road, Arlington, Virginia, at 9:00 a.m., Eastern Time, Ms. Martha Bashford, Chair, presiding.

PRESENT:

Ms. Martha Bashford, Chair
MG Marcia Anderson, US Army (Ret.)
Ms. Kathleen Cannon
Ms. Meg Garvin
Ms. Gentile Long
Hon. Paul Grimm (via telephone)
Mr. A.J. Kramer
Sgt. James Markey, Phoenix Police Department
(Ret.)
Dr. Jenifer Markowitz
BGen James Schwenk, US Marine Corps (Ret.)
Dr. Cassia Spohn
Ms. Meghan Tokash (via telephone)

STAFF:

Mr. Dwight Sullivan, Designated Federal Official
Colonel Steven Weir, US Army, DAC-IPAD Staff
Director

Ms. Julie Carson, Deputy Staff Director
Ms. Theresa Gallagher, Attorney Advisor
Mr. Glen Hines, Attorney Advisor
Ms. Kate Tagert, Attorney Advisor
Ms. Stacy Powell, Senior Paralegal
Mr. Dale Trexler, DAC-IPAD Chief of Staff
Ms. Amanda Hagy, Senior Paralegal
Mr. Chuck Mason, Attorney Advisor
Ms. Marguerite McKinney, Management & Program
Analyst
Ms. Megan Peters, Attorney Advisor
Ms. Stayce Rozell, Senior Paralegal
Ms. Theresa Saunders, Attorney Advisor

WITNESSES:

Colonel (Ret.) Andrew Glass, US Army
Colonel (Ret.) J. Wesley Moore, US Air Force
Colonel (Ret.) Jeffery Nance, US Army
Captain (Ret.) Bethany L. Payton-O'Brien, US Navy

SERVICE REPRESENTATIVES:

Major Paul Ervasti, US Marine Corps
Ms. Janet Mansfield, US Army
Jim Martinson, US Navy
Captain Vasilios Taskikas, US Coast Guard
Ms. Asha Vaghela, US Air Force
Josephine Van Driel, US Air Force

ALSO PRESENT:

Colonel Patrick Pflaum, US Army
Jennifer Elmore

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

2 (9:02 a.m.)

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

8 This meeting is open. Ms. Bashford,
9 you have the conn.

10 MS. BASHFORD: Before we get started,
11 apparently, in order to speak, you need to hit
12 Request, the green part, and when you're done,
13 hit the part that says Speak. That seems odd,
14 but in any event.

15 Mr. Sullivan, thank you, and good
16 morning. I want to welcome the members and
17 everybody in attendance today, on Valentine's
18 Day, to the 16th public meeting of the Defense
19 Advisory Committee on the Investigation,
20 Prosecution, and Defense of Sexual Assault in the
21 Armed Forces, or DAC-IPAD.

22 We are going to begin by taking

1 attendance. General Anderson?

2 MG ANDERSON: I'm here.

3 MS. BASHFORD: Ms. Cannon?

4 MS. CANNON: Here.

5 MS. BASHFORD: Ms. Garvin?

6 MS. GARVIN: Here.

7 MS. BASHFORD: Mr. Kramer?

8 MR. KRAMER: Here.

9 MS. BASHFORD: Ms. Long?

10 MS. GENTILE LONG: Here.

11 MS. BASHFORD: Mr. Markey?

12 SGT MARKEY: Here.

13 MS. BASHFORD: Dr. Markowitz?

14 DR. MARKOWITZ: Here.

15 MS. BASHFORD: General Schwenk?

16 BGEN SCHWENK: Present.

17 MS. BASHFORD: Dr. Spohn?

18 DR. SPOHN: Here.

19 MS. BASHFORD: Judge Grimm, by

20 telephone?

21 HON. GRIMM: Telephonically here.

22 MS. BASHFORD: Great.

1 Ms. Tokash, by telephone? Ms. Tokash?

2 MS. TOKASH: I'm here.

3 MS. BASHFORD: Great. Judge Brisbois,
4 Chief McKinley, and Judge Walton could not be in
5 attendance today. But with 11 members present,
6 we have a quorum for this public meeting.

7 The DAC-IPAD was created by the
8 Secretary of Defense in 2016 in accordance with
9 the NDAA for fiscal year 2015, as amended. Our
10 mandate is to advise the Secretary of Defense on
11 the investigation, prosecution, and defense of
12 allegations of sexual assault and other sexual
13 misconduct involving members of the Armed Forces.

14 Today's meeting is being transcribed,
15 and the complete written transcript will be
16 posted on the DAC-IPAD website.

17 We will begin today's meeting with a
18 panel of retired military judges. The Committee
19 has not previously had the opportunity to hear
20 the perspectives of military judges who have
21 presided over sexual assault cases. On today's
22 panel, we will hear from two retired Army judges,

1 a retired Navy judge, and a retired Air Force
2 judge. And the Committee looks forward to
3 hearing from each of you.

4 Following the military judges' panel,
5 the Committee will discuss the judges' testimony
6 and then take a break for lunch. In the
7 afternoon, the Committee will deliberate and vote
8 on whether to approve the DAC-IPAD's draft 4th
9 annual report.

10 The Committee will then receive an
11 update from the staff on its 2020 military
12 installation site visits and members'
13 observations of courts-martial.

14 Next, the Army's Chief of Criminal
15 Law, Colonel Patrick Pflaum will provide the
16 Committee with a presentation on the fiscal year
17 2020 NDAA provisions that affect the DAC-IPAD and
18 military justice. The DAC-IPAD Staff Director
19 has informed me that an individual has made a
20 request to provide a public comment at today's
21 meeting. We will hear the comment after Colonel
22 Pflaum's presentation.

1 If a member of the audience would like
2 to make a public comment, please direct your
3 request to the DAC-IPAD Staff Director, Colonel
4 Steven Weir. The comment may be heard at the
5 discretion of the Chair, and written public
6 comments may be submitted at any time for
7 Committee consideration.

8 Finally, the DAC-IPAD Staff Director
9 will wrap up the meeting and answer any questions
10 the Committee may have. Thank you all for being
11 here today.

12 Judges, we are ready to begin. We
13 have your bios. But if you could, please provide
14 us with a short description of your military
15 career, your military judicial experience, and
16 any training you received as a military judge.
17 Thank you so much.

18 CAPT PAYTON-O'BRIEN: Good morning.
19 Thank you for this opportunity. My name is
20 Bethany Payton-O'Brien. I'm a retired Navy Judge
21 Advocate and military judge. I spent
22 approximately nine years on the bench between the

1 trial judiciary and the appellate court.

2 Prior to becoming a military judge, I
3 attended the judges course in Charlottesville.
4 While I was on the bench, I attended various
5 training, some focused on sexual assault, other
6 training such as evidence, scientific evidence,
7 courtroom security, and drug cases.

8 But other than that, during the course
9 of my career, I spent five years prosecuting
10 sexual assault cases. Thank you.

11 COLONEL MOORE: Hello. I'm Colonel
12 Wes Moore, U.S. Air Force, retired. I retired
13 from the United States Air Force after 26-1/2
14 years, six and a half of those on the trial
15 bench. I also served as a Staff Judge Advocate
16 twice. I've served as a prosecutor and defense
17 counsel and now work for the Office of Military
18 Commissions.

19 COLONEL NANCE: Hi. I'm Jeff Nance.
20 I retired after 30 years in the Army.
21 Twenty-five of those years was -- I was involved
22 with military justice in some form or fashion,

1 and more than 13 as a military judge.

2 The training we received included what
3 has already been talked about, the military
4 judges' basic course, and then at least twice
5 annually refresher training on various issues of
6 criminal law and military judge business,
7 including training at the National Judicial
8 College in Reno, Nevada.

9 COLONEL GLASS: Hi. I am Andrew
10 Glass, 26 years in the Army, was a prosecutor,
11 defense counsel, supervised prosecutors, defense
12 counsel, was a trial judge on three different
13 occasions at three different locations,
14 culminating in being a Chief Circuit Judge with
15 Jeff.

16 Went to the military judges course in
17 Charlottesville, which is a three-week course.
18 Twice, in between my first time as a judge and
19 coming back to the trial judiciary, I was a Staff
20 Judge Advocate, and so they made you go back
21 again.

22 In terms of sexual assault training

1 within the context of being a judge, I tried to
2 remember when we started doing specialized sexual
3 assault training, typically in August of the
4 year. It's a week-long course. I think it's
5 four or five times -- Jeff may have a better
6 memory -- when we would go and have intensive
7 courses discussing sexual assault cases,
8 discussing evidentiary issues, for example, and
9 the kind of procedural issues that were germane
10 to that issue.

11 I also went to several national
12 judicial college courses. The ones I recall are
13 a death penalty case -- I was actually there with
14 Jeff -- advanced evidence, and then some judicial
15 art course.

16 COLONEL NANCE: I think the sexual
17 assault training started in either 2011 or 2012
18 for judges.

19 COLONEL GLASS: And I should say for
20 Jeff, we both attended and presented, moderated
21 panels, et cetera.

22 MS. BASHFORD: Thank you very much for

1 being here. This Committee has in the past heard
2 from -- we have heard from victims, we have heard
3 from accused, we have heard from victims'
4 counsel, we have heard from defense attorneys,
5 and we have heard from prosecutors and
6 investigators.

7 But this is our first chance to really
8 have questions for people who have kind of seen
9 the whole thing being put together. So I open it
10 up to questions from the Committee.

11 (No response.)

12 MS. BASHFORD: Then I'm going to
13 start. What has been your experience with the
14 VLCs and the SVLCs? Has it changed how the
15 courts-martial proceed, in your opinion, in terms
16 of witness preparedness or surprises seeming to
17 come out for which the complainants have not been
18 prepped? But if each of you could just take a
19 moment.

20 CAPT PAYTON-O'BRIEN: You don't always
21 have to start with me, but thank you. Feel free
22 to jump in, gents.

1 The VLC program really changed sexual
2 assault cases, in my view. Prior to VLCs being
3 involved -- and I look back at even my time in
4 prosecuting these cases -- it was a free-for-all
5 against the victim where oftentimes the victim,
6 male or female, seemed to be sort of dragged
7 through the mud.

8 The VLCs really have stepped up and
9 are protecting them, to I think an extreme now,
10 because when I prosecuted cases the victims would
11 come in generally and testify at an Article 32.
12 That was a good opportunity as a prosecutor to
13 see how that individual would fare under
14 cross-examination.

15 They don't have that opportunity
16 anymore. Most victims will assert their rights
17 to not come to an Article 32. Thus, they come
18 into court, it seems sometimes, unprepared for
19 what is going to happen and how the questions
20 will come at them.

21 As a judge, cross-examination often
22 was the opportunity for defense counsel to really

1 point out how they prepared with the prosecution
2 and completely refused to talk with the defense.
3 I think that's a disadvantage to the government,
4 to their case, if the victim has never had that
5 opportunity and refuses to, as is their right.

6 Understandably so, there have been
7 some bad scenarios with Article 32s, as we know,
8 for the victims being cross-examined, but -- and
9 I am using the phrase victim -- alleged victim
10 but the -- I think in terms of preparation for
11 trial, all they are getting is the ability to
12 prepare with the government, and in some ways
13 that is not doing them a service because they are
14 not having that opportunity for cross-examination
15 at any point or even interviews with the defense.

16 I will mention that I am -- I now have
17 my own practice. I am a criminal defense
18 attorney. Sexual assault cases are something I
19 defend, and it can be difficult on both sides, if
20 that opportunity is not there for victim
21 interviews, understanding that it's their right,
22 but I think that it would help if they -- for the

1 process -- would have interviews with counsel on
2 both sides, because then it looks as if -- and I
3 saw this as a judge -- it looks as if they have
4 something to hide. And we know they don't in
5 most cases, but perhaps they do.

6 I don't know, but it just seems that
7 there is something missing from the process. All
8 you get as a defense counsel now is the CD from
9 an interview with NCIS or CID or OSI, and I don't
10 think they are asking the tough questions either
11 during the investigation.

12 Thank you.

13 HON. GRIMM: Could I ask a question?

14 This is Paul Grimm.

15 COLONEL MOORE: I think the VLCs have
16 sort of a great purpose in empowering victims and
17 in preparing them for what they are about to
18 face. The process is a difficult and arduous
19 process to go through, and one of the best things
20 that the VLCs do is to -- is to very
21 realistically describe what that process is going
22 to be like. And I think that's empowering for

1 victims.

2 I think before the VLCs it was kind of
3 up to the variability, the personality of the
4 individual prosecutor in the case, who was pretty
5 much charged with taking care of the victim. But
6 the victim was not the prosecutor's primary
7 concern, and so having somebody whose primary
8 concern is taking care of the victims has had a
9 positive effect.

10 As a judge, I did not find that it was
11 skewing the results one way or the other. I do
12 believe, as Captain O'Brien says, you do have
13 less opportunities to evaluate that testimony,
14 and that's a double-edged sword.

15 As she said, it does have an impact on
16 credibility. It certainly can be woven by a good
17 defense counsel into a narrative that is not
18 supportive of the victim. But, by the same
19 token, the VLCs can advise and the victim can
20 decide to testify. I have seen that happen to
21 great effect as well, and to engage in
22 interviews. And so I have seen both.

1 But by and large, I think it has been
2 a positive development. I know as a staff judge
3 advocate, in the early days of the program when
4 they were coming directly out of my manning, it
5 was a difficult transition. But I think the
6 transition proved to be worth it.

7 MS. BASHFORD: Colonel Nance?

8 COLONEL NANCE: Yes, ma'am. I agree
9 with what has been said so far. You know, my
10 experience was that early on in the
11 implementation of the program, the VLCs almost
12 uniformly, in the Army, had no criminal law
13 experience, and so they were coming in advising
14 alleged victims about things that they really had
15 only a very narrow understanding of.

16 And sometimes, as Beth said, that
17 advice would -- which was designed to protect
18 that alleged victim from abuse -- would run
19 counter to the overall object of that victim, of
20 having the perpetrator convicted.

21 And so not understanding the criminal
22 court process, they would sometimes give advice

1 that didn't necessarily advance the ultimate goal
2 of that victim. That said, as time went on, I
3 believe that the training got better, the lessons
4 learned were implemented in the training, and the
5 advice got better, and things sort of evened out.
6 That was my experience.

7 Andy?

8 COLONEL GLASS: So without -- I'll
9 just underline a couple of things said
10 previously, and then hit a couple different
11 points. I think access when you're a judge
12 matters, because your job is to make sure there
13 is a fair trial. And if there is something, for
14 example, the defense hears for the first time in
15 an open courtroom, you have to do something to
16 accommodate that issue, whether that is giving a
17 delay, whether that is giving a delay, whether
18 that -- and sometimes it can be a substantial
19 delay, because there is some new nugget that has
20 come out. And so I think having somebody who
21 understands the process matters.

22 Having said that, that's a

1 double-edged sword. Here is why it's a
2 double-edged sword in the Army. The Army does
3 not have enough experienced trial litigators. It
4 is near crisis. The problem is that as kind of
5 the victim advocate program has waxed and waned,
6 it has become politically more necessary to put
7 people with a lot of trial experience in the
8 victims' realm. That has a positive benefit, as
9 discussed by Jeff and the other panel members.

10 It can have a negative benefit because
11 Bob or Mary, who have tried a bunch of cases, are
12 no longer trying cases, and we don't have that
13 many Bobs and Marys. Okay? The reality is, in
14 the current era, there are a lot of people who
15 are trying cases and it's their first two or
16 three or five cases.

17 Prosecutors and defense counsel trying
18 these cases, which are always narrow, complicated
19 cases, often involving complicated discovery
20 issues, complicated expert issues, you can't be
21 doing this for the first time. You just can't,
22 and do it well. And when the evidence is close,

1 ultimately what that can result in is an
2 acquittal, sometimes when it wouldn't otherwise
3 be an acquittal.

4 The other thing that I have seen as a
5 judge that, again, derails and slows down the
6 process, is in the context of interviews and
7 ongoing conversations with the alleged victim,
8 sometimes material will come out that is what's
9 called Brady material. Those of you who are
10 lawyers understand what that means. It just
11 means exculpatory material. It is required to be
12 disclosed.

13 My experience again is often that
14 material is disclosed either during trial or on
15 the eve of trial. And so the reason that the
16 trial gets pushed back is, if it's exculpatory
17 material that involves the possibility of expert
18 analysis and testimony, which happens with some
19 frequency, you're talking about a lengthy delay
20 because you have to go through a contracting
21 process that does not work.

22 The contracting process to get expert

1 witnesses does not work in the Army. It just
2 doesn't. It can take forever. It can result in
3 circumstances where you have much more delay than
4 you would otherwise have to do because of trial
5 dockets.

6 And so the problem is, when this
7 process is kind of lurching to trial and this new
8 material is coming out that changes the context
9 and the setting of the trial, when you're a
10 judge, you're just trying to do the fair thing.
11 And the fair thing is to throw time at it, and
12 sometimes money, so that you have the opportunity
13 to address those issues.

14 So those are the things that off the
15 top of my head seem to be -- and I would tell you
16 the victims' practice has gotten better. I used
17 to speak at the victims course and kind of say,
18 hey, this is kind of the code. This is what I
19 need from you as a judge. This is how you help
20 your client.

21 And it has gotten better, but in the
22 context of the entire system, it has created

1 challenges that are kind of unforeseen
2 challenges.

3 MS. BASHFORD: I believe Judge Grimm
4 on the phone has a question.

5 HON. GRIMM: Thank you. Thank you
6 very much. I appreciate your comments, and I
7 think that you have spoken to an issue --

8 MS. BASHFORD: Judge Grimm, can you
9 speak a little more loudly, please?

10 HON. GRIMM: Yes. Is that better?

11 MS. BASHFORD: Not really.

12 HON. GRIMM: Is that louder?

13 MS. BASHFORD: No, Judge.

14 HON. GRIMM: Can you hear me?

15 MS. BASHFORD: You are really going to
16 have to shout.

17 HON. GRIMM: All right. Can you hear
18 me now? I can just pass on my question and go on
19 to the other panel members. For some reason, I'm
20 not -- I'm talking pretty loud, and I know that
21 this phone will work this way, but I think it's
22 on the receiving end, maybe there is something

1 going on. I apologize.

2 Why don't you go on to the next
3 person.

4 MS. BASHFORD: I think we've got you
5 a little bit louder. Can you repeat the
6 question?

7 HON. GRIMM: Can you hear me now? Is
8 it better now?

9 MS. BASHFORD: Yes.

10 HON. GRIMM: Okay. So my question is
11 this. We have noticed that in the statistics
12 that show the number -- the outcomes of trials,
13 penetrative offenses when they go to trial, that
14 the conviction rate on the penetrative offenses,
15 the most serious ones, the sexual assault
16 offenses, that the overall conviction rate across
17 the Services, but particularly in the Army, is
18 shockingly low when compared to conviction rates,
19 certainly in the federal system where we don't
20 have sexual assault that often, but in the state
21 system as well.

22 And one of the things that we, as a

1 group, have been trying to do is to try to come
2 up with an explanation for why that may be. And
3 there are many factors, no doubt.

4 But part of it suggests that maybe it
5 has something to do with the experience of the
6 prosecution, and the frequency with which the
7 military assignment system, you get a job, you're
8 in it for two years, maybe three, and, boom,
9 you're off to something else. And for career
10 progression, you are moving out of it, and you
11 may come back to it.

12 So you don't get the situation like we
13 have on our Committee, of Ms. Tokash, who is a
14 career prosecutor who has an unbelievable
15 career's work of being in court dealing with
16 cases.

17 And I wonder whether or not there is
18 some correlation between the lack of experienced
19 prosecution and people who develop expertise over
20 a length of time that then allows them to teach
21 others and carry that forward when it is a
22 correlation between that and what might be the

1 low conviction rate.

2 COLONEL GLASS: So, first of all, it
3 to me is interesting that you reference Ms.
4 Tokash. I was her first supervisor in the Army.

5
6 HON. GRIMM: You did a good job.

7 COLONEL GLASS: Yeah. Well, I could
8 take credit for that, but that doesn't seem
9 honest. She has always been very talented.

10 So the talking point you will always
11 get about this is that the Army tries cases that
12 the civilians don't, and that is the truth. I
13 will tell you as a staff judge advocate, a former
14 staff judge advocate, I would try cases on some
15 occasion -- I wouldn't say habitually -- that the
16 civilians wouldn't take, and sometimes they would
17 be tried to acquittal, and sometimes they would
18 be tried to conviction. And we can talk about
19 that process and how you approach that process,
20 but to me that's not the overriding factor.

21 The overriding factor is Ms. Tokash
22 used to be an SVP in the army. There are a ton

1 of SVPs who used to be SVPs in the Army. Ton is
2 -- there are not that many SVPs in the Army, but
3 people who like to try cases like to try cases.

4 And when you tell them that they have
5 to go be the chief of ad law after the graduate
6 course, or they have to go do whatever else, it's
7 like telling a cook that he has to go be an auto
8 mechanic.

9 And the reason the Judge Advocate
10 General's Corps tells people they have to do that
11 is twofold. It's a personnelist approach to
12 managing people. I've got X number of slots. I
13 need staff judge advocates. The pinnacle job in
14 the JAG Corps is not to be a judge, not to be an
15 SVP, it's to be a staff judge advocate. It just
16 is.

17 The way you become general officer of
18 the JAG Corps -- there's five -- is by what you
19 do operationally and what you do as a staff judge
20 advocate. It's just -- it's a truth.

21 So when you look at, why is this,
22 there are -- I think to fix this you have to

1 break some -- you have to break some china. You
2 have to recognize that most of the trial
3 advocates I know -- and you can certainly
4 informally talk to people.

5 Some of whom are on your panel would
6 have said, if you just tell me I'm going to be a
7 major my whole life, but I get to try cases,
8 that's what I want to do. Or a lieutenant
9 colonel. I was told I had to leave being a trial
10 judge to go be a staff judge advocate or "You
11 probably won't get promoted."

12 Now, there is a lot of fixes to that.
13 There are people sitting in who have sat on
14 myriad promotion boards. You can give
15 instructions to boards about relative importance
16 of jobs. You can change your assignment cycle.

17 Specialization in the JAG Corps is
18 perceived as bad or unnecessary. It's ironic to
19 me that we have contract specialists who spend
20 most of their time in contracts. There is an
21 incrementalism. There just is.

22 In 2000 -- and I can't remember if

1 Jeff was on the same panel -- but I sat on a
2 blue-ribbon panel. I love blue-ribbon panels.
3 But we had these conversations in 2000, and not
4 much has changed.

5 The SVP program is a band-aid, and
6 this is what I mean. There is a lot of really
7 good, talented SVPs. There are some who aren't
8 that good. The problem is, there is no SVP for
9 life program or, go be an SVP and we'll make you
10 senior defense counsel. We'll keep you in this
11 realm where you want to be. We'll recognize your
12 particular specialty and build on that specialty.

13 I honestly don't think that exists in
14 the civilian world. There is a lot of
15 explanations for that that you will hear. We
16 have to be able to go down-range and try cases.
17 Sure we do.

18 We need people with military justice
19 experience as SJAs. You don't need that much
20 experience. I've been an SJA. I can tell you in
21 an hour what you need to know to be an SJA and
22 advise people.

1 It helps if you can answer nuanced
2 questions, but guess what? You can call Mr.
3 Nance, if he's a civilian working for you, and
4 say, hey, how does this work, because that's how
5 this society works, right? We reach out to
6 expertise.

7 I can't tell you the number of times
8 I was told I needed to do claims or ad law
9 because it was good for my career. Worked out.
10 I made colonel. Okay? But there is an awful lot
11 of really, really good prosecutors who don't stay
12 in the courtroom. And how do you fix that?
13 Well, I don't know of a way. Society fixes that
14 with specialization.

15 When I walk into a room, I don't want
16 to hear that my surgeon just got off of a tour,
17 again, as an auto mechanic. I want to know they
18 know how to fix me up or try cases. And that
19 just doesn't exist, and I think it requires
20 significant change.

21 Another piece of china that you might
22 consider is we believe that the province of

1 military justice is only green-suiters or
2 whatever the color of the suit is now. The suit
3 has changed it seems like 30 times since I was
4 in. I'm just happy I don't have to buy the PT
5 uniform anymore.

6 But there are almost no civilians
7 except at a very high level, highly qualified
8 experts, that are informing the system on a
9 day-to-day basis, that are saying -- and then
10 what you'll hear is, well, we can't deploy that.
11 Yeah, you can. You do it now. You take
12 civilians down-range now. Civilian defense
13 counsel go in-theater and try cases.

14 So in terms of, Judge, I think it's a
15 great question. I think it's fixable. I think
16 it takes the will to fix it. I know the current
17 Army system -- and I know very little about it
18 has a pilot program. I understand that's how the
19 Army does things. We pilot things.

20 The analogy to me is really a Navy
21 analogy. We're trying to turn a battleship going
22 full speed. I think it requires more drastic

1 change, a greater commitment to changing how we
2 approach prosecution and defense work. And it
3 requires money. It always requires money.

4 MS. BASHFORD: Anybody have anything
5 to either add or contradict?

6 COLONEL MOORE: I would say my
7 experience in the Air Force has been markedly
8 different than my Army colleagues. I do not
9 recall a case where the performance of the
10 special victims prosecutor was the reason for an
11 acquittal. I have -- my experience has been that
12 they have been highly professional, highly
13 effective, highly available, doing tons of cases.

14 I think the real challenge for the Air
15 Force SVP program, and Air Force senior
16 prosecutors in general, is that it is just such a
17 grueling job. It involves tons of travel.

18 The Air Force does cases more
19 expeditionary at the various bases as opposed to
20 centralized, which some of the other services do,
21 which makes that assignment a particularly
22 grueling one as a surrogate counsel, and I think

1 we lose some really good litigators just to the
2 fact that that's also happening at a point in
3 their personal lives when they are trying to have
4 families. And so they have to make some choices
5 there as to what they pursue.

6 So anything we can do in the paradigm
7 to make that job less grueling and more
8 attractive, I think we could attract some better
9 litigators there. But I think currently, at
10 least in the Air Force, we are attracting some of
11 the best and the brightest litigators to the
12 special victims prosecutor. And I have seen them
13 be very effective.

14 BGEN SCHWENK: Do you want to comment
15 on Judge Grimm's question about convictions?

16 COLONEL MOORE: There are any number
17 of factors that go into the increased acquittal
18 rate. I will say, the chief factor that I have
19 seen in the increased acquittal rate is that
20 beyond a reasonable doubt is a very high
21 standard. Court members do a very meticulous job
22 of applying that standard, and these are very

1 tough cases.

2 And as Colonel Glass said, we're
3 taking cases that perhaps wouldn't be taken in
4 the civilian sector. Whether that's good or bad,
5 we can talk about some more. But that's just an
6 indication that we're taking tough cases, that
7 there is risk involved in that, and the ability
8 to take on that risk sometimes results in
9 acquittals, and they are not necessarily a
10 reflection that anything is wrong with the
11 system.

12 I think the pendulum has swung and is
13 in the process probably of recentering on the
14 prosecutorial judgment on whether cases should go
15 to trial. For a long time, it was a swinging to
16 almost everything needs to go to trial. And if
17 it recenters a little -- and I think that could
18 happen in conjunction with the special victims
19 counsel, giving realistic advice to victims about
20 what the process is going to put them through and
21 what the likelihood of ultimate success would be
22 -- I think that pendulum should recenter. It

1 should probably recenter somewhere with a greater
2 number of prosecutions than before it started to
3 swing, but somewhere less than it is now.

4 MR. KRAMER: I am curious. Now two of
5 you have said that the military takes cases the
6 civilians wouldn't take, and I'm -- why that is.
7 Was there some -- especially given the effects on
8 both victims and the accused of such cases, why
9 it is that the services take cases that the
10 civilians wouldn't? Was there pressure or
11 emphasis that these cases should be tried, or why
12 that is?

13 COLONEL NANCE: I think commanders --
14 first of all, we trust these two-, three-, and
15 four-star generals to protect our country and to
16 keep our soldiers safe. And I think we can trust
17 them to make decisions on referral. I think the
18 commanders -- this is a commander system, and it
19 should be a commander system.

20 But I do believe that there is an
21 incredible amount of pressure on commanders with
22 respect to sexual assault cases. And as a human

1 being, their inclination is to say, let's send it
2 to trial and let the judge and/or panel members
3 decide.

4 The people that decide those things at
5 big levels, whether that should be the process
6 that we follow or not, you know, I'm perfectly
7 happy to let them live with the decisions they
8 make on whether that should be the process. But
9 if -- and I think it should be a commander
10 system, and I don't have any problems with that
11 process, of the commander saying, look, I don't
12 know what happened here. Nobody knows what
13 happened here. So let's send it to trial and let
14 impartial judges and/or panel members make the
15 decision.

16 If that's the dynamic we follow, then
17 we have to be willing to live with the results.
18 And the results are going to be where you have
19 bad facts, it's a bad case, and you're going to
20 get an acquittal.

21 COLONEL GLASS: Well, and just to
22 dovetail on that, I agree with all of that. I

1 agree it should be a commander-based system. If
2 it comes out of the commander's hands, I don't
3 think the military justice system is what it is,
4 which is an effective -- if used properly, an
5 effective tool for not just justice but also for
6 good order and discipline.

7 The point I would make is this: there
8 have been myriad high-profile instances where
9 someone has made a tough call, and that tough
10 call has come up publicly and has impacted
11 promotion. For the less morally courageous
12 commanders -- and I'm not saying that's
13 necessarily the world that Jeff is talking about
14 -- sometimes when you walk into that office and
15 you brief and say -- I mean, I've been in a brief
16 with a general officer, two-star general, where I
17 said, sir, we've got these preferred charges. I
18 don't think we should take them to trial. She is
19 not credible. My trial counsel does not believe
20 her.

21 I don't know ethically that that's an
22 appropriate case to take to trial, just under the

1 rules of ethics. And that's where we end up.
2 That's why the case does not get referred,
3 because we're moving in that conversation, which
4 many of you have had with staff judge advocates,
5 we're moving in that conversation to a referral
6 decision, where I finally just say, sir, if you
7 refer this case, you need to get a different SJA,
8 a different set of prosecutors, because it is not
9 ethical to try it.

10 That commander then says, got it,
11 Andy. I didn't know you felt so strongly. And
12 we move out.

13 I will tell you, I've sat in another
14 seat where I'm the judge and that just hasn't
15 happened, where there is just no way the
16 government had a good faith basis to bring that
17 case to trial. And the problem is, front of the
18 mind, back of the mind, with all due respect to
19 the general officers here, little generals want
20 to be bigger generals, generally. They want to
21 get promoted. It's a promotion-based system.
22 It's how we gauge success.

1 It's hard when there are what are
2 perceived sometimes as unfair shots against their
3 friends to sit there and say, I'm not going to
4 push this to trial, recognizing that five, six
5 years later, three, four, years later, sometimes
6 less, there will be an implication that will
7 change your career.

8 So, I mean, we'll talk presumably
9 later about the DOJ standard. I think one of the
10 things you can do is give insulation to those
11 commanders by instituting a standard that is at
12 least -- not taking away their discretion, but is
13 at least presumptive, that if you don't meet a
14 certain standard -- I mean, there is a standard,
15 right? So there is -- there are existing
16 standards, but they're not the standards that
17 we're talking about.

18 And so I think it takes an awful lot
19 of courage for a staff judge advocate and a
20 commander -- we ask them to do that all the time
21 in more important -- or not more important, but
22 equally important decisions, and -- but that's

1 why we take them.

2 And I took cases -- I can think of
3 three or four off the top of my head that the
4 prosecutors literally would say, well, I'm not
5 touching that, because they know they'd lose and
6 they know their conviction rates come up on
7 re-election.

8 CAPT PAYTON-O'BRIEN: If I may give a
9 perspective of the Navy. I'll echo what I've
10 heard up here. The Navy -- I see it from both
11 angles, both experienced litigators and non
12 experienced litigators. Why is that? Retention.
13 We can't keep good people in that want to try
14 cases, even -- we have a military justice track.

15 I spent about 16 or 17 years of my
16 almost 23 years in the Navy involved in military
17 justice. And back in 1994, when I started in the
18 Navy, I was told, don't be a litigator. You
19 won't get promoted. But I wanted to try cases.

20 I joined the Navy to try cases.
21 That's what I wanted to do. And so I spent my
22 first two tours trying cases, despite the urgings

1 of my seniors and my detailers to get out of
2 litigation. You won't get anywhere. You're not
3 going to make captain.

4 Well, I did. It worked out for me,
5 thanks to the military justice track, in my view.
6 But I've really tried cases, so I did 16 of 22
7 years and saw a lot of cases. We used to have a
8 saying when I was a prosecutor: We try
9 everything. And if we don't, we put it in
10 writing why you don't go forward.

11 And we would tell commanders, this is
12 why you don't go forward, and let me tell you my
13 -- after interviewing witnesses and the
14 credibility and evaluating credibility, I made a
15 recommendation.

16 And back then it was -- may not have
17 been followed in every case, but at least the
18 commander had a letter to rely on that was a
19 prosecutorial merits memo is what they call them
20 now, it seems, in the Navy. But we would tell
21 them, don't go forward, and here's why. They
22 often would choose to go forward anyway.

1 Okay. I will tell you my -- I had a
2 losing record as a prosecutor, because, back to
3 what I said earlier, we tried everything. So now
4 what I would say is I think -- and echoing what
5 I've heard up here -- some of the commanders
6 don't have the ability to make that tough call.
7 Should it go forward? Should it not? Because of
8 some of the potential ramifications to them.

9 Yes, little generals want to make big
10 generals, but commanders want to make captain,
11 too. And so if they are seen as the -- not being
12 tough on good order and discipline, and ignoring
13 the desires of the victim, that has ramifications
14 for them.

15 But when it comes to senior
16 prosecutors, we used to try a lot more cases than
17 we do today. And we would cut our teeth as baby
18 prosecutors on the unauthorized absence, the AWOL
19 cases, the drug cases. We would cut our teeth on
20 those small little specials.

21 We don't have many of those anymore.
22 A lot of that goes the administrative route or

1 the non-judicial punishment route. So you're not
2 having the opportunity for litigators to really
3 try cases. And then in certain areas right now,
4 even in the Navy, there aren't enough
5 prosecutors.

6 There is not even enough support
7 staff. Prosecutors are making copies, and they
8 can't keep up with discovery obligations. Thus,
9 we end up as judges now having to take up
10 discovery issues right before a trial because the
11 prosecution can't get the work out to the
12 defense. That impacts military justice and how
13 cases languish in the system.

14 I mentioned that I'm a defense
15 attorney. I have a case that I am defending
16 where it has been around for a year, and it is
17 still not moving anywhere. I mean, a year seems
18 like a really long time for a case to be in
19 investigation and then under consideration by
20 either the prosecutor or the command.

21 A year is a long time, both to an
22 alleged victim and to the sailor who is facing

1 potential action in the future. It is a grueling
2 job to be a prosecutor, or it can be. It can be
3 also very professionally rewarding.

4 But we have prosecutors as lieutenant
5 commanders who are saying, I've had enough. I'm
6 leaving. Because they can't be prosecutors, they
7 can't get support for either staff or other
8 prosecutors, and they leave, they punch.

9 I mentioned I spent nine years on the
10 bench, so my process was two years trial bench,
11 three years appellate bench, four years trial
12 bench. I was told I could no longer be a judge;
13 I had to go back and be a staff judge advocate.
14 After 16 years of doing military justice, I was
15 told, you need to go be a staff judge advocate
16 now. We have no more military justice job for
17 you.

18 So I retired in 2017 because I was
19 told there was nothing more for me in military
20 justice. So if we're telling the judges after so
21 much time that they have to leave, and we're
22 telling the prosecutors they can't try cases, or

1 even the defense counsel that they can't
2 litigate, we lose good people.

3 But the commanders, going back to --
4 they need to make the tough call and often don't.
5 And I understand that they send cases to trial
6 that would not otherwise go to trial. I was one
7 of those prosecutors that took those cases to
8 trial. But we need to put people in command that
9 can make those tough calls, even at the
10 prosecution level or the defense counsel level.

11 If we're putting non-litigators as
12 commanding officers of litigation shops, then
13 that's a problem, because you're having
14 commanding officers who are operators supervising
15 the prosecutors. And the operators haven't been
16 in the courtroom in a very long time, and they
17 don't know prosecution. They might know how to
18 be a commanding officer, but they don't know
19 prosecution, they don't know defense.

20 So we may be -- we may have to look
21 at, how do we select who is in charge of those
22 various offices?

1 Thank you.

2 COLONEL MOORE: My experience with
3 cases --

4 MS. TOKASH: Hi. This is Meghan
5 Tokash. Can you hear me?

6 COLONEL MOORE: -- that were declined
7 in the civilian system that we went forward with,
8 is generally those were local, state-level
9 prosecutors that were declining those
10 prosecutions. And there is just a different set
11 of dynamics that goes into the prosecutorial
12 decision.

13 A staff judge advocate and the
14 commander doesn't have to run for reelection, for
15 instance, so doesn't have a conviction rate to
16 protect. And it's -- generally, your conviction
17 rate is not something that is going to determine
18 whether you were successful as a staff judge
19 advocate or not.

20 And so, in that regard, having the
21 greater latitude to take some of the tougher
22 cases to trial is not a bad thing. I think it's

1 a good thing that we're taking some of those
2 cases. Should we be taking everything that we
3 are taking to trial now? I don't think so.

4 But the fact that we are taking some
5 of the harder cases I don't think is a knock on
6 us. And the cost of that is that the acquittal
7 rate is going to be higher, but I think we can
8 manage that cost.

9 I want to take a contrary position to
10 my colleagues, or at least state the contrary
11 position on the specialization. I was a
12 specialist for a while, then I went and
13 specialized in something else, and then I went
14 and did the staff judge advocate thing on a
15 couple of occasions and I found that that
16 actually was helpful.

17 I believe that being a staff judge
18 advocate made me a better military judge,
19 because, as a staff judge advocate, you are
20 working with commanders, you are working in the
21 trenches, you get a better feel for what is
22 actually out there going on in the Air Force.

1 I also believe that the best way to
2 train the next generation of new prosecutors is
3 in that staff judge advocate office, because as a
4 lieutenant colonel staff judge advocate, I was
5 getting in the new lieutenants, fresh out of law
6 school who were raring to try cases, and the best
7 way to develop them into the litigators is to
8 have former litigators in that staff judge
9 advocate's office to train them up and to show
10 them how it's done.

11 So there is a case to be made for
12 specialization, but generalization also has its
13 benefits, which can't be overlooked.

14 MS. BASHFORD: Ms. Cannon, and then
15 Ms. Tokash.

16 MS. CANNON: Thank you for your
17 comments. Regarding the question of commanders
18 making the ultimate decision and some of the
19 competing interests that they might be troubled
20 by, including ethical issues, we have discussed
21 among ourselves here on the DAC-IPAD the issue of
22 the preliminary hearing and how that is, or has

1 been at times, a vetting process for cases where
2 there is actual evidence introduced and where you
3 can see what a case looks like.

4 I would like your thoughts on
5 preliminary hearing officers having binding
6 decision-making capability when they come to the
7 issue of probable cause, and if that would have
8 an effect on insulating commanders with regard to
9 those decisions.

10 COLONEL NANCE: I'll speak to this
11 first, I guess. You know, I thought about this
12 and I think it's -- there is pluses and minuses
13 to both sides of that question. And what I came
14 down to was what I thought is kind of a hybrid
15 preferral process. So, and here are the five
16 elements of it that I came up with.

17 First, the general court-martial
18 convening authority can send the case to a
19 binding 32 for any offense, not limiting it to
20 sexual assault offenses. Otherwise, the default
21 is to the current Article 32 standard.

22 Second element. At that binding 32,

1 the investigating officer would need to be an
2 active duty or reserve component military judge
3 or a full-time magistrate judge. More on that in
4 a minute.

5 Third element. Probable cause is
6 still the standard. I don't see anything wrong
7 with the R.C.M. 406 standard as it now applies,
8 and that's the same standard that is applied in
9 the civilian criminal justice system.

10 Fourth element. The government can
11 come back with new evidence if no probable cause
12 is found and reenergize the hearing.

13 And then the fifth element, and this
14 might -- I don't know if this will be
15 controversial or not, but only a no probable
16 cause finding is binding. This preserves the
17 general court-martial convening authority's
18 authority to -- and it does not erode the current
19 important protections for an accused.

20 I think that these -- this concept of
21 a full-time magistrate judge that would be a
22 senior O-4, they would be -- they would -- as

1 opposed to our current part-time military
2 magistrates, they would do nothing but magistrate
3 duties and do 32s. They would supervise the
4 part-time military magistrates, and they could
5 help the actual military judges with important
6 rulings on controversial motions, or whatever.

7 But I think -- as I think about it and
8 have thought about it, I think something like
9 that might work, and it might provide sort of an
10 escape valve for the commander, who is under a
11 tremendous amount of pressure on some of these
12 sexual assault and high-profile cases.

13 And it's -- you know, it's tough at
14 the top. And like I said before, I think
15 sometimes the decision is just to say, on a close
16 case, we'll just let the panel decide or let the
17 judge decide.

18 COLONEL GLASS: So for a number of
19 years, Jeff and I worked together on the Military
20 Judges Benchbook Committee. He was my boss. You
21 know why now.

22 I endorse the Nance proposal, but I

1 would note a couple of issues that you are going
2 to hear. One of the issues you are going to hear
3 is, at least in the Army, at post, camp, or
4 station, there is often only one judge. Most
5 places there are multiple judges. And so are you
6 really going to at Fort Riley, at Fort Drum, add
7 an O-4 billet that works there? I mean, that's
8 one of the logistical -- that's one of the
9 pushbacks you're going to get from -- I would
10 guess. I don't presume to know what pushback you
11 would get from the services is we don't have the
12 bodies.

13 The thing I like about Jeff's
14 proposal, beyond just the fact that it -- it puts
15 it in a little different box is that -- and I
16 think a more favorable box for the system, for
17 the commanders, and more favorable box for the
18 soldier or the service member, but it also allows
19 you to start to develop judges. Your O-4
20 magistrate in this system would be able to get
21 some reps.

22 One of the things you are going to

1 hear over and over again, to use a sports
2 analogy, is, you know, my son is swimming in
3 regionals today, hopefully doing great. He
4 doesn't get to be good unless he gets reps. But
5 we expect trial advocates and military judges to
6 be good without getting repetitions. Okay? That
7 O-4, whatever we're calling them chief
8 magistrate -- gets some time in the saddle where
9 they get to make decisions.

10 One of my best jobs was as a part-time
11 military magistrate, as a captain at Fort Bragg.
12 It was -- I didn't know at the time -- a stepping
13 stone job that helped me to be a judge. And so I
14 think it does provide a benefit. My only concern
15 is it goes back to the normal Army issues, right?
16 Staffing, et cetera.

17 I think one of the questions that we
18 were told might be asked of us was, how about
19 judges doing preliminary hearings? And the
20 problem is, when I'm -- when I was at Fort Drum,
21 I don't have the time, and there is one of me,
22 you know, and if you're going to say, bring a

1 reservist, reservists have life issues, too.
2 They are not always going to be available.

3 And some of the other issues that
4 you're concerned about -- timing, and how things
5 move through the system, again, experience.
6 Those become issues as well.

7 COLONEL NANCE: And then if you've
8 done -- if you're the judge that's doing the 32,
9 you're not trying the case.

10 COLONEL GLASS: Right.

11 COLONEL MOORE: I will say in the Air
12 Force, judges do almost all of the Article 32
13 hearings for sexual assault cases. I did several
14 when I was a judge. We really handled the
15 logistics issue by doing most of them by video
16 teleconference.

17 And so we could do one in a morning
18 many times and spend the afternoon writing it up
19 and still have it done. So at least in the Air
20 Force's experience we had the manning, we had the
21 ability to do that.

22 I think it did add value, and I think

1 if a military judge is making a no probable cause
2 call, then there is no reason that that should
3 not be binding, at least as -- at least subject
4 to the opportunity to come back and present
5 additional evidence.

6 CAPT PAYTON-O'BRIEN: I agree that --
7 with the proposition that an Article 32 no
8 probable cause determination should be binding.
9 If the government has an opportunity later on, if
10 new evidence is found, then they can come back
11 and revisit it.

12 What I see, though, as the problem
13 with the preliminary hearing currently is it's
14 almost a foregone conclusion, because the
15 government's obligation is to walk in -- and
16 while I agree with the probable cause standard,
17 how they are meeting it generally in the Navy is
18 to walk in with an investigation and give it to
19 the preliminary hearing officer and say, here you
20 go. No cross-examination of witnesses. No
21 testimony. They just drop a paper case on the
22 preliminary hearing officer.

1 So back to some of my earlier
2 statements about alleged victims not testifying,
3 many witnesses aren't testifying. Most witnesses
4 aren't testifying, because the government's
5 position has been in most cases is we don't have
6 to bring in testimony because it's cumulative
7 with that report.

8 Despite defense counsel asking for
9 witnesses to come, in many cases the witnesses
10 aren't because either they are civilians and they
11 decline or the government's position is that
12 their testimony is cumulative with the paper. So
13 are you really vetting a case out based on paper?
14 I would submit that maybe not. You are not
15 really getting into the issues of the case.

16 And in the case of the Navy, I don't
17 know if the Army and Air Force are doing it
18 differently. I have to assume because their
19 investigators are uniformed. We have NCIS
20 declining to appear claiming they are civilians.
21 They don't have to.

22 So that's causing a lot of discussion

1 amongst preliminary hearing officers -- our
2 preliminary hearing officers. While sometimes we
3 do use the judiciary for the more serious cases,
4 it's usually a staff judge advocate from another
5 command that hears the case, an O-3, an O-4,
6 sometimes an O-5, hearing the evidence.

7 I was a staff judge advocate as well.
8 I mean, I didn't specialize in just military
9 justice. I was a staff judge advocate. Some of
10 our junior staff judge advocates don't have a lot
11 of military justice experience either, and they
12 are making recommendations in their -- maybe
13 their second tour.

14 Let's assume it's a second-tour
15 lieutenant. They didn't try very many cases in
16 their first tour, and now they're a staff judge
17 advocate weighing the evidence at a preliminary
18 hearing officer, the evidence which consists of a
19 report and no testimony, not even by the agent
20 who investigated. And I think that is a hollow
21 process. You're not really getting to the
22 evidence and what exists, other than what is in

1 an investigation, which may not be thorough.

2 It seems the agents have a checklist
3 that they use for investigating sexual assault
4 cases, and so they are not really delving deep
5 into some of the issues that might exist that are
6 credibility issues that would be important to
7 know at the preliminary hearing phase.

8 Colonel Moore made a comment about in
9 the morning he might hear a 32 as the preliminary
10 hearing officer and in the afternoon write it up.
11 That tells me that it sounds like a paper case,
12 right? We drop a report on it. In the
13 afternoon, all he has to do is review it and
14 write it up. I would think that that might not
15 have been a thorough 32, all due respect to
16 Colonel Moore. But did the government really
17 present the evidence other than what was written
18 on paper?

19 And while I understand that's what the
20 rules allow for, the rules also allow for the
21 defense to have that opportunity to present
22 witness testimony, and it seems they are not

1 getting that opportunity.

2 Thank you.

3 MS. BASHFORD: Ms. Tokash, and then
4 Ms. Long.

5 MS. TOKASH: Thank you. I hope you
6 can hear me okay.

7 MS. BASHFORD: Meghan, you're going to
8 have to speak louder.

9 MS. TOKASH: Okay. Can you hear me
10 okay?

11 MS. BASHFORD: That's better.

12 MS. TOKASH: Okay. From where you sat
13 as judges, and where you sit today, what impact,
14 if any, does the lack of a required prosecution
15 standard akin to the U.S. Justice Manual have on
16 acquittal rate? And would a standard that you
17 must have admissible evidence sufficient to
18 obtain and sustain a conviction be helpful?

19 So, in other words, are the military
20 services really seeking harder cases because of
21 the facts, or is the military labeling them hard
22 because the military doesn't have a prosecution

1 standard akin to federal civilian prosecutors?

2 COLONEL MOORE: I'll take the first
3 shot at that one. I think that higher standard
4 would actually remedy the observations that
5 Colonel Payton-O'Brien has about the pro forma
6 nature of the Article 32 investigation.

7 The reason that there is not a lot
8 being presented at the Article 32 investigation
9 now is that there is not a lot that is needed to
10 meet the probable cause standard. So, to me, if
11 we're saying that you would need to bring more
12 information out at these investigations, what
13 we're really saying is that we need a higher
14 standard.

15 And so I think that's the question is,
16 do you want someone to look at the case just
17 based on what's there, what's minimally necessary
18 to establish probable cause? If so, status quo,
19 continue as we are. If you think you need more
20 information, if you think you need to evaluate
21 witness credibility, well, that doesn't go into
22 probable cause, really. In that case, you're

1 going to need to have a higher standard, and
2 maybe the Department of Justice standard does
3 make sense.

4 COLONEL GLASS: So when we talk about
5 discretion, again, I hate to beat this drum, but
6 it's relevant. Who is making that discretionary
7 call? You can impose a higher standard, but if
8 that discretionary call is an experienced
9 prosecutor making a recommendation to somebody
10 who has experience in the process, that's a
11 different discretionary call than somebody who
12 has two or three cases making a recommendation.

13 And it does matter that the
14 prosecution standards are different. They are
15 dramatically different. I would tell you I have
16 sat in cases and I believe this to be true, where
17 the -- I would look and I would think, how are we
18 hearing a motion to dismiss a sexual assault
19 case, a very, very -- what's called an R.C.M. 917
20 motion -- how are we even hearing this? Why are
21 we here? Because that's not a credibility
22 determination. That's just the base-level facts,

1 have they met this burden? Meaning the
2 government. Have they met this burden?

3 And if you're there, that tells me
4 there is something really wrong with your case,
5 which happens, right? Sometimes witnesses don't
6 show up or change their testimony. Or that you
7 didn't fully consider whether this case should
8 see the inside of a courtroom.

9 Now, does that happen a lot? No, it
10 absolutely does not. I don't want to overstate
11 that. But to have it happen once to me is
12 problematic in that system, because that's an
13 ethical call a lawyer ought to be making.

14 I'll tell you. I sat as a judge a
15 number of times ruling on motions where I would
16 have both sides present evidence, facts,
17 whatever. For example, one time I had a motion
18 where the relevant issue was, when did the
19 Article 32 change? That's a fact. That's a
20 fact.

21 Experienced defense counsel --
22 experienced defense counsel, experienced

1 prosecutors did not give me that fact. That's
2 if done intentionally, that's an ethical
3 violation. I don't think it was done
4 intentionally, so there was no ethical follow up.
5 But it's an ascertainable fact.

6 You know what I know? I googled it.
7 It exists. I took judicial notice of it. But
8 the reality is that at the end of the day, yes, I
9 think it would make a difference, Meghan. I
10 think it would make a huge difference in having a
11 standard. It would insulate people in the
12 system. But at some point in time, it doesn't
13 fix all of the issues that are out there.

14 Now, I want to make one -- make sure
15 there is one clarifying point. I think SVPs in
16 the Army are amazing, talented people. I'm not
17 besmirching that program. I'm just saying it's
18 not enough.

19 Ultimately, if those SVPs go on to be
20 older SVPs, they are better going to be able to
21 inform a system, inform commanders, and make that
22 system work.

1 COLONEL NANCE: And I would just sort
2 of agree with what has been said so far about the
3 standard and just sort of refer back to what I
4 said earlier about, what is our purpose? And if
5 our purpose is to get more convictions on sexual
6 assault cases, then having a higher standard will
7 reduce the number of bad cases that judges hear
8 or panels hear, and reduce the number of
9 acquittals in sexual assault cases.

10 If the object is to give a sort of --
11 pull back the mists of uncertainty that the
12 public might have about the military justice
13 system by having all cases go to trial and live
14 with the results, then I'm not sure standard -- a
15 higher standard is going to achieve that goal.

16 MS. BASHFORD: Ms. Long?

17 MS. GENTILE LONG: Okay. Thank you
18 for being here. I guess before I ask my question
19 I do want to be the dissenting voice that I don't
20 think that we can actually say that your
21 acquittal rate is any better or worse than the
22 civilian world, because we don't have that

1 comprehensive data.

2 And I think everyone always thinks
3 they are taking cases that the other doesn't
4 take, and I think that that's true. You have
5 certainly sat some place where you know your
6 civilian jurisdiction hasn't taken something that
7 you have, so that's definitely helpful.

8 But I did just want to -- for me, I
9 just wanted to put that out there, so that there
10 is some comfort, that I don't think you are
11 chasing a -- you are different than any other
12 standard right now.

13 My question is on the Article 32. And
14 since a lot of you also have civilian experience,
15 you know that preliminary hearings in the
16 civilian world are definitely more than what you
17 have described the current Article 32 as, by not
18 necessarily a full and open discovery piece where
19 defense witnesses are called, although they can
20 be. Can you envision a system -- a process in
21 the Article 32 where it is different than it is
22 now?

1 It's not a paper, but it also isn't a
2 full hearing basically where you are determining
3 issues that are not necessarily relevant at the
4 probable cause standard and maybe would be then
5 determined by the SJA if there was admissible
6 evidence or other things to go forward?

7 Can you envision a hearing that would
8 be protective of victims but also fair to the
9 accused and fair to the process than exists now?
10 Because from what I'm hearing, what you're saying
11 now about the paper, that doesn't seem to be
12 satisfactory based on your experience.

13 CAPT PAYTON-O'BRIEN: I'll start. You
14 seem to be looking at me. So while certainly as
15 a defense counsel it would be great to have
16 opportunity to cross-examine a victim, I'm not
17 talking necessarily about that for a fair
18 hearing, or even a thorough hearing.

19 Because victims decline, as is their
20 right, to be present at the 32 -- and I've seen
21 some that do come in. They are willing to do it.
22 But then, when you use a paper case, when it's

1 the agent's interpretation of what was said
2 summarized in a report, which may or may not have
3 some sort of -- I think there was just a change
4 in the volume.

5 I lost my train of thought there for
6 just a moment. When the agent puts on just the
7 report, or when a prosecutor puts on just the
8 report, which may or may not have the testimony
9 or a statement, verbal, you know, an audio or a
10 video, then we just get a summary, which is not
11 helpful in the process.

12 And when you have an agent that
13 declines to come in because they view themselves
14 as being protected under the rule as a, quote, a
15 civilian -- and I would disagree. I believe that
16 if that had come to me as a judge, that I heard a
17 motion for a new 32 because I don't believe that
18 our civilian law enforcement, who work for the
19 Department of the Navy, can claim they are a
20 civilian, don't have to testify.

21 But if that's the only person that
22 comes in -- and I've been part of civilian

1 processes where at a preliminary hearing the only
2 person that came in was the police officer. At
3 least there was some testimony that while I
4 understand it's not a full discovery avenue for
5 the defense, it's also just an opportunity to see
6 what is there and present some of perhaps defense
7 evidence that might go to that determination of
8 probable cause.

9 If as a defense attorney you don't
10 have that ability, then all that needs to be
11 presented is that little bit of evidence to get
12 over probable cause, which, as we know, it's a
13 fairly low standard.

14 Do I think it needs to be back to the
15 old days of when it was an all-day 32 and we
16 paraded all of these witnesses in? No. I think
17 there can be something in between.

18 But to claim that any witness who
19 testifies -- and this seems to be, at least from
20 my perspective now, what is happening is the
21 government claims anybody who testifies, if their
22 name is in the report and they have given a

1 statement, then their testimony would be
2 cumulative.

3 I would disagree that that's always
4 the case. I think, as a defense attorney, when I
5 -- when I talk to witnesses and interview people,
6 there is probably something I find that I would
7 like to present. I can't do that if they're not
8 there, because the government has said, Well,
9 they're cumulative. And oftentimes the
10 preliminary hearing officer will agree, I have a
11 report; I don't need the person.

12 I think something in between, because
13 you need to explore some of the issues. And it's
14 not a full discovery tool, like it used to be.
15 But the defense still does have an opportunity to
16 put on witnesses. It's in the rule, and it's not
17 happening.

18 And I think if they had that
19 opportunity, it would be a more thorough
20 investigation, at least for that credibility or
21 that -- that determination by the commander who
22 has to make that call when they receive a report,

1 if a probable cause standard was met, you know,
2 but -- and we see those recommends, yeah, met,
3 but don't go forward and here's why, or go
4 forward but know you're going to lose.

5 And don't get me wrong, I don't
6 believe the objective should be let's just get
7 more convictions. The objective should be
8 present the case. If it's going to trial, let the
9 process take place. And the objective of a 32
10 shouldn't be to perfect a government case or to
11 poke enough holes so it doesn't get probable
12 cause, but at least so that there is an
13 evaluation of the evidence.

14 Thank you.

15 COLONEL MOORE: I think, again, the
16 standard will drive behavior. If the standard is
17 probable cause, I don't think any prosecutor is
18 going to show any more of his cards than he has
19 to to meet that standard. And so if you think
20 that more needs to be done, that more needs to
21 come out, then the answer is to raise the
22 standard, or to change the rules of admissibility

1 at the Article 32 investigation perhaps.

2 I think any change to the rules,
3 prosecutors will adapt and overcome. So
4 certainly I think any modification is easily
5 enough implemented. I think we've seen
6 adaptations to changes over the last five years
7 that everybody has handled with aplomb, so I
8 think it's certainly doable.

9 MS. GENTILE LONG: Colonel Moore, just
10 a follow up, though. But the civilian standard
11 at preliminary hearing is probable cause, and
12 there is not this issue. So would it have to be
13 a change in standard at the hearing for there to
14 be a change in behavior, or do you think the Air
15 Force or the people that you're saying you had
16 seen in the courtroom could change the behavior?

17 COLONEL MOORE: You can probably
18 change the underlying rules as well. And so, for
19 instance, Captain Payton-O'Brien mentioned the
20 cumulativeness standard. And so maybe you
21 tighten that up and you have a broader definition
22 of what is -- or a tighter definition of what's

1 cumulative or you eliminate cumulative as a basis
2 altogether or you have military judges who feel a
3 little bit more comfortable standing up to the
4 prosecutor and saying, "I want to hear from this
5 witness."

6 COLONEL NANCE: I think a more robust
7 Article 32 hearing would be useful in providing
8 information, so that the person who makes the
9 decision about referral has the most information
10 available to make an informed decision.

11 And I don't know, I'm a simple guy.
12 I don't see how that's a negative thing.

13 COLONEL GLASS: So I think we think
14 there is a public benefit -- and I understand
15 that these hearings would be closed at the -- at
16 certain critical portions. But I think we think
17 there is a public benefit to this being able to
18 be on TV today.

19 I joked with Jeff that if I -- one of
20 the good reasons that we don't have TVs in a
21 military courtroom is what that gentleman did
22 before, I would have found him in contempt.

1 Okay? I know he's doing his job, but my point is
2 -- my point is that we believe that this has a
3 public benefit to being out there.

4 What public benefit is there to a
5 paper case? And what does it do to the
6 presumption in society that this really isn't a
7 justice system? So that's the first point.

8 The second point -- and this is -- I
9 know these things are numeric as can be, and you
10 maybe already have this statistic. But if you
11 don't -- and I know that all of the various
12 departments are going to love me; this table over
13 here is going to hate me. But I would look into
14 how often in sexual assault cases the 32 is
15 waived by the defense, because they don't think
16 it's fair, because they don't think there is any
17 benefit, and because they don't think that
18 anything good can come of it. So I would check
19 that if I were you.

20 Then the other piece. If a judge
21 doesn't have comfort standing up to a prosecutor,
22 whatever the rules, and making sure something is

1 fair -- let me say that a little more positively.
2 The judges here at this table have -- would have
3 no trouble saying, "Nope, we're going to hear
4 this case." Or, "Nope, I'm going to allow some
5 latitude."

6 Now, there is no doubt -- and I don't
7 know the specifics of some very, very public
8 misuses of the Article 32 system in the past, but
9 there is no doubt that there have been some
10 misuses and abuses in the former Article 32 that
11 resulted in this change.

12 I think there is a middle ground, and
13 I think to the degree you can get somebody who
14 knows what they are doing, who has been trained
15 what they are doing, whether they are a major or
16 a lieutenant colonel or a colonel, sitting there
17 saying, "Nope, I'm going to allow this," or
18 "Nope, you need a little more." I think it makes
19 a difference. It does matter.

20 MS. BASHFORD: Mr. Kramer?

21 MR. KRAMER: I'm sorry to switch
22 topics for a second. I wonder what you think of

1 the ability of defense counsel to obtain experts
2 and the procedure they have to go through to do
3 that and whether that should be changed?

4 COLONEL NANCE: Sir, I have preached
5 on this for my entire time in the military. I
6 think it should be changed. I think it's
7 difficult to impossible for the defense counsel
8 to get experts. I think having it approved by
9 the prosecutor is the wrong answer.

10 I think the defense bar should be --
11 or TDS in Army parlance should be funded, and
12 they should have at the TDS headquarters level a
13 warrant officer who is in charge of dispensing
14 money for expert witnesses. And the chief of TDS
15 is the adult in the room who makes sure that
16 there are no abuses for frivolous requests.

17 And of course the judge is going to do
18 that, too. I mean, the judge ultimately gets to
19 say whether an expert gets to testify or not.
20 But I think that's a better dynamic, a better
21 system for experts for the defense bar.

22 COLONEL GLASS: So I agree with all of

1 that. I would just say this -- and I think this
2 has changed -- I am not conversant with what is
3 going on in the Army in terms of the Trial
4 Defense Service. But sometimes you need an
5 expert to be able to establish you need an
6 expert, right?

7 So somebody has got to come in and
8 testify and say that "This is what I'll provide
9 to the court to persuade the judge that this
10 person should be allowed to testify." I think
11 there is money -- I know, again, years back in
12 Trial Defense Service that was a big
13 conversation.

14 I mean, hey, how do we do this? We
15 can't get there without -- and it's the rare
16 expert or the very dedicated expert that is
17 willing to come in and testify to establish that
18 they are needed for free, because if they don't
19 get retained, they're not getting that back.

20 And so, yeah, absolutely. I think --
21 I think -- I want to echo what Jeff said. There
22 needs to be a pot of money that the defense can

1 go to, and I think now with investigators also,
2 so that you can establish that kind of baseline
3 case for that additional assistance.

4 COLONEL MOORE: I think the current
5 system has actually worked fairly well in the Air
6 Force. I generally more often than not would see
7 experts that I did not have to compel as a
8 military judge, so that they were getting
9 appointed and funded. That's not to say that
10 Colonel Nance's proposal isn't superior.

11 I think the fact that I'm saying it
12 works in the Air Force and it doesn't work in
13 another service indicates that the process is not
14 as good as it should be. It shouldn't depend on
15 one service's implementation of it.

16 And to that extent, having Trial
17 Defense Services in charge of it does make sense.
18 You're still, as a judge, going to have those
19 circumstances where the individual defense
20 counsel doesn't agree with his boss' decision,
21 but I think you're going to see a lot fewer of
22 those than you do disagreeing with the prosecutor

1 as he advised the convening authority on granting
2 that expert.

3 CAPT PAYTON-O'BRIEN: I have actually
4 tried a case with Colonel Moore as a defense
5 counsel, and I will say that I was surprised,
6 because I came from the Navy, that the Air Force
7 did it, in my view, so well. There were multiple
8 experts granted by the convening authority, but
9 in the other services we struggle as defense
10 counsel to get experts just for purposes of
11 consultation. Do we need an expert?

12 And convening authorities often --
13 more often than not deny that, and I think that
14 for defense counsel that is a -- that's a
15 difficult road for them when they are trying to
16 evaluate their case, they think there is
17 something there, they are trying to find somebody
18 who might talk to them for free.

19 And as defense counsel, we all have
20 sort of that group of experts we can reach out to
21 just to, you know, have that five-minute
22 conversation. Do you think there is something

1 there? They won't charge us. But then in order
2 to do the evaluation, they need to be appointed,
3 and convening authorities resist.

4 I do a lot of appellate work now, and
5 I read records of trial, and I am often shocked.
6 I guess I shouldn't be because I know this is
7 happening, but I'm often shocked at how many
8 pages of transcript I am reading with the
9 government fighting over experts, you know,
10 hundreds and hundreds of pages on motions, and
11 the court not granting experts, or ultimately
12 granting the expert after, you know, a day of
13 testimony and fighting back and forth.

14 And I think the system needs to be
15 changed to allow the defense to have that
16 opportunity to seek consultation because we know
17 the government has it, right? They have all of
18 the tools at their disposal they can call,
19 although I would say that maybe even in the Navy
20 medical system many of the experts don't want to
21 be involved, and that presents a trouble for the
22 government as well. But I think the current

1 system does need to be improved upon.

2 MR. KRAMER: Why is it that they don't
3 want to be involved?

4 CAPT PAYTON-O'BRIEN: I don't think
5 anybody relishes the idea of having to testify in
6 court, no matter what side you're on.

7 COLONEL NANCE: Plus, it's a hassle.
8 It takes away from what they're doing on their
9 day-to-day --

10 CAPT PAYTON-O'BRIEN: Right. Our
11 military medical system is overstressed just with
12 patient care. I mean, see what is happening with
13 dependents and retirees. They are not
14 necessarily seeking treatment at the medical
15 facilities anymore because they can't.

16 There is not enough -- there aren't
17 enough doctors, not enough time, so now you have
18 a doctor who sees patients and has to be an
19 expert, and they are just -- they don't want to
20 get involved. There are some who love it. They
21 want to. But I would say that oftentimes you
22 will find the medical because they are stressed

1 on just doing patient care. They don't want to
2 be involved.

3 So we then look to the civilian
4 population. There are plenty of civilians out
5 there who do this for a living, and I would say
6 that I think the Navy has a pretty good pool of
7 who they utilize, and it's probably shared with
8 the other services as well. But it is difficult
9 to find the active duty to be involved.

10 MS. BASHFORD: That's a great segue
11 for Dr. Markowitz.

12 DR. MARKOWITZ: So this is an issue
13 near and dear to my heart. I am interested in
14 hearing from all of you because the services do
15 use experts differently, whether or not you
16 believe that experts are being used effectively
17 at trial.

18 CAPT PAYTON-O'BRIEN: So, in the Navy,
19 I would say that in the sexual assault cases
20 there would be experts involved. In every case
21 that I have ever tried, whether I was a judge,
22 trial counsel, defense counsel, there was some

1 sort of expert involved.

2 Do I believe they were effective?

3 Well, I think that sometimes is expert-specific.

4 But we're talking DNA; we're talking computer
5 forensics. There is this phrase that often is
6 batted about about cases are so much more
7 complicated today.

8 I would tend to disagree that the
9 cases are more complicated than they were 20
10 years ago, perhaps except with computer, cell
11 phones, you know, the Snapchat where things
12 disappear. Maybe that side is a little more
13 complicated because of just the forensics that
14 goes into that. And if you have trial counsel
15 who are young, who don't understand the computer
16 forensics and the phone, that can be problematic.

17 And I see it in transcripts I read,
18 and I saw it when I was a judge. I mean, I won't
19 tell you my age, but I can tell you that my 16-
20 and 18-year-old kids are way more proficient on
21 the iPhone than I am. I hand it to them. "Hey,
22 screenshot this for me. I'm not sure what to

1 do."

2 So if I'm a judge and I have that
3 difficulty, we can imagine that maybe some of the
4 counsel do as well. But do I think they're being
5 used effectively? I think for the most part yes.
6 But is it a fair playing field? I would say no.

7
8 I think that with the defense -- and
9 we go back to your question of having to ask for
10 the expert, you know, come sort of begging hat in
11 hand, "Please give us an expert. We need it for
12 this." And oftentimes the court might say,
13 "Well, you should be experienced in this. You've
14 done enough of these cases."

15 I know as a defense counsel when I
16 seek experts I often do get the response back
17 from the government that says, "You were a judge
18 advocate for 23 years. You were a judge for
19 nine. You don't need an expert. You're fully
20 versed in this." But I can't testify, so they
21 tend to miss that part that I need a consultant
22 to help me who may turn into an expert. But they

1 are denying because of the experience level of
2 just the counsel.

3 Admittedly, you know, the case law
4 indicates that I should be -- I should educate
5 myself, but that only goes so far, and sometimes
6 -- oftentimes we need an expert.

7 COLONEL MOORE: I would say most of
8 what I've seen from experts has been that they
9 have been very helpful and very well employed.
10 What I saw in my Air Force practice was the same
11 handful of experts over and over again working
12 equal number of cases on the prosecution and on
13 the defense side, which gave them great
14 credibility.

15 I can recall a few cases where the
16 experts were advocates in disguise, and that was
17 very easily revealed throughout the course of the
18 court-martial. And they were not effectively
19 employed, and they were not persuasive, and had a
20 really negative impact on the overall outcome of
21 that case.

22 But, by and large, many of the issues

1 that we are dealing with, particularly in sexual
2 assault cases, I have been much more enlightened
3 by hearing from experts. Alcohol is almost
4 always involved, and so the education I've gotten
5 on issues like blackout and on the effects of
6 alcohol on memory, those are invaluable to these
7 court members and to a judge sitting as a
8 court-martial in evaluating all of this evidence
9 that you have before you.

10 So my experience has been it has been
11 very effective, very helpful, and the experts
12 that I see on a regular basis have been very,
13 very professional, neutral, tell it as it is, and
14 have been very helpful.

15 COLONEL NANCE: I agree with what Wes
16 said. When an expert gets to trial, my
17 experience has been that most of the time, a vast
18 majority of the time, counsel -- both defense
19 counsel and trial counsel -- do a good job of
20 getting the pertinent information out of that
21 expert in a good way, in a good presentation.

22 I think they struggle, and I think

1 that's because the expert helps them, you know,
2 design their direct or cross-examination. But I
3 think where they struggle is in the decision and
4 in figuring out whether or not and how -- they
5 need an expert and how to get the expert. And
6 that's a product of lack of experience.

7 But I want to just add to that that I
8 think the HQE program, at least -- I don't know
9 if they -- if the Air Force or the other services
10 said it, but I think the HQE program,
11 particularly in the Army, they do a great job of
12 helping young counsel understand the expert
13 process and helping them make the decision about
14 whether an expert would help their case or not.

15 I think that's the question that young
16 counsel struggle with the most. Do I really need
17 an expert or am I just hypersensitive about
18 ineffective assistance of counsel and asking for
19 an expert when I really don't need one?

20 COLONEL GLASS: So I just want to echo
21 what other panel members have said. I think
22 discernment matters, right? So discernment of

1 not just, do I need an expert, but what are the
2 consequences to the timeline of my case if I call
3 an expert because often you are going to get a
4 kind of concomitant defense request for, you
5 know, an opposite expert.

6 And also, what are the consequences in
7 terms of evidence that is now admissible or
8 approaches that are now admissible? You don't
9 always see that. I would say, just to echo,
10 again, the testimony I have heard in my
11 courtrooms has -- from experts has almost
12 uniformly been when given, professionally done,
13 usually professionally cross-examined, sometimes
14 I have wondered, huh, why did he or she testify?

15 Especially when I am the fact-finder,
16 I'm like, well, why did I have to hear this? Or
17 what did this add to in terms of the development
18 of the case?

19 I have had instances in sexual assault
20 cases where experts have been almost dispositive
21 because of the -- because, you know, it just
22 strikes me always with young counsel, judges like

1 to learn. You know, sitting -- those of you who
2 have been judges, sitting on the bench every day
3 can get kind of dry, and so learning and
4 developing an understanding of how this works, a
5 good expert is a good educator. And so that
6 certainly has been interesting.

7 I want to give you a contrast. I'm
8 not sure exactly what it means, and, obviously,
9 we can't fund all cases like this. But I had --
10 I had the honor to sit as a defense counsel in a
11 capital murder case. And when you talk about
12 experts, because death is different, you get --
13 it's pretty much like a candy store of experts.
14 You get all you want.

15 And it is at least striking to me to
16 see the contrast of all you want versus we can't
17 figure out getting this expert to trial to give
18 both sides an adequate opportunity. It rarely,
19 in my experience -- and the others can certainly
20 correct me -- it rarely, in my experience, looks
21 fair, for Dr. Jones to come in and testify for
22 the government. And if any of you are Dr. Jones,

1 I apologize. Dr. Jones to come in and testify
2 for the government and there be nothing on the
3 other side.

4 So I'm not saying it can't happen.
5 Obviously, the standard allows that sometimes.
6 But in a capital world, for good reason, there
7 are millions of dollars spent on expert
8 witnesses. It seems to me that there could be a
9 greater balance in how we approach that.

10 MS. BASHFORD: Ms. Garvin, and then
11 Ms. Long.

12 MS. GARVIN: Thank you. Thank you all
13 for being here. I have an intentionally broad
14 question, so that you all can take it where you
15 want. And it's a compound question, but you all
16 can't object to it, which is fun, to have judges
17 on the other side.

18 So, really, just want you to share
19 your experiences with 412 and 513, and
20 particularly as the SVCs and VLCs have been
21 involved in those. What have you seen hopefully
22 post-2015 when they were amended? But, if not,

1 that's okay, too.

2 And with the constitutionally required
3 exception, which I find odd as an explicitly
4 drafted exception because, of course, it would be
5 there even if it wasn't explicitly in the
6 language, but what are your experiences? How are
7 you seeing that impact trial? Are you seeing it
8 impact trial? And what are you seeing with the
9 role of the SVC/VLC?

10 And, truly, wherever you want to go
11 with 412, 513. It has been something that has
12 been talked about quite a bit by this committee,
13 by other committees, and would love to hear the
14 judicial perspective.

15 COLONEL GLASS: Sure. I'll take the
16 tough legal question first. So I -- my
17 experience kind of runs the gamut, from the old
18 412 to the newer 412 to the new 412, and 513
19 doesn't exist, simple privacy issues, and then
20 litigating and expanding how we look at 513.

21 I would say generally that victim's
22 counsel in the Army, in my experience, are really

1 good on 412. And I don't know if it's because
2 they've been collaborative with the government
3 but are really good at saying "me, too." I don't
4 get a lot of new, nuanced arguments about -- or I
5 didn't get a lot of 412 or 513 from victim's
6 counsel where I said, "Huh, that changes the
7 landscape."

8 In that context, one of my concerns as
9 a judge, as the 513 system evolved, was I had a
10 couple of cases under the old 513, or maybe under
11 a misunderstanding of 513, where medical records
12 came in, were disclosed under a protective order,
13 and were huge in a determination of judicial
14 guilt, but may have also been huge in the
15 determination as to whether this thing ever
16 happened.

17 I've had instances -- not recently,
18 obviously, follow the law -- but I have instances
19 where there were personality disorders disclosed
20 in the release of medical records that went
21 directly to the claim.

22 And, frankly, and one of the medical

1 records said -- well, I won't give the specifics,
2 but said -- gave facts that undermined the
3 original claim of sexual assault, and had a
4 diagnosis of a personality disorder that was
5 among the DSM criteria, has a difficulty telling
6 the truth, which, you know, that's huge.

7 And so having litigated under a
8 different paradigm and released it, sure, it was
9 -- defense had a heyday with it.

10 So my concern I guess as a human and
11 as a judge was always, what don't I know, right?
12 What is out there that I haven't seen that may
13 a year or two years, maybe never, implicate
14 whether or not this was a just trial, whether
15 this is a just process, whether this was a just
16 verdict. So that's kind of my observations of
17 the system.

18 COLONEL NANCE: You know, and just to
19 sort of dovetail on that, I think my experiences
20 were similar to Andy's because our time in the
21 judiciary sort of spanned the same timeframe.

22 So I lived with and experienced myself

1 and struggled with the implementation of the
2 rules as they changed and, you know, sort of
3 coming to an understanding of what was required
4 and how logistically to go about it.

5 I'll say that unlike my current job,
6 as a military judge, I didn't have a law clerk.
7 It was me and me alone. And so when I would get
8 a stack of medical records this high to go
9 through and try to see if there was something in
10 there that needed to be released, man, I didn't
11 have the time to do it. I really didn't have the
12 medical expertise to be able to do it.

13 And I was always afraid I'm going to
14 miss something that should be released and not
15 and not release it because I just don't know what
16 I'm looking for or because I don't understand
17 what I'm seeing.

18 So that was always my fear. I mean,
19 maybe that was a good thing because it made me
20 more vigilant in reviewing those things. But it
21 really was a burden as a military judge to try to
22 have to go through that in the midst of a hotly

1 contested trial when I had a lot of other things
2 to do.

3 So, yeah, I mean, I think that,
4 though, as counsel became more experienced with
5 it, I saw the requests in those areas sort of
6 shrink, not just in terms of numbers but in terms
7 of the scope, so they learn to narrow their scope
8 and figure out what they were looking for, which
9 made life a little bit easier, and I think made
10 the chance of making a mistake reduced -- from my
11 perspective as the military judge reduced the
12 chances of me making a mistake on that front.

13 Wes?

14 COLONEL MOORE: I agree with Colonel
15 Nance. 513 made the job of reviewing
16 psychotherapist patient records immensely more
17 difficult. Sometimes you have to do the
18 difficult, and so the other side of that is I
19 think we do a much better job of protecting those
20 confidential records than we did before.

21 I think the default position before
22 513 was release everything, subject to a

1 protective order, and then we'll just fight
2 whether it comes out during trial or not, and
3 without much consideration to the fact that that
4 is a victimization, in and of itself, of
5 somebody, because so many of those records turn
6 out to be irrelevant.

7 That's one area where I think the VLCs
8 have been of value -- having somebody who is on
9 that victim's side who can talk through that
10 issue with them, and very often come back and
11 waive privilege as to huge amounts of the
12 records.

13 It turns out in many cases that there
14 was only this one little part of the records that
15 she really had any issue with anybody seeing.
16 And if the VLC could help you to narrow that
17 issue, they can help you to get to a better
18 quality decision.

19 But I echoed many times Colonel
20 Nance's feeling of inadequacy to be doing this,
21 just from the terms of knowing what you are
22 looking at and making the right call, so you have

1 to have your own DSM out and looking at things
2 like that.

3 COLONEL NANCE: That's malpractice.

4 COLONEL MOORE: Probably so. So when
5 we talked about experts before, having an expert
6 available to the court maybe to talk to on a
7 confidential basis on something like that would
8 have certainly been helpful, and helpful in
9 defraying that workload issue as well.

10 COLONEL NANCE: Exactly. That's a
11 good -- that's a good thought. I think that's a
12 good thought.

13 CAPT PAYTON-O'BRIEN: So I have tried
14 cases as a prosecutor under old 412, tried cases
15 as a judge under new 412 and newer 412, and of
16 course even newer 513. We talked early on about
17 the training we had had as judges, and the annual
18 sexual assault-focused training for judges was
19 invaluable to sort of navigate, okay, what are we
20 doing now, and how are we doing it, and who has
21 suggestions on what you do?

22 Perhaps I got it wrong on more than

1 one occasion. I can think of at least one case
2 that the court said I did it wrong under
3 constitutionally required. But it could be a
4 struggle, right? If you don't have a court
5 expert -- and I have used a court expert in one
6 case because I had a -- it was a mental health
7 issue. It wasn't even sexual assault.

8 It was a mental health issue for an
9 offender, and so I think using a court expert
10 would be invaluable when you are going to be
11 evaluating mental health records, to determine if
12 anything needs to be released.

13 The comment about the requests are
14 shrinking, I would agree that it seems that the
15 number of requests and motions that I was
16 receiving towards the end of my time on the bench
17 seemed to drop. Or at least, to be frank, some
18 of the motions were the same every case. I need
19 the mental health records because she saw a
20 therapist.

21 That's not helpful. I mean, seeing a
22 therapist was not necessarily what you needed.

1 You needed to know if she had a mental health
2 disorder.

3 The problem for the court and for
4 counsel is, yes, they might know that somebody
5 sought mental health treatment, but they don't
6 know why. And so what are we missing? What
7 don't we know? And sometimes counsel struggle
8 with that because the VLC is doing a great job in
9 protecting their client, but the prosecution may
10 not know what is out there. The defense may not
11 know. They just know there is something.

12 And at least in one particular case I
13 can recall, not for me as a judge, the mental
14 health issue came up in sentencing. And so then
15 now there is this -- we have to continue the case
16 and look and see what that is.

17 That's too late in the game for that
18 issue to be now vetted. I mean, it's very late
19 in the game because it comes up in a victim's
20 statement during sentencing. And while in the
21 old days we would look at 513 records for -- and
22 I think I did this. I'm certain others did as

1 well. You would look for prior inconsistent
2 statements. Of course, that's not what we do
3 now. We look for the mental health disorders.

4 But I can think back when we were
5 releasing records, if there were prior statements
6 in there.

7 Now trying to find the mental health
8 disorders that might be there, and counsel for
9 both sides are still unaware of what they are,
10 presents a challenge for the court, because we
11 are being asked to rule on 513 motions without
12 all of the information.

13 Defense counsel motions, well, we
14 think there is something there. Do you have
15 anything more than that? No. Okay. So our
16 hands are tied by the law.

17 MS. BASHFORD: Ms. Long?

18 HON. GRIMM: This is --

19 MS. GENTILE LONG: And I think then
20 Judge Grimm. Thank you again.

21 HON. GRIMM: Yeah. I --

22 MS. GENTILE LONG: I want to go back

1 to an issue that came up -- I think both Colonel
2 Glass and Colonel Nance raised it -- about
3 command decision and cases going forward that may
4 not -- that the command or someone may not
5 actually believe there is a credible claim or
6 that the person did it, which I -- is something
7 that when you said it is concerning.

8 And I'm curious, sort of like the
9 Article 32, if there is some solution you could
10 think of where that command decision to go
11 forward could be subject to attorneys, if there
12 is an ethical issue -- and I understand that from
13 the civilian perspective and from the military
14 justice perspective sometimes we differ in terms
15 of the ethical obligations of the prosecutors
16 going forward.

17 Sometimes we have had arguments about
18 whether the rules of professional -- not you and
19 me, but in trainings -- whether the rules of
20 professional responsibility apply, but obviously
21 we -- in the civilian world, and I would say in
22 any world where we have a criminal case, you

1 don't ever want to just be throwing it up to
2 someone if you don't believe a crime has
3 happened.

4 So is there a solution that checks the
5 decision-making to ensure that cases that
6 ethically should not be done -- I'm not talking
7 difficult cases that are complex where we don't
8 know what a jury would do. I'm talking about
9 cases that do not have admissible evidence or do
10 not have credible testimony, and "credible"
11 meaning there is no testimony -- we don't believe
12 the complainant and/or we don't have admissible
13 evidence, and someone is throwing that up because
14 they're afraid of not getting promoted.

15 Is there a check on that that you
16 could recommend?

17 COLONEL NANCE: Well, I haven't
18 thought of one. But I really believe in our
19 commander's system. And I believe we are
20 different. Military justice is different, and I
21 believe that it should be different. I believe
22 that the commander being involved in the system

1 is hugely important.

2 Will there be times when commanders
3 make an unethical decision? I suppose so. But I
4 think that happens in the civilian justice system
5 as well. I mean, I have never worked in it, but
6 I have paid attention to it. And I think it
7 happens there as well.

8 My experience has been that -- and,
9 again, we're not talking about the close
10 call/flip a coin cases. We're talking about the
11 unethical decision. I have not seen that, and I
12 think -- and I have advised commanders about
13 referral. I didn't spend my entire time as a
14 military judge, although I would have liked to.
15 The commanders take the decision seriously.

16 My experience has been that they take
17 their duty to the system seriously, and though
18 they may feel pressure at times to let the -- and
19 I hope I didn't infer from my earlier comments
20 that commanders were sending cases that ethically
21 they should not have. But do they feel pressure
22 from without and from the civilians that oversee

1 our military justice system sometimes? Do they
2 feel pressure to send a case that maybe they are
3 not, you know, sure about?

4 I think they do. But I don't -- I
5 have not had the experience where they know a
6 case is not a true case, not a case that has a
7 chance in the world of success at trial, and they
8 -- and they refer that case to trial knowing
9 that. I haven't experienced that.

10 COLONEL GLASS: So I think any honest
11 response to this question involves this
12 disclaimer. When you're a judge, more than any
13 other time in this process, you don't know what
14 you don't know. You don't know what has gone on
15 behind the scenes. You don't know if a -- well,
16 you should know if a witness doesn't show, but
17 you don't know what a witness was supposed to
18 say.

19 So with that caveat, I think there are
20 what I would call bulwarks against that in the
21 system. The question is whether they work and
22 whether those bulwarks are supported

1 sufficiently. So I will just give you -- so I
2 certainly have sat in a courtroom as a judge
3 thinking, how did this get here? I don't even
4 see why we're here. Not he said/she said
5 credibility call.

6 I would tell you extremely
7 infrequently, and I don't know what happened in
8 the SJA meeting with the commander, but I do know
9 that when I have sat in classes -- so there is a
10 process, at least there used to be a process in
11 the Army where you have things that are called
12 bridge the gap, which is after a trial tell
13 people -- kind of mostly -- it's supposed to be
14 technically what they did right or wrong.

15 That waxes and wanes in the service,
16 but there is -- also, you are supposed to do
17 something called gateway sessions where you train
18 prosecutors and defense attorneys and talk about
19 legal stuff. I have sat in those systems or,
20 excuse me, in those classes and said, "Why are
21 you applying a different standard" -- if you are,
22 "Why are you applying a different ethical

1 standard to sexual assault cases than you would
2 from just a general crimes case?"

3 More emotional, complicated case, I've
4 got all that, but it's the same ethical standard.
5 I have also sat in a room where I thought we were
6 narrowly close to referring just to see what
7 happens, and I think that expression -- I'm not
8 -- in the use by Colonel Nance, but that
9 expression in the system is problematic. That's
10 not how the system works.

11 We don't just throw things up against
12 the wall because there is a service member's life
13 on the line. There is an alleged victim who has
14 to come in and pay this price, which there is
15 always a significant, difficult price for that
16 person.

17 And I think you can do a couple things
18 to try to make it better. You can vest people
19 with experience, so that when they stand up and
20 say, "Hey, this doesn't work" -- and I fully
21 agree the commander -- it's a commander-based
22 system, and it ought to be a commander-based

1 system.

2 You can train, right? The Army is
3 really good at training, and the Army is really
4 good at standards. We need to not lose what that
5 standard is. I'm fine with the DOJ standard,
6 right? Civilian Andrew Glass is fine with it.
7 But if that's the standard, we need to train to
8 that standard, and we need to tell people it's
9 okay to walk away when you don't meet that
10 standard.

11 And then some of this is just whoever
12 is advising that commander, whether it's an SVP
13 or an SJA, them having the moral authority to say
14 in writing -- I never had a problem with saying
15 in writing. Maybe it's just my lack of
16 intellect. I don't know. But I was always one
17 to say, "Sir, you shouldn't do this, and here is
18 why."

19 And then some of this, with all due
20 respect, falls to the politicians. Every time a
21 decision doesn't go the way we want it to go, if
22 there is a lynching or a cross-burning, or

1 whatever your chosen metaphor is, because the
2 commander made a tough call, we've got to take a
3 step back and understand that's what we pay
4 commanders to do. That's ultimately what -- we
5 vest them with that authority.

6 And so I think there are ethical
7 protections involved. I think we need to train
8 them more. It shocks me sometimes -- well, not
9 anymore, but it used to shock me when I'd sit
10 there with young captains and say, "What's your
11 ethical standard?"

12 Real quick war story. We don't
13 believe her. In a he said/she said, we don't
14 think she is telling the truth. She has
15 affirmatively lied to us in the past. How do we
16 meet the ethical standard? How can we take that
17 to a courtroom? If that's all there is, there's
18 no forensics, there's nothing else. To me,
19 that's -- I don't know if it's easy. It's never
20 easy, but it's straightforward. That's not a
21 case that goes to trial.

22 COLONEL MOORE: I would say, first of

1 all, as a staff judge advocate, I got the honor
2 of working with commanders who, by and large,
3 actually universally were some of the most
4 impressive, loyal, and courageous people that I
5 have known. And so, to me, the implication that
6 they would fail to make the tough decision
7 because of career implications, I have not seen
8 any evidence to support that.

9 That being said, I believe, at least
10 when I was a staff judge advocate, if the staff
11 judge advocate in his advice to the convening
12 authority said there is no probable cause to go
13 forward, then that took the matter out of the
14 convening authority's hands. He did not have the
15 authority to refer over that recommendation. So
16 there was at least that check in the system
17 before going in.

18 Another thing that I always
19 experienced -- and I have advised commanders not
20 to go forward on charges, and we have decided not
21 to go forward on charges. And one of the things
22 that we always did was coordinate that decision

1 with the victim's counsel and with the victim.

2 Much like you don't see people suing
3 their doctor for malpractice if the doctor has a
4 good bedside manner, there is a lot to be said
5 for having that relationship with the victim.
6 And even if it's going to be a negative decision,
7 that you thoroughly explain why you're doing that
8 and what all of the thought process was. And I
9 have never had that come back on a commander for
10 doing that.

11 So that's the only comment I had.

12 Thank you.

13 CAPT PAYTON-O'BRIEN: Well, as a
14 prosecutor, I can recall on occasion doing those
15 memos saying, "I don't believe this occurred."
16 That's my personal belief. Does that mean it
17 didn't happen? I can't speak to that. I can
18 just say what the evidence is telling me.

19 I also, though, believe that in the
20 current system that because we do have some
21 inexperienced or not overly experienced
22 prosecutors handling sexual assault cases, their

1 personal belief that there is nothing here, or
2 their personal belief that I don't find the
3 victim credible, causes concern for whether or
4 not they really can evaluate a case.

5 And does that make them then, if they
6 make that expression, "I don't believe her; don't
7 go forward," and then the government chooses to
8 go forward, does that put that government counsel
9 in an ethical quandary? I would suggest no.

10 I mean, there are certain cases -- I
11 concur with Colonel Glass, yes, there are cases
12 that came across the bench when I was on -- when
13 I was on the bench that you did have to think,
14 wow, how did this get through a 32? Did anybody
15 ever talk to this person, this victim? Did they
16 know what he or she was going to say when they
17 came in here? How did it get here?

18 I was the fact-finder on a case that
19 ended up at trial where I convicted, and then it
20 came out in the press later that the convening
21 authority had concerns about the case from the
22 get-go. And the question is, well, then,

1 convening authority, if you had concerns, why was
2 it at court-martial?

3 Why did you feel it necessary to throw
4 it up at the law? If you believed, convening
5 authority, that it shouldn't have been there, why
6 did you send it? Because from my perspective as
7 a court, there was sufficient evidence. What was
8 it that caused your concern?

9 And sometimes it's that evidence that
10 doesn't come into court, that we don't see. We
11 don't know everything that is going on behind the
12 screen. But convening authorities need to have
13 that ability to say, "I'm not going to take it."
14 Don't just throw it up there and let us try to
15 figure it out or let members try to figure it
16 out.

17 What's the solution for that? I'm not
18 sure. I just know that commanders need to be
19 able to make the hard calls. That's why we pay
20 them the big bucks to do so. They are to make
21 the tough calls. And sometimes they have a
22 prosecutor that may not be giving them the

1 correct advice or good advice, and the staff
2 judge advocate, the same thing, because of a lack
3 of experience.

4 MS. GENTILE LONG: Thank you.

5 MS. BASHFORD: Judge Grimm?

6 HON. GRIMM: Thank you very much. I
7 wonder if we could --

8 MS. BASHFORD: A little bit louder,
9 please.

10 HON. GRIMM: -- take advantage of your
11 -- can you hear me now? I hope you can hear me
12 now. I'd like to take advantage of your
13 experience to shift to another part of the
14 process, namely sentencing.

15 We heard information not from judges
16 we heard that active duty military judges were
17 reluctant to speak to our committee because they
18 felt that they should not be, because of
19 appellate decisions, explaining a reasoning for a
20 sentence that they imposed at a court-martial,
21 that they should just simply announce the
22 sentence and not explain the reason.

1 When we look at the actual sentencing,
2 and we're trying to see whether it was
3 confinement or some other sentence that was
4 imposed, when the military judge was imposing a
5 sentence, the announcement of a sentence and the
6 reason for it is an enormous portion of the
7 sentencing process in the federal system.

8 And because we have sentencing
9 guidelines that likely would not smartly be
10 transferable to the military, that are very
11 complicated and are an enormous portion of the
12 sentencing process in federal court, one thing
13 that they do is they require an explanation by
14 the court as to how the court evaluated a number
15 of factors to include the seriousness of the
16 offense and the prior history and characteristics
17 of the defendant and a sentence which is
18 necessary to serve the purpose of sentencing.
19 And there are a lot of other factors that go into
20 that as well.

21 I have met with active duty military
22 judges and was requested to -- to talk about how

1 sentencing occurs in federal court, and there is
2 much of what happens in federal court sentencing
3 that would not be, in my judgment, good to be
4 adopted by the military.

5 But one thing that does strike me as
6 being important in the sentencing process where I
7 live is that if you experience a concern, or a
8 reluctance to comment on why it was that you were
9 imposing a sentence, just because you were afraid
10 that the appellate court -- not afraid, but you
11 had gotten guidance from the appellate decision
12 saying if you did that you were doing something
13 wrong.

14 And, secondly, do you have any
15 thoughts, now that you are retired, about whether
16 or not the convening authority should have the
17 ability to change a sentence when that sentence
18 has been found by a court-martial and imposed by
19 a military judge or by members?

20 COLONEL GLASS: Judge, this is Andrew
21 Glass. So, first of all, with regard to the --
22 going through the process, I think -- and I'm

1 sure you appreciate a little bit of it is that in
2 terms of active duty judges speaking to
3 sentencing, or speaking in this forum, is a
4 concern that something you say may or may not be
5 misconstrued as taking a position that is adverse
6 to either the prosecution or the defense.

7 With regard to the appellate issue, I
8 can tell you back as a baby judge, there were so
9 many times -- and this isn't directly responsive
10 to your question, but there were so many times
11 where I really felt like the -- in non-sex cases
12 -- I felt like the accused really just needed a
13 good butt-chewing and really needed to have
14 somebody in a judicial robe tell them they're on
15 the road to perdition, and that that would have
16 as much impact, maybe that plus jail or that --
17 and I will tell you in all candor, I have done it
18 before in cases in which I didn't give jail time
19 or a sentence that was necessarily going to
20 quality for an appellate review, an automatic
21 appellate review.

22 I don't see, frankly, any real issue

1 with -- well, I don't see many issues with
2 allowing judges or requiring judges to give some
3 reason for their sentence, but, again, some of
4 this goes back to how long have you been a judge
5 and knowing not -- what not to say in that
6 context, not stepping in it when you say
7 something, and not being contrary to what you are
8 -- we only have certain things we can do in
9 sentencing, not being contrary to those things
10 that you're allowed to do, not -- and so think
11 about this.

12 You're junior lieutenant colonel,
13 maybe just promoted, walked into the job and you
14 haven't done justice in five years. And you've
15 been trained, you've been to the judges course,
16 you've been through all of these things. Are you
17 -- and you have a different appellate system.

18 I think it bears mentioning that there
19 is mandatory appeal, no accused has to pay for a
20 transcript to be prepared, no accused -- at least
21 on the first level of appeal -- has to pay for
22 their attorney. Awesome -- awesome protections

1 for service members, but everything I do goes up.

2 And so what are the chances that in
3 that system you want that junior lieutenant
4 colonel to get up and say explicitly what
5 happened. So that's one piece.

6 With regard to the convening authority
7 changing the sentence, I believe convening
8 authorities ought to have the ability to change a
9 sentence. Simply put, I have -- as a defense
10 counsel, when I was young, was able to mitigate
11 sentences for individuals into, for example,
12 non-felonies from felonies, where they got a low
13 sentence because they -- it was a relatively
14 mitigated case, and make a huge difference in
15 those service members' lives.

16 I think sometimes, particularly at
17 some of the warfighting divisions and corps, you
18 will get outlier sentences that are too harsh and
19 that need to be mitigated.

20 So I think the failure to have that
21 ability to do that would be concerning. And I
22 think if you want a fair system, it doesn't look

1 good if at Fort Lee Bob gets two years and at
2 Fort Campbell, same set of facts, he gets 50.

3 And so I think that has always been a
4 check on the system. And, again, I want to echo
5 what I have said before and what other panel
6 members have said, that we trust these folks with
7 a heck of a lot of responsibility. And, yes,
8 sometimes they, quote-unquote, "get it wrong" by
9 public perception. But most of the time we trust
10 them to get it right, and they do get it right.
11 And so that's my perception of how that system
12 should operate.

13 COLONEL NANCE: Judge Grimm, this is
14 Jeff Nance. I would be really afraid of a system
15 that would have judges explaining the reasons for
16 their sentence in our current military justice
17 system where we don't have sentencing reports, we
18 don't have sentencing guidelines, and that sort
19 of thing.

20 My fear would be, as Andy mentioned --
21 well, let's put it this way. We would certainly
22 increase the work of the appellate bar. I think

1 whether or not a judge said something that he or
2 she shouldn't have said during explanation about
3 their sentencing, we're going to have more
4 appeals if we do something like that.

5 Is that a reason not to do it? I
6 don't know. I think that thought tells me that
7 the chances of a judge saying something that is
8 either wrong or could be construed as wrong in
9 that process would increase. And so if we did
10 something like that, I think it would be -- need
11 to be very, very narrowly focused.

12 Right now I do bond hearings in the
13 courts that I practice in now. And when I --
14 when I deny a bond or grant a bond, I say -- I
15 find that the respondent would be a danger to the
16 community because of this conviction and this
17 arrest for this offense. Or I find that the
18 respondent would be a flight risk because, and I
19 leave it at that.

20 So something along those lines would
21 have to be implemented to prevent judges from
22 saying things that they perhaps shouldn't say in

1 explaining their sentence.

2 You know, I guess everybody probably
3 knows how I would come down on the ability of the
4 convening authority to change the sentence. I
5 believe in the commander system. I trust our
6 commanders. And I think that they need to have
7 that option, that escape valve option, to correct
8 the -- what I will call the very rare mistakes
9 that occur in cases before they get to them.

10 But the rarity of them doesn't
11 diminish the significance of those mistakes. And
12 having a convening authority who has the ability
13 to say, "Hey, this was wrong, I'm reducing the
14 sentence" is indispensable.

15 COLONEL MOORE: I would say with
16 regard to articulating the basis for a sentence
17 there has to be some standard against which that
18 articulation would take place. If the standard
19 is you are giving a sentence somewhere between no
20 punishment and 30 years' confinement and a
21 dishonorable discharge, there is really not any
22 reviewable way that you are going to be able to

1 articulate how you arrived at that, in the
2 absence of some standard that is already pre
3 promulgated and that is out there.

4 Now, as judges -- if you give us a
5 standard, we will be able to articulate why we
6 are complying with that standard. We do that
7 when we are dealing with challenges for cause.
8 We know what the standard is for granting that
9 challenge. We can articulate that standard. We
10 can say why this fits within that standard.

11 But if the standard is just, you know,
12 from no punishment to dishonorable discharge in
13 30 years, then there is really not a framework
14 for us to make those comments.

15 I will say, as much faith as I had in
16 military juries to arrive at a finding of guilt
17 or not guilty, in talking with military juries
18 after trial they felt completely at sea when it
19 came to the issue of sentencing, almost
20 uniformly, just because of the lack of any real
21 standard between that minimum and the maximum.

22 And so, as a judge, at least I had the

1 experience of having seen enough cases to have
2 kind of an internal barometer, but really nothing
3 more than that. And so, in the absence of
4 standards, I don't know that we would be able to
5 articulate the basis for the sentence in any
6 meaningful way.

7 As far as the convening authority's
8 ability to review and to modify the sentence, I
9 think any system has to have somebody with the
10 clemency power to take care of unforeseeable
11 results. Many times what you get coming out of
12 the back end of a court-martial has no
13 resemblance to anything that anybody foresaw
14 going in, and sometimes that is an unjust result
15 and somebody has to have the power to correct
16 that.

17 CAPT PAYTON-O'BRIEN: I'll start
18 backwards. I'll start with clemency. When I sat
19 on the Court of Appeals, we used to receive
20 sentence disparity assignments of error
21 regularly. And I know we occasionally would
22 grant the assignment of error and grant some sort

1 of relief in sentencing, but that was rare.

2 Some of the language we would use is
3 that that's clemency; we're not in the position
4 to do clemency. That's not our job. That's the
5 convening authority's job.

6 I don't think the convening
7 authorities should just be limited to perhaps
8 correcting errors, but to grant true clemency,
9 and they don't have that ability in most cases
10 now, to grant clemency. So, the defense counsel,
11 where traditionally they could go to the
12 convening authority and ask for clemency
13 post-trial, there's really that limited power
14 now. There's not much that the convening
15 authority can give them in clemency.

16 And I would add that the clemency
17 post-trial matters are submitted very quickly
18 after trial. If your argument to the convening
19 authority as a defense counsel is I want
20 clemency, if you only have 10, 20, 30 days, maybe
21 you could argue that clemency should be granted
22 just as a matter of the type of case it was. But

1 if you're looking for some sort of post-trial
2 conduct that was good on the part of the
3 offender, there isn't any within the first month
4 of trial. If they went to the brig, they don't
5 have good conduct at the brig yet to rely on.
6 Did they do something good for the government
7 post-trial? Ten to 30 days doesn't give a good
8 measure of what their assistance might have been.

9 So I do believe that the convening
10 authority should have that power to be able to
11 not only correct any mistakes, but also to just
12 grant pure clemency because that traditionally
13 was their role. That's where the clemency came
14 from, not from the appellate courts.

15 When I was, I think to use Colonel
16 Glass' analogy or statement, a baby judge, I
17 would very rarely comment on what I gave as a
18 sentence. When I became a little more seasoned
19 after seven-eight years, I perhaps on more than
20 one occasion would give those comments, but they
21 were very limited, because, perhaps, I was
22 concerned.

1 I sat on the appellate court. I can
2 recall receiving records of trial going, ooh, why
3 did the judge say that? And so, it was a bit
4 concerning to be worried about what might be
5 evaluated of what I said. And if I said
6 something, was I going to be challenged in the
7 next case because I made a comment about why I
8 had adjudged a certain sentence? Maybe I should
9 have been more deterred in some of the things I
10 did say, but I did make comments about sentences
11 on occasion, and some of those might have been in
12 the cases that didn't reach appellate review
13 because there was no record.

14 The members have no sentencing
15 guidelines. We have no sentencing guidelines. I
16 think we should have sentencing guidelines. I
17 think saying to members, you can sentence up to
18 30 years, 50 years, whatever it is, or even to a
19 judge, from zero to 50, where do you come down?
20 I know, as a judge, I kept a binder of every case
21 I did and every sentence I awarded and what the
22 charges were, so that I could look back and see

1 what have I done in prior cases.

2 Every case was treated individually,
3 but I had a record of how I treated other cases,
4 too. And if there were unusual sentencing
5 matters, extenuation, mitigation, I'd make a note
6 of that, but members don't have that. They have
7 the prosecutor asking for 20, they have the
8 defense counsel asking for six months, and they
9 come down wherever they come down.

10 And so now, even in the appellate
11 world, you see individuals convicted of sexual
12 assault. Some have very great sentences. Some
13 have very little sentence. How is that a fair
14 system? How can an offender who maybe pleaded
15 guilty, or maybe he didn't, but why is the system
16 set up so that he's serving seven years and the
17 guy in the cell next to him is serving two for
18 almost the same exact offense? I think
19 sentencing guidelines are appropriate.

20 MS. BASHFORD: I'm going to ask the
21 panel if you would indulge and stay with us just
22 for a few more minutes. We are a little bit past

1 11:00, but I think there are some more questions.

2 And I have one. We've been talking
3 about sort of the upstream of the process, the
4 cases that are getting referred to courts
5 martial. I'd like to just shift a little bit to
6 downstream.

7 When presiding as a judge with a
8 member panel, have you been surprised at a
9 verdict, that the members are acquitting when you
10 would have found somebody guilty, particularly
11 when there's issues of incapacitation by alcohol?

12 COLONEL MOORE: I would say not very
13 often because, when you a try a case to a panel,
14 as a judge, you approach it from an entirely
15 different mindset. I very rarely engaged in the
16 idea of what my result would have been because I
17 have so many other things to deal with in
18 instructing the panel and in ruling on all of the
19 evidentiary objections. And I'm not sure it was
20 particularly helpful. I also wanted to keep my
21 mind open, so that nothing that went into my
22 instructions came across as slanted in one way or

1 the other.

2 And so, I think when you're trying a
3 case before a jury, your mindset is so different,
4 that it's very rare that you would even make that
5 calculation of whether they've got it right or
6 wrong. I have many times, when I'd go talk to
7 members afterwards, they would ask me if they got
8 it wrong or if they got it right. And I'd say,
9 if you went through the process and you believe
10 in your verdict, then you got it right.

11 So, I would say the other thing is
12 that, again, I think member panels do an
13 extraordinary job of listening to evidence and
14 applying the instructions and getting to the
15 right result. So, it was very rare -- I mean,
16 there were cases, and perhaps it's the court
17 reporter who is the better barometer because
18 there were cases where I'd ask the court reporter
19 what he thought the result was going to be, or
20 she. And they'd usually be within like 10
21 percent one way or the other. So, they might be
22 the better barometer.

1 But I was very rarely surprised by the
2 findings. I was frequently surprised by the
3 sentence, just because the sentences varied so
4 greatly and because members had so little
5 guidance on how to come down within that
6 spectrum.

7 COLONEL NANCE: I'll be quick. I
8 can't improve on anything Wes said there. I
9 mean, that's my experience exactly.

10 COLONEL GLASS: So, I agree with what
11 Wes said about how you listen to a case. And
12 remember, we have no JNOV authority. If it meets
13 the basic threshold of R.C.M. 917 really, which
14 is what I'm listening for, there have been times,
15 with that caveat, where I've thought, wow, how
16 did they get there? Remember, you're talking --
17 I don't know how many -- you're talking about
18 very few in what seems like at least, maybe just
19 because I'm aging, hundreds of cases.

20 And I would also mirror what Wes and
21 Jeff said vis-a-vis sentence. The time where
22 there's usually a point where you're like,

1 really?, is the sentence. And I would tell you,
2 frequently, that's to the harshness of a
3 sentence. I was known by the defense bar as a
4 very harsh sentencer. And there were times where
5 I would hear a sentence and think, wow! And on a
6 very, very few occasions I actually wrote a memo
7 to the convening authority, when they had that
8 authority to change the sentence, saying that --
9 I would say very fair; I think it's twice --
10 where I would have sentenced much differently.
11 But that's my observation.

12 CAPT PAYTON-O'BRIEN: I would agree
13 with Colonel Glass on the sentence, but my wow
14 was more the leniency in sexual assault cases of
15 sentences. Members don't have any parameters
16 other than what's being asked for by either side,
17 and they come back completely away from anything
18 that any side asked for, and less. And that
19 sometimes was a surprise. But, then, again, they
20 don't know what cases are, in our view or the
21 prosecutor's or the defense counsel, worth. They
22 just sentence, and I know they take their job

1 seriously because I've interviewed or discussed
2 with members afterwards just their job and what
3 they do. And they take their oath very
4 seriously.

5 But I've had members also express
6 concern about that was a really tough case. Yes,
7 it was, from all sides. But did I ever think
8 they got it wrong on a verdict? No, because I
9 don't go into it from that perspective of what
10 would I have done? And I've had counsel come to
11 me afterwards, so what would you have done,
12 Judge? It's irrelevant what I would have done
13 and I didn't think of it from that perspective.

14 COLONEL NANCE: And I just had an
15 alibi. I think one of the greatest strengths of
16 the military justice system is our professional
17 juries, essentially panels. I think they are
18 smart and they take their duties seriously. They
19 have tremendous experience. And my experience
20 has been that the vast majority of the time, into
21 the 90 percentiles, they're getting it right.

22 MS. BASHFORD: That I think, though,

1 brings us right back to the acquittal rate.
2 Because if the members are getting it right --
3 and I do disagree with Ms. Long -- I think these
4 rates are pretty much unheard of in the civilian
5 system. And I certainly know we brought really
6 difficult cases and had much, much higher
7 conviction rates. So if the members are getting
8 it correct 90 percent of the time, then the
9 problem seems to be back upstream, if you agree
10 there is a problem.

11 COLONEL GLASS: Before, ma'am, so the
12 question I would ask back, at least the
13 rhetorical question is, how long have your
14 prosecutors been doing that job? And the reason
15 I go back to that is because I think it just
16 matters. So, when you look at the most
17 experienced prosecutor in the Army, I don't know
18 what the number is, but it's five-seven years
19 prosecuting cases. That's just not the way it is
20 in district attorneys' offices, and that makes a
21 difference, especially with these cases that are
22 almost always -- well, that's an overstatement --

1 very frequently, almost like dormitory room, the
2 analogy is dormitory room Saturday night, a lot
3 of alcohol, little supervision, if any, and it's
4 a he said, she said, and she may not or he,
5 whoever the victim is, may not remember.

6 And so, I think what we're saying is,
7 based on what we see come into the courtroom,
8 based on the evidence that's developed and
9 presented, generally, we think they do a very
10 good job of reconciling some very difficult
11 issues, and they take it very seriously. Almost
12 always, if not the entirety of your panel,
13 college-educated; the vast majority is
14 college-educated, experienced people.

15 But the reason why I keep banging this
16 drum is because, ultimately, to me, this part is
17 not rocket science. This part really comes down
18 to, when you're asking somebody to try some of
19 the very, very hardest cases, often without
20 quote-unquote objective evidence that's forensic,
21 sometimes with, you're asking, that's a tough
22 carry for Major Jones who is the experienced

1 prosecutor, even if they have highly-qualified
2 experts to talk to.

3 And you all know this if you've tried
4 cases. Some of that is just the field. Okay?
5 What I've heard -- and pardon my horrible German
6 -- referred to as *fingerspitzengefuhl*, which is
7 just the feel, the knowledge. I've been on my
8 feet so many times arguing this issue where I've
9 felt this is what's going on I need to change.
10 Then, some of it is the develop people skills to
11 be able to pull those difficult facts out of the
12 victims.

13 And so, I don't think they're
14 unreconcilable. I think they're very
15 reconcilable. I think that some of it is -- and
16 I would tell you, going back to a question you
17 asked, ma'am -- as an SJA, I know that they
18 turned down the cases because they said, nope, we
19 don't want anything to do with this case. And
20 some of that is just a fact. But I don't think
21 that's the prevailing fact.

22 I think the prevailing fact is that,

1 as good as these young men and women are, that we
2 don't keep them in these positions in the Army --
3 I can't speak to anything else -- where they
4 develop that feel, where they develop the ability
5 to know this is a good case, this is how you
6 present this evidence.

7 I'll give you a real quick anecdote
8 because I think it matters. I had a case where a
9 Special Victims Prosecutor came in and tried to
10 introduce what were essentially outcry evidence,
11 arguably from a victim. We don't have an outcry
12 exception to the hearsay rule. The outcry
13 evidence was an excited utterance. Puts on the
14 alleged victim. She testifies and says, I called
15 my best friend and I was upset and I cried, and I
16 told him the whole story. When did you call?
17 Things were so crazy I don't remember.

18 Okay. So, we all know that there's
19 some exceptions for -- it could have been a day,
20 a month, a week. Really good cross examination.
21 I don't remember. We know there's exceptions for
22 child victims extending out that time, but I have

1 no timeframe. So, how's it an excited utterance?
2 How's it admissible? So I don't admit it.

3 A different witness testifies at
4 trial. She's the best friend. She says, I
5 talked to her the next day. Okay? Probably an
6 excited utterance. Probably falls under it
7 because she meets the other piece, and it was a
8 late-night kind of assault.

9 The experienced Special Victim
10 Prosecutor does not attempt to reintroduce that
11 evidence. And when told about it in bridge the
12 gap says, I didn't know I could use more than one
13 witness, and kind of seems to imply that I should
14 have sua sponte introduced the evidence, which
15 kind of seems finger on the scales.

16 So, to me, that's why I keep hitting
17 that. I think that that's the difference. I
18 think that some of it is more difficult cases,
19 and offline we can talk about some of those
20 cases. But I think some of it is just it matters
21 when you've spent time, reps matter.

22 COLONEL MOORE: I think perhaps the

1 difficult decision is, what is a healthy
2 acquittal rate? I would submit zero is unhealthy
3 because it means we're not taking the difficult
4 cases. Eighty percent is probably unhealthy as
5 well. What is the middle ground in there that is
6 an indication we're still taking the tough cases,
7 but we're not unnecessarily incurring all of
8 these costs?

9 Because there are costs for everybody
10 involved in prosecuting a court-martial. There's
11 costs to the victim in going through the whole
12 process of being interviewed, being cross
13 examined at trial. There's costs to the accused.
14 Airmen facing court-martial are among our highest
15 suicide risks. And if we really care about that,
16 we have to be thinking about incurring that cost
17 as well when we go into the prosecution decision.

18 And so, if we're going to incur all of
19 this cost, what is going to be enough to say it's
20 worth those costs? I think we have to start with
21 investigations. The investigations have to be
22 more thorough. Investigators have to feel at

1 ease to ask the tough questions of alleged
2 victims. I don't think that they always do.

3 I think especially in the last 10
4 years or so there has been a real tendency for
5 investigators to take statements at face value
6 and to not ask the probing questions that are
7 only going to get harder to explain as the time
8 of trial approaches. So, better investigations I
9 think is one thing, in addition to the trial
10 counsel investigations.

11 The ability to read my own handwriting
12 would be helpful.

13 (Laughter.)

14 But the other would be trust in the
15 people who have the discretion, the prosecutorial
16 discretion to go forward. I think that's been
17 kind of a theme that has permeated everybody's
18 testimony here today. It is that, whether it's
19 the Staff Judge Advocate or whether it's the
20 convening authority, we have to trust them. We
21 have to accept that they are on occasion going to
22 make bad decisions, and those decisions sometimes

1 are going to get public scrutiny. But that's the
2 cost of any system. There are going to be bad
3 decisions in any system. And overcorrecting for
4 every bad decision on an anecdotal basis I don't
5 think is the way to go forward.

6 So, when you talk about not having the
7 evidence, I think developing the evidence --
8 everything we're telling you is anecdotal, of
9 course. And so, I think going back and looking
10 at the evidence and the data to determine really
11 what the next steps are is the best approach.

12 CAPT PAYTON-O'BRIEN: When you talk
13 about going upstream, I think that upstream is
14 even further upstream. As we know, a lot of the
15 cases we see as judges, whether we were
16 prosecuting them before, defending them now,
17 involve the component of alcohol. And as I read
18 investigations and I read records of trial, and I
19 see how much alcohol is involved in these cases
20 that ended up in some sort of sexual assault
21 situation, I often wonder, how is this Service
22 member getting to this point when we're supposed

1 to be training them about the effects of alcohol?

2 And training them, I know that with
3 the sexual assault training we give to military
4 members, sometimes they come in and we hear -- I
5 know I heard from some of the staffers about they
6 would train one drink is enough. You can't
7 consent with one drink. And we spend, I think, a
8 lot of time educating members that that is not
9 the law. The law is not, if you have one drink,
10 you can't consent. Because if that was the law,
11 both the offender and the victim should be in
12 court-martial because they both were drinking.

13 But we have to do better at that
14 stage, whether it's the training of the military
15 members. Intervention, when I see some of these
16 records and I see some of these cases, I wonder,
17 how did we get here and nobody intervened? Why
18 did nobody intervene with this girl who was
19 sloppy drunk and two males are taking her up to a
20 room? Where were the supervisors? Where was the
21 barracks petty officer who saw that? Why did
22 nobody intervene?

1 We talk about bystander intervention,
2 but is it really working? I would beg to say
3 that it might not be, this training that we're
4 giving them, and certainly the training, then,
5 not only when we talk about bystander
6 intervention, but when we tell them that you
7 can't have one drink and consent.

8 Now in my practice, I have male
9 offenders say to me, alleged offenders, how come
10 I'm the one facing trial? I drank, but so did
11 she. So, why am I called the perpetrator, when I
12 would view her as being the aggressor? The
13 client's words, she's the aggressor. Why am I
14 called the offender?

15 I can't answer that sometimes for him.
16 That just seems to be the way our process is set
17 up. Most of our offenders that are charged are
18 male. And I think that we need to educate better
19 way further upstream.

20 MS. BASHFORD: We can take on last
21 question from General Schwenk, and then I'm going
22 to ask us to take just a 10-minute break, and

1 maybe start our lunch at 12:15, so we'll have
2 more time.

3 BGEN SCHWENK: Okay, but my question
4 is going to turn into two questions. And with
5 all of the authority that I don't have, I'm going
6 to make you whatever, assistant DAC-IPAD members,
7 because in the 2020 National Defense
8 Authorization Act, Congress asked the DAC-IPAD to
9 issue reports on a couple of different issues.
10 And two of the issues I would like to ask your
11 thoughts on. So, any thoughts at all are
12 helpful.

13 Okay. The first one has to do with
14 victim impact statements. And I will read from
15 the Joint Explanatory Statement of the conferees
16 from conference. The conferees recognize the
17 importance of providing survivors of sexual
18 assault an opportunity to provide a full and
19 complete description of the impact of the assault
20 on the survivor during court-martial sentencing
21 hearings related to the offense. The conferees
22 are concerned by reports that some military

1 judges -- obviously not retired judges, it must
2 be somebody else -- some military judges have
3 interpreted R.C.M. 1001(c) too narrowly, limiting
4 what survivors are permitted to say during
5 sentencing hearings in ways that do not fully
6 inform the court of the impact of the crime on
7 the survivor.

8 Therefore, they ask us to do an
9 assessment and issue a report whether the
10 military judges are according appropriate
11 deference -- their word -- to victims of crimes
12 who exercise their right to be heard under 1001
13 at sentencing hearings and appropriately
14 permitting other witnesses to testify about the
15 impact of the crime.

16 So, victim impact comments, please.

17 Thank you.

18 COLONEL GLASS: Sir, was that both
19 questions or was that --

20 BGEN SCHWENK: No, that was one.

21 COLONEL GLASS: Okay. So, from my
22 perspective, I have limited victim impact

1 statements in the past according to what the rule
2 requires. I've just read the rule and applied
3 the rule.

4 BGEN SCHWENK: Could you give an
5 example?

6 COLONEL GLASS: I don't know that I
7 can, in all honesty.

8 BGEN SCHWENK: But you know you've
9 done it?

10 COLONEL GLASS: I know I've done it.

11 I also know that I've seen victim impact
12 statements that were very, very effective and
13 persuasive, and I've seen victim impact
14 statements that were rambling and not very
15 effective -- maybe all because of victimization.
16 I'm not trying to be insensitive to that. I'm
17 just talking about as an advocate, as a former
18 advocate in the courtroom, I've seen them work
19 very well and I've seen them not work very well.

20 I've seen them be entirely in writing.
21 For me, that's okay, but that writing doesn't
22 usually emote very much. There's not much

1 emotion to it.

2 But I guess, ultimately, the question
3 whether I appropriately limit or whether judges
4 appropriately limit victim impact statements, I
5 mean, to me that's an unanswerable question
6 because I don't know what they're talking about.
7 When they're saying the rule means this and
8 judges are interpreting this incorrectly, I'm not
9 sure what the eaches of that is.

10 I would say that, in observing
11 practice with victim impact statements as opposed
12 to -- so, I'm not sure, I guess, what Congress
13 envisions in terms of the breadth at which they
14 can give a statement and what its purpose is,
15 other than allowing them to tell their story,
16 which I understand that purpose. That may or may
17 not be as helpful for achieving a sentence as
18 they may envision it.

19 I would say in terms of the
20 effectiveness of them, my experience goes back a
21 little bit to before we had that rule where
22 victims would come in and talk about impact. And

1 I think that the effective impact statements
2 before me have been very, very similar to the
3 victim impact I heard before, sometimes crushing
4 impacts on their lives and their ability to
5 trust, et cetera. All of that is relevant and
6 admissible under the current rule, but it was
7 relevant and admissible under the former rule.

8 So, I'm not sure that answers. And I
9 apologize. It's just because I'm struggling to
10 try to figure out what exactly the question is.
11 I know it's not your question.

12 COLONEL NANCE: Yes, sir. I have
13 limited victim impact statements before. The
14 occasions that jump to mind are situations where
15 the victim impact statement included comments or
16 references to evidence that I had previously
17 excluded for it being unfairly prejudicial or for
18 some other reason. And so, yeah, I have limited
19 that before, and I don't think that's
20 inappropriate.

21 Otherwise, there is an instruction
22 that we would give. I don't know if it's still

1 in the benchbook because I haven't looked at the
2 benchbook for a long time, but, thank goodness
3 for that. But there is an instruction we give to
4 the panel members about how they should consider
5 this victim impact statement, and I think that's
6 a good instruction. It was a product of a lot of
7 thoughtful reflection by a lot of judges.

8 And so I trust everything else that I
9 haven't ruled on previously as being inadmissible
10 to be appropriately covered by that instruction.
11 So members consider that as they should.

12 BGEN SCHWENK: So you're vouching for
13 Colonel Glass that he only did it for evidence
14 that he had excluded also?

15 COLONEL NANCE: I don't know.

16 BGEN SCHWENK: It must have been his
17 reason.

18 COLONEL NANCE: It had to be a reason.

19 BGEN SCHWENK: Okay.

20 COLONEL MOORE: It just has not been
21 my experience. I can't recall having limited a
22 victim impact statement. I've found the victim's

1 legal counsel has done a very good job generally
2 of preparing those and of modifying them, if
3 there are rulings throughout the course of the
4 proceedings. So, I can't recall a time when I've
5 been in a situation where there was even an
6 objection to a victim impact statement.

7 CAPT PAYTON-O'BRIEN: I recall making
8 a ruling limiting in some capacity, but I don't
9 recall what it was. I believe, if memory serves
10 me right, it had to do with a recommendation for
11 a particular sentence, and I limited it to that.
12 And they took that out.

13 But I agree with Colonel Moore, I
14 think the victims' legal counsel are doing a
15 pretty good job at helping them prepare. I think
16 the only concern towards the end of my time on
17 the bench before I retired was the timing of it
18 and when it was provided to the Government to
19 have an opportunity to review. And sometimes
20 that caused delay, because the Government was not
21 privy to it until the moment the person was
22 coming in and wanted an opportunity to have a

1 chance to object. But I don't recall any
2 significant items that I had the victim extract
3 out or would not consider. It seemed that they
4 had pretty full range of options to give their
5 statement.

6 BGEN SCHWENK: Thank you.

7 COLONEL GLASS: Sir, I do have one
8 alibi, and I know you're trying to get done and
9 we all want to take an appropriate break.

10 BGEN SCHWENK: No, my wife told me I
11 should lose weight, so I'm not in any rush.

12 COLONEL GLASS: Yes, sir. So, I do
13 want to note that the issues, as I reflect on it,
14 involve notice, as required by the rule.
15 Usually, that was cured, if it needed a cure,
16 with some form of recess. Now in one instance I
17 can recall an overnight recess. It was near the
18 end of the day anyway.

19 The second did involve specific
20 sentences, which our case law is very clear on, a
21 victim recommending a specific sentence.

22 And then, the third was, it involved

1 the members in a matter that had been previously
2 excluded that to reopen would constitute a
3 mini-trial.

4 BGEN SCHWENK: Thank you very much.

5 Okay. The other one, as advertised:
6 appointment of guardian ad litem for minor
7 victims. This is from the House side. The
8 Committee is concerned for the welfare of minor
9 military dependents who are victims of an alleged
10 sex-related offense. The Committee acknowledges
11 the Department of Defense's continued efforts to
12 implement services in support of Service members
13 who are victims; and further, to expand some of
14 these services to dependents who are victims.
15 However, the Committee remains concerned that
16 there is not an adequate mechanism within the
17 military court-martial process to represent the
18 best interests of minor victims following an
19 alleged sex-related offense.

20 So they ask us for a report that
21 evaluates the need for, and the feasibility of,
22 establishing a process under which a guardian ad

1 litem may be appointed to represent the interests
2 of a victim of an alleged sex-related offense for
3 people under 18.

4 So, need for, and I guess the
5 feasibility of, practicality of doing so. Thank
6 you. Any thoughts?

7 COLONEL NANCE: Well, I realize that
8 a guardian ad litem has a different role than a
9 Special Victims Counsel. But, in the cases where
10 I had child victims, the Special Victims Counsel
11 would undertake to assist the family, the
12 custodial parent, to assist the child. I've seen
13 that happen before.

14 I think the need is probably a
15 reasonable need. I think that, certainly, there
16 are times when the custodial parent's interest
17 might not dovetail with the child-victim's
18 interest. And I've seen that happen before and
19 had to, in my own mind, sort of worry about, you
20 know, was the child's real interest, both
21 personal interest and legal interest, being taken
22 care of?

1 I don't know how we would do that. I
2 haven't had a lot of time to think about how we
3 would do that in a military justice system.

4 BGEN SCHWENK: Let me just say, in
5 regards to both issues, our door is always open,
6 our mailbox is always open, the email works. So,
7 if you have thoughts later on about any of this,
8 feel free to let us know and we'll include it in
9 our records. Thank you.

10 COLONEL NANCE: Yes, sir.

11 COLONEL GLASS: Yes, I would echo what
12 Jeff said and go a little further, I guess, with,
13 who does it? I mean, are you going to retain a
14 civilian lawyer, or are you going to take that
15 new-to-the-JAG-Corps legal assistance attorney
16 and teach them to do all of the other things,
17 beyond being a victims' counsel, to be a guardian
18 ad litem? And if it's not them, are we, then,
19 going to take the prosecutor who's got four years
20 of experience and tell them their next career
21 position is to be a guardian ad litem? Or the
22 defense attorney who ought to be defending that

1 next big case?

2 The problem really is in the details.
3 You absolutely could augment your system by
4 having a civilian attorney come in and do this
5 work. I don't know that at most posts, camps,
6 and stations, that there is -- I don't know. I'm
7 going to stop with I don't know, because what I
8 started to say is I'm not sure there's enough
9 work to support just one full-time position as a
10 guardian ad litem at a small post, camp, or
11 station. At a bigger one, like at Ft. Bragg,
12 there probably is. But they certainly could do
13 some things that that junior legal assistance
14 attorney or the Special Victims Counsel may not
15 have the training to do.

16 What I've also observed in the
17 courtroom is that the victims' counsel are doing
18 their level best, and that they are doing the
19 things you want them to do in terms of getting to
20 know the child. To the degree those interests
21 compete, though, again, you don't know what's
22 happening behind the scenes.

1 COLONEL NANCE: I know that at a lot
2 of places there are private, nonprofit
3 organizations that provide guardian ad litem
4 services for children. I wonder if there would
5 be a way that the military could sort of come up
6 with a cooperative agreement with some of those
7 organizations in order to work hand-in-hand and
8 maybe even provide them some funding to be able
9 to help them help us provide that. I mean,
10 that's just a thought that just occurred.

11 MS. BASHFORD: As you continue to
12 think about this, please let Colonel Weir know if
13 you have further thoughts.

14 I'm going to give us a 10-minute
15 break, and then, we will work through discussing
16 your testimony, which I truly appreciate. And
17 we'll adjourn for lunch, then, at 12:15. So, 10
18 minutes, but, then, back in seat, please.

19 (Whereupon, the foregoing matter went
20 off the record at 11:43 a.m. and went back on the
21 record at 11:55 a.m.)

22 MS. BASHFORD: Okay. We have 20

1 entire minutes to discuss the testimony that we
2 heard today.

3 Mr. Markey, you were very quiet. Give
4 us your thoughts.

5 SGT. MARKEY: Yes, I'll start it off.
6 Thank you, Chair Bashford.

7 I think a lot of the information that
8 we heard, a lot of the testimony that we received
9 -- first, I want to thank the panel for taking
10 time out of their second career to be with us
11 today and their service -- is a lot of the same
12 type of gaps and challenges that we've seen from
13 some of the other testimony we received from
14 folks that we have brought in to provide
15 information.

16 I think everybody is concerned about
17 improving the process. I think everybody is
18 genuinely interested in ensuring that the process
19 is fair and equitable, and that the individuals
20 involved in the process have the knowledge,
21 skills, and ability to do their jobs, that they
22 have the resources and tools to be able to

1 perform the functions that they need to.

2 I think some of the information that
3 was discussed about the Article 32, I think we
4 have heard lots of different testimony, and
5 really it's been all over the board about who
6 thinks Article 32 is valuable and who thinks it's
7 not as valuable as it could be or should be. And
8 so that's an area that I know that we have had
9 discussions and concern about.

10 Also, the preferral and referral
11 decisions made by command authorities, we've
12 heard various degrees of testimony about.
13 Interestingly enough, today they felt that they
14 were very strong in supporting that current
15 process.

16 And I was trying to resolve the
17 conflict of there was complete confidence in the
18 ability to do that, and yet, the SJAs and other
19 staff that are providing the legal information,
20 decisionmaking process, and information for them
21 to make the decision are typically transferred a
22 lot, don't have a lot of experience, not much

1 training. And so, you kind of question the basis
2 for the command to be able to make -- I don't
3 want to say a really good decision -- but a
4 decision based on facts, circumstances, and
5 information that is brought to them.

6 So, those are the comments I had.

7 Thank you.

8 MS. BASHFORD: Ms. Cannon?

9 MS. CANNON: With regard to some of
10 the areas that we discussed, I thought that there
11 was kind of overwhelming support for the idea of
12 a 32 being a valuable evidentiary process where a
13 true vetting of the issues is gathered. And one
14 of the participants, one of the judges was
15 talking about the four criteria, which I think
16 are criteria to consider. But, certainly, that
17 is an underscoring of some of the things that we
18 think are important about the Article 32 and I
19 think supports what we want to be doing.

20 There are a number of things, but the
21 only other one I'll address right now is the
22 point that was raised with regard to experts, and

1 defense experts being a really important area
2 where there has to be independence from the
3 prosecution and funding independent from the
4 prosecution. And I thought that was a valuable
5 contribution. And also, they said experts for
6 the court, which I thought was also -- that's
7 kind of a good idea, it seems.

8 MS. GENTILE LONG: Thank you. So, in
9 addition to some of the things that have been
10 raised -- I might be reiterating a little bit of
11 Mr. Markey's comments about the need for a
12 process to support specialized, experienced trial
13 attorneys to stay within the system and to,
14 therefore, create a true Special Victims Unit
15 within the military justice system of trial
16 attorneys, of prosecutors who are truly able to
17 bring a breadth of experience, along with the
18 training and expertise that they may receive, and
19 to be rewarded, or at least not to be penalized
20 from a career perspective or to be moved around
21 for the needs of the military, to really support
22 people staying in the position. Because,

1 although there wasn't consensus, I heard enough
2 of it that was very credible to me.

3 And the second piece about
4 investigations, I think, much like the Article
5 32, perhaps through investigator training, there
6 has not been enough nuanced training to help
7 people understand how to be victim-centered while
8 still thoughtfully and thoroughly fleshing out an
9 interview, and following up on things that may be
10 truly inconsistent or may appear that way, asking
11 followup questions in a way that is consistent
12 with good investigations without barraging a
13 victim or, you know, abusing them.

14 So, those are the things that stood
15 out to me today, and we need to put resources in
16 that.

17 MS. GARVIN: So, I won't reiterate,
18 but I agree with most of what's been said.

19 I believe it was Colonel Nance who I
20 thought posited a good question back to us in the
21 midst of an answer, which was, during the 32
22 discussion, it was, ask what is the purpose,

1 which I know we're talking about, and determine,
2 before changes are made, what is the purpose. Is
3 it to get -- and this is paraphrased -- but to
4 get more convictions or to pull back the curtain,
5 or exactly what is the purpose?

6 So, before recommendations are made,
7 I think it's a good reminder to us, as a
8 Committee, and to other future committees, that
9 always kind of being at a meta-level of what's
10 the purpose of this in the grander analysis of
11 military justice, and keeping that in mind. So,
12 I wanted to flag that because I thought it was a
13 very thoughtful answer amidst many thoughtful
14 answers.

15 The other three things I wanted to
16 flag is the experts support a very interesting
17 idea, and one that has happened in some civilian
18 courts, which I think is interesting. The
19 recommendation explicitly articulated by one of
20 the judges about sentencing guidelines is
21 something that I think is maybe not on our near
22 horizon of an agenda, but I know there's a lot,

1 but something to consider.

2 And then, there was consistency, at
3 least in what I heard, that the SVCs and VLCs are
4 doing a good job overall in what their job is,
5 which is to help the victim and protect the
6 victim, even though that might make the system
7 less smooth at times. But it was articulated by
8 all of them that they seemed to be doing their
9 jobs well, which is to protect the rights of the
10 victim. And I didn't want to lose that because
11 in the commentary there was some, you know, that
12 it could slow down the system, it could result in
13 some delays, but there was also always the note
14 that they're doing their job. And I think it's
15 important to hear both of those pieces of that.

16 DR. SPOHN: May I respond? So, one of
17 the things that the four of them emphasized is
18 that the Services take cases to trial that the
19 civilian world wouldn't. And I think they said
20 that a number of times. And the question that I
21 have is -- and that they didn't really answer, I
22 don't think, is why is that? Is it because

1 they're referring cases to court-martial using a
2 probable cause standard, which many civilian
3 prosecutors' offices would not do? Especially in
4 the arena of sexual assault, they would use
5 something approaching a
6 proof-beyond-a-reasonable-doubt standard before
7 they would take a case to trial.

8 I know in Los Angeles that was their
9 explicit standard in sexual assault cases, and
10 they would not refer the case or take the case to
11 trial unless there was some type of corroboration
12 of the victim's allegations.

13 So, I mean, I think that's an
14 interesting question, is, why might the Services
15 be taking cases to trial that the civilian world
16 wouldn't? And they sort of danced around it a
17 bit with the talk about some sort of political
18 pressure to prosecute these cases.

19 And the other thing that struck me --
20 and we kind of ran out of time or I would have
21 asked them -- is, the analysis of the yearly data
22 shows that the acquittal rate is much higher for

1 cases that are tried by a panel of members than
2 that it is by judges. And yet, the judges said
3 that they felt that the panel members were making
4 appropriate decisions, which there's a little bit
5 of disconnect there. Although one question that
6 we might ask is, are different kinds of cases
7 going before a panel of members as opposed to
8 going before a judge only? And that might be
9 something that we can tease out as we start
10 looking at some of the data.

11 MS. BASHFORD: It would be very
12 interesting to see, in the cases that we've
13 documented that alcohol is a factor, are those
14 more likely to go before a panel of members or
15 are they more likely to go before a judge? I
16 just don't know the answer to that, but I bet we
17 could find out.

18 MR. KRAMER: Go ahead.

19 MG ANDERSON: I don't have much to
20 add. I agree with Meg regarding her comments
21 about experts, that they need to be resourced, I
22 think, across the defense, the prosecution, and

1 the court to have access to experts.

2 I was struck by one of the judges who
3 commented that they're trying to read the DSM and
4 understand medical information in a victim's
5 file. And to me, that's a recipe for error, I
6 think. So, I think the experts are really
7 important.

8 And the second one is I was around
9 when the sentencing guidelines were initially
10 imposed in the federal courts. I was working at
11 the Second Circuit at the time. And there was a
12 great deal of resistance amongst the judges,
13 which over time subsided a bit. But the fact of
14 the matter was there was a huge disparity in
15 sentencing. And then you add the fact that the
16 panels are tasked with imposing, not imposing the
17 sentence, but certainly recommending a sentence.
18 And now, you've taken it down to another level
19 where there's going to be a lot of opportunities
20 for a great range of punishment.

21 And so, I think that's something to
22 consider very seriously, is sentencing guidelines

1 or something maybe softer than the original
2 version of the sentencing guidelines, but
3 something that provides more guidance to a panel
4 than here's the max and here is the minimum.
5 Pick something in the middle of it. Pick
6 something in that range.

7 MS. BASHFORD: Mr. Kramer?

8 MR. KRAMER: I, too, will try not to
9 reiterate, although I think I've read something
10 recently about disagreement about whether
11 sentencing guidelines are too high in certain
12 cases.

13 But, in any event, a couple of things.
14 We still can't seem to get an answer of why the
15 acquittal rate is so high compared to the
16 acquittal rate in civilian courts on not only
17 sexual assault cases, but any type of cases. And
18 I can't understand why we can't get a better
19 answer on just we take cases that civilians
20 wouldn't take. I don't know how we would compare
21 that to begin with, but it's troubling that we
22 can't seem to get an answer to that.

1 The alcohol thing is also very
2 troubling, although I have to say they give them
3 training, and they talked about that. The same
4 thing goes on at college campuses. They give
5 them training about that, and routinely, alcohol
6 is involved in many sexual assault cases on
7 college campuses. So, that one is very
8 troubling, but I'm not sure there is any answer
9 to that at all. It's just a fact of life.

10 The final thing, the sentencing, they
11 all seem to agree that it's a very bad idea to
12 give reasons for sentences. And I would have
13 thought just the opposite, both for the victim
14 and for the defendant, that it seems to me
15 important to give reasons for why the sentence
16 being imposed is being imposed. So, that just
17 kind of was strange. Without getting into the
18 whole discussion about whether sentencing
19 guidelines are appropriate, which I have strong
20 feelings about, but it just seems to me it would
21 give both parties some kind of idea of why.

22 MS. GARVIN: Just a quick comment

1 back. That was in my notes also, about that
2 every single judge, I believe all four commented
3 that they didn't want to put the reasons on the
4 record. And the reason they gave was about
5 appellate review, and maybe not saying something
6 they shouldn't say, which flagged to my brain
7 training moments to understand permissibility,
8 but also the sentencing guidelines to understand
9 range.

10 But if you're thinking about
11 procedural justice, the more transparency there
12 is at every step of the process, the more the
13 accused and the victim, as well as the other
14 system actors, can understand and have faith in
15 the system. And so, I found those comments,
16 while understandable, also a little disturbing
17 through a procedural justice lens.

18 MS. CANNON: I would be curious to
19 follow up on the pilot program that was pointed
20 out by Colonel Glass when we were discussing
21 staying in your position as a prosecutor or a
22 defense attorney, and somehow there is a program

1 going on, a pilot program, in the Army. I'm not
2 familiar with that. Maybe somebody here is. But
3 I would like to know more about that program.

4 The other question that came up with
5 regard to preliminary hearings, and going toward
6 the usefulness of them today is how often is a 32
7 waived by the defense as being unhelpful in any
8 way. So, I would be curious about that
9 statistic.

10 MS. BASHFORD: I think we've gathered
11 that data.

12 MS. CANNON: You do have that one?
13 Okay.

14 MS. BASHFORD: I don't know it off the
15 top of my head, but we have it.

16 MS. CANNON: I could find it. Fine.

17 MS. GARVIN: If I may, on the 32 also
18 -- and I guess this might be a transcript
19 question for later -- but while there seemed to
20 be consistency of, depending on the purpose, a
21 more robust 32 that involves some, I believe,
22 evidentiary ideas, I didn't hear any of them

1 articulating a return to the previous 32. In
2 fact, I believe they all said the opposite of
3 that, and included that they weren't asking for
4 the cross examination of the victim. I at least
5 heard one of the judges say that. So, it's about
6 what I heard -- and I'd like to look back through
7 the transcript a bit -- but it's about ensuring
8 the defense can get witnesses in the room, other
9 witnesses potentially, and have testimony, but
10 perhaps not a return to the victim being in the
11 space.

12 MS. TOKASH: I have a comment.

13 MS. BASHFORD: Ms. Tokash?

14 MS. TOKASH: Yes.

15 HON. GRIMM: And I have one after her.

16 I have one after her.

17 MS. TOKASH: So, I'll go first, Judge
18 Grimm.

19 HON. GRIMM: No, please, please,
20 please.

21 MS. TOKASH: Okay. I agree with Mr.
22 Kramer that we need to get behind this alleged

1 notion that the military is taking cases that the
2 civilians aren't. I heard from the judges today
3 characterize what are considered hard cases or
4 the military is taking hard cases. But I think
5 we need to determine, is the military
6 characterizing these cases as hard because of the
7 facts, or because they don't have a prosecution
8 standard that civilian prosecutors have?

9 So, by way of example, many Assistant
10 United States Attorneys are taking to trial what
11 they could characterize as hard cases involving
12 sexual assault. For example, sexual assault on
13 airplanes in flight, sex trafficking cases, child
14 exploitation cases, but we still take them to
15 trial because prosecutorial decisionmaking
16 processes in the Department of Justice are
17 evidence-driven.

18 And I was primarily struck by Colonel
19 Glass' comment that the prosecution standards in
20 the military and civilian systems are, I believe
21 he said dramatically different, and that
22 sometimes he found himself saying, how are we

1 here? Why are we here? If we are here, then
2 something went really wrong with the case, or you
3 didn't really consider that this case should see
4 the inside of a courtroom.

5 And then, Colonel Nance followed on by
6 saying we have to look introspectively and
7 determine what is our -- that being the
8 military's -- purpose, and that perhaps a higher
9 standard will reduce the number of bad cases and
10 acquittals. I think that this is so important,
11 and I think that we need to keep examining this.

12 MS. BASHFORD: Judge Grimm?

13 HON. GRIMM: Thank you.

14 I have some very specific comments,
15 but I want to start off by thanking the judges
16 for their time. They made me feel very proud
17 that the military could attract people of their
18 dedication and thoughtfulness and service. So, I
19 want to just express that.

20 A couple of observations. Number 1,
21 a standard for bringing a case to trial, I agree
22 with Ms. Tokash and the others who have commented

1 about that. This is critical. A standard that
2 requires admissible evidence sufficient to move
3 forward seems to me to be an essential
4 clarification that we should consider and
5 explore, number 1.

6 Number 2, a sentencing standard. What
7 I heard was a reluctance on the part of some of
8 our distinguished panelists to rush into an area
9 and express a view without a standard, and that
10 if there was a standard, that that could govern.
11 My thoughts are it is essential to have a
12 standard for a sentence that's imposed.

13 I share Mr. Kramer's concern about the
14 guidelines approach, but there should be a
15 standard, and every sentence, whether recommended
16 by a panel or a judge, should meet that standard.
17 And I think it is essential, as one of our
18 colleagues said, for transparency to explain what
19 the reason is. To simply go from nothing, a
20 reprimand up to 30 years with no explanation
21 seems to me to be disruptive for the system and
22 invite criticism about the transparency, the

1 consistency of the system, and to the ultimate
2 detriment of the phenomenal efforts that the
3 military has made to try to get its arms around
4 this issue.

5 Experience of attorneys, that is an
6 important factor. I don't know how. I think
7 there would be tremendous pushback by certain
8 areas in the military to have career paths for
9 prosecutors, but these are hard cases. And
10 regardless of the standards, and if you make a
11 standard to the admissibility of evidence, it
12 highlights the need to have people with the
13 experience to be able to do it. And it
14 advantages no one to have inexperienced folks
15 doing this because it's not fair for the victim,
16 it's not fair for the defendant, the accused;
17 it's not fair for the military.

18 Experts, something needs to be done to
19 give equal access to experts to Government and to
20 the defense and to the court, where needed,
21 without going to some cadre of bean-counters who
22 view this as being nothing more than a long and

1 demanding process to justify it.

2 Alcohol seems an enormously
3 significant factor here, which should surprise no
4 one, as Mr. Kramer said, because we have a
5 phenomenally large population of young people in
6 that same demographic as the college kids who not
7 only is there alcohol present, but have, at least
8 according to some of the information I've heard
9 from sources outside of this panel, of this group
10 and our Committee, where binge drinking is not
11 just simply a phenomenon, but it is a goal,
12 drink for the purpose of becoming so under the
13 influence that you don't know what's going on.
14 And that's a phenomenon that exists among this
15 age group and it's a real problem because so much
16 of this includes alcohol. And when alcohol is
17 involved, it makes the facts more difficult as to
18 whose version you believe.

19 And I think the guardian ad litem is
20 an interesting idea, but I will tell you in the
21 federal system we have a statute allowing for a
22 guardian ad litem, but there is no funding. And

1 if you're going to require it, you have to have
2 funding. Otherwise, all you're doing is creating
3 an expectation that cannot be fulfilled.

4 MS. BASHFORD: Thank you. Ms. Long,
5 very briefly.

6 MS. GENTILE LONG: Very briefly, just
7 on the conviction rates. Because this is an area
8 that we are steeped deep in, I really want to say
9 it's certainly an area to spend time to look
10 into. But there is no comprehensive evidence,
11 and that that exists actually shows the civilian
12 rate is much worse than what we're talking about
13 here but every 2600 jurisdictions, each one of
14 them has a different rate of prosecution and a
15 different number of cases going forward.

16 We cannot look to the U.S. Attorney's
17 Office. They simply do not do these cases. They
18 don't handle the same cases that state and local
19 do with the same volume, and they don't have
20 jurisdiction to do it. The few that they do, and
21 I mean sex trafficking as well, I think one of
22 the challenges, when we work with them is just

1 knowing that they are prosecuting all of the
2 cases that exist.

3 But I think this is one of the big
4 questions across our country. Not only what is
5 the actual rate of convictions, but how do we
6 measure like-case to like-case. And I think that
7 there are ways of doing it, but we haven't done
8 it yet. So, I think people think they know what
9 their conviction rate is, but when you look at
10 the data, I don't think it's what they think that
11 it is. So, I would just like to caution us to
12 mark this as something to really look into and
13 try and make the comparison.

14 MS. BASHFORD: Thank you.

15 DR. SPOHN: Just one thing.

16 MS. BASHFORD: Very, very briefly.

17 DR. SPOHN: I agree, and I think it
18 also depends on whether you calculate convictions
19 based on reports, you know, in the civilian
20 world, based on arrests, or based on cases that
21 are taken to trial.

22 In Los Angeles -- I just pulled up our

1 data -- there were five acquittals out of 5,000
2 cases, 5,000 reports.

3 MS. GENTILE LONG: Five acquittals?

4 DR. SPOHN: Five acquittals out of
5 5,000 reports, but there were only 600 arrests
6 out of 5,000.

7 MS. GENTILE LONG: How many were
8 tried?

9 DR. SPOHN: How many were tried?
10 Well, I don't know how many were tried because
11 some of them pled --

12 MS. GENTILE LONG: Out of the total
13 disposition, how many like --

14 DR. SPOHN: Three hundred and ninety
15 were convicted.

16 MS. GENTILE LONG: So, 190 out of
17 5,000?

18 DR. SPOHN: Three hundred and ninety.

19 MS. GENTILE LONG: Three hundred and
20 ninety out of 5,000?

21 DR. SPOHN: It depends on what your
22 denominator is.

1 MS. GENTILE LONG: Right, but you have
2 to care about that denominator of what is
3 happening. What was that big number again?

4 DR. SPOHN: Five thousand thirty-one.

5 MS. GENTILE LONG: Five thousand
6 thirty-one? So, does that mean that 4,000 of
7 them are false? Like that's the question we have
8 to get at, and this panel can do it or these
9 smart people, but you have to get there first
10 before we start doing it.

11 Sorry. Sorry, Chair.

12 MS. BASHFORD: Back at one o'clock.

13 (Whereupon, the above-entitled matter
14 went off the record at 12:23 p.m. and resumed at
15 1:06 p.m.)

16 MS. BASHFORD: Okay, we're going to
17 get started with our afternoon session. I think
18 we have -- Dr. Markowitz is here and we're just
19 missing Ms. Long, but she'll be on route.

20 Do we have our, Meghan Tokash and
21 Judge Grimm on the line?

22 HON. GRIMM: We're here.

1 MS. TOKASH: Yes, Meghan Tokash --

2 MS. BASHFORD: Okay, great.

3 MS. TOKASH: -- and Judge Grimm is
4 here.

5 MS. BASHFORD: Great.

6 COLONEL WEIR: Good afternoon. I'm
7 going to give a little bit of background, how we
8 got to this point. Because that has not been
9 made as part of the public record of the
10 Committee.

11 So, about three weeks ago the Staff
12 drafted a draft annual, this is the fourth annual
13 report. And that report was sent out to the
14 Committee Members for comment.

15 Comments were made and then those
16 comments were then incorporated into the draft
17 report that we have on the screen.

18 Yesterday we had an administrative
19 preparatory session. In that session the
20 designated federal official in the morning was
21 Mr. Sullivan and in the afternoon was Mr. Gruber,
22 to keep us straight according to the federal, the

1 FACA rules.

2 So, what I plan to do this afternoon
3 is go through the report, similar to what we did
4 yesterday. But it shouldn't take as much time
5 because we covered technical edits yesterday, and
6 those were edits where the Staff and the
7 Committee Members made edits.

8 And those edits did not substantially
9 change what was written. In most cases, or in
10 all cases, it made it clear to the reader what
11 was intended.

12 Yesterday there was several times
13 where we had to stop what we were discussing
14 because it needed to be discussed or deliberated
15 in the public forum, in a public meeting today.
16 So when we get to those points I will turn it
17 over to the Chair, and then she will discuss, and
18 handle that discussion.

19 And after you all come to a consensus,
20 or don't come to a consensus, we'll have a vote
21 for what is going to go into the final report.

22 So, we'll start with the table of

1 contents and Page 1, and the edits that were
2 made, were approved by General Schwenk.

3 And if we move to Page 4, once again,
4 those edits were approved yesterday because they
5 didn't have any substantive change to the report.

6 Now we're on Page 6. And once again,
7 we have no substantive changes to the reports,
8 just technical edits.

9 Page 8 we added a staff footnote. And
10 that was just to clear up what was going on in
11 the paragraph that it was discussed.

12 Page 9, once again, General Schwenk
13 approved the staff edits, and we added his
14 information into the report.

15 On Page 10, we added a footnote to
16 clear up any ambiguity in the previous, that that
17 footnote clears up.

18 So we go to Chapter 1, which is on
19 Page 11. And Chapter 1 is Findings and
20 Observations Based on the Review of MCIO, those
21 are Military Criminal Investigation
22 Organizations, Penetrative Sexual Offense

1 Investigation of Investigative Case Files Closed
2 in Fiscal Year 2017.

3 And so, we look at Page 11. General
4 Schwenk had a comment. I think we approved, or
5 yesterday we went over that comment and he had no
6 further issues.

7 On Page 12 we have one technical
8 change. And throughout the report you will see
9 this change, so I'm not going to cover it every
10 time we go over it, but we changed the word
11 sexual assault to sexual offense.

12 So for consistency throughout the
13 report, that's the term we'll use is sexual
14 offense.

15 Page 13, we had more edits, which we
16 took care of yesterday. Same with Page 14. And
17 15.

18 We look at Page 16, this is the first
19 instance where the Committee is going to have to
20 discuss and deliberate. Ms. Garvin had a
21 comment.

22 And I'll turn it over to the Chair to

1 discuss the language that should be in the
2 sentence that's in the first full paragraph.
3 While some victim's counsel agreed to do the
4 follow-up interview, other counsel requested that
5 the MCIO send written questions for the victim to
6 answer, which is less than an ideal method for
7 developing information.

8 MS. GARVIN: We felt the explicit
9 statement of which is being valued. So what I
10 was commenting on is, there are lots of ways of
11 developing information.

12 And in a case-by-case analysis, there
13 can be times when written questions are the most
14 effective way for a particular person to respond
15 to questions. But we're making a globalized
16 statement here that it is always a less than
17 ideal method for developing information.

18 And so my question was for whom, to
19 what end. Those kind of things. And not
20 necessarily factoring that in a case-by-case
21 moment there are different ways of eliciting
22 effective information for investigative purposes.

1 Depending on the person being interviewed and
2 followed up with.

3 So my recommendation was that rather
4 than at this relatively early phase in some of
5 our work, putting that assessment in that we
6 strike the clause. But again, I was not a part
7 of the case review process so there might be
8 strong feelings by the case review that that's a
9 really important clause.

10 MS. BASHFORD: Well, my thought on
11 that is that unless you're dealing with a witness
12 with some type of disability, written questions
13 don't, written questions then get sent some
14 place. They get answered, they get sent back.
15 Which really completely curtails the ability to
16 do follow-up questions.

17 Mr. Kramer, if the Government told you
18 you could only communicate with your client by
19 written questions, do you think you would get a
20 full sense of what had happened?

21 MR. KRAMER: No, obviously -- I mean,
22 obviously you're correct that I would never think

1 of communicating with a client in writing.

2 MS. BASHFORD: What --

3 MR. KRAMER: As the primary.

4 MS. BASHFORD: Ms. Garvin, what if we
5 added for the victim to answer, except in rare
6 instances, is a less than an ideal method.

7 MS. GARVIN: So we're, the value that
8 we're putting on here is less than ideal method
9 for law enforcement to elicit what they perceive
10 as the full story. Is that --

11 MS. BASHFORD: Yes.

12 MS. GARVIN: And the reason I'm
13 flagging this is, right, so someone who is being
14 asked questions, and again, was this that there
15 would never be another moment for in person
16 questioning, which of course we know because to
17 trial there will be.

18 So, I get a first round of questions
19 with you and then, let's say the SVC says, and
20 I'm assuming that's where this came from, right,
21 based on the paragraph it is, said, you know
22 what, I'm not going to have them sit down for an

1 in person again because when they sit down with
2 you, law enforcement, they actually start to have
3 panic, their memory becomes confused and, in
4 fact, they are going to give you a statement that
5 is less accurate because of the way X, Y or Z has
6 impacted them.

7 And this is true of defendants, too.
8 I want to be clear about this that sometimes our
9 interrogation tactics do not factor the way the
10 brain is working in the moment. And so what we
11 actually are eliciting is less accurate and
12 useful information from persons being interviewed
13 or interrogated. Whichever verb you want to use.

14 And so, either -- for my comfort I'd
15 either want it to be, which is often less than
16 ideal for developing information from a law
17 enforcement perspective. That I would be
18 comfortable with.

19 But then we're at least putting the
20 lens on who is assessing that this is effective
21 information.

22 MS. BASHFORD: With that friendly

1 amendment, which is often a less than ideal
2 method for developing information for law
3 enforcement, from a law, or for a law enforcement
4 perspective, does anybody have any problem with
5 that?

6 (Show of hands.)

7 MS. BASHFORD: So, as amended. Raise
8 your hand if you're in favor. And Ms. Tokash and
9 Judge Grimm, if you could simply say yes. Judge
10 --

11 HON. GRIMM: Yes.

12 MS. BASHFORD: Ms. Tokash?

13 MS. TOKASH: Yes.

14 MS. BASHFORD: Okay, that's unanimous.
15 Next?

16 COLONEL WEIR: Okay, thank you. We
17 look at Page 17, those edits were handled
18 yesterday.

19 Page 18, the Number 2 there under
20 discussion. The last sentence in that paragraph
21 says, the word swiftly is used and that seemed to
22 cause some issues.

1 So, investigators need the ability to
2 tailor the scope of an investigation to the facts
3 of that case, including the ability to swiftly
4 close investigations when appropriate.

5 There was some discussion, but once
6 again, it entered into the realm of deliberation.
7 So in abundance of caution, we decided to discuss
8 it today.

9 So there was some talk yesterday,
10 before we cut it off, about just deleting that
11 word. So I'll turn it over to the Chair for
12 discussion.

13 MS. BASHFORD: Does anybody feel
14 strongly that the word swiftly needs to be in
15 there?

16 I think what we were trying to address
17 is the cases that really aren't making it out of
18 the starting gate seem to go on for six months.
19 But I think it would be fine if we say close when
20 appropriate. Because when appropriate will vary
21 depending on an investigation.

22 MS. CANNON: I think part of the thing

1 that we wanted to address was the speed. And so,
2 I would just add a little twist to what you
3 suggest to close the investigations quickly as
4 practicable and appropriate.

5 MR. KRAMER: How about if we said, the
6 ability to close investigations in a timely
7 fashion?

8 MS. CANNON: I think that's fine too.

9 MS. BASHFORD: Anybody have any
10 thoughts about Mr. Kramer's proposed amendment?

11 BGEN SCHWENK: You going to keep one
12 appropriate?

13 MS. BASHFORD: In a timely fashion?

14 MR. KRAMER: No, I'm sorry. It would
15 say, to swiftly to -- I'm sorry, the ability to
16 close investigations in a timely fashion or
17 timely manner.

18 MS. BASHFORD: And keeping in mind,
19 closing an investigation can be referring it for
20 prosecution as well. It doesn't mean closing it
21 down with no action.

22 HON. GRIMM: Could you say timely and

1 appropriate fashion?

2 MS. BASHFORD: Say again?

3 HON. GRIMM: Timely and appropriate
4 fashion. To capture the general --

5 PARTICIPANT: Timely and appropriate.

6 HON. GRIMM: -- suggestions.

7 PARTICIPANT: An appropriate fashion.

8 MR. KRAMER: Sure.

9 MS. BASHFORD: Okay. So Judge Grimm
10 has proposed that we say, closing investigations
11 in a timely and, I already forgot.

12 BGEN SCHWENK: Appropriate fashion.

13 MS. BASHFORD: Appropriate fashion.

14 Anybody have any problems with that? Okay. In
15 favor?

16 (Show of hands.)

17 MS. BASHFORD: Everybody present is in
18 favor. Judge Grimm, Ms. Tokash?

19 MS. TOKASH: Yes.

20 HON. GRIMM: Yes.

21 MS. BASHFORD: Okay, that's unanimous.

22 BGEN SCHWENK: Are Judge Grimm and Ms.

1 Tokash raising their hands when they say yes or
2 are they --

3 (Laughter.)

4 HON. GRIMM: And we're standing.

5 (Laughter.)

6 BGEN SCHWENK: Thank you.

7 MS. TOKASH: Saluting.

8 COLONEL WEIR: Okay, turning to Page
9 19.

10 MS. CANNON: May I inquire? On Page
11 18, did we delete a portion of the sentence,
12 before the one we just addressed where it said,
13 shape the scope and nature?

14 PARTICIPANT: Yes, I believe we did.

15 BGEN SCHWENK: Yes. I believe
16 yesterday we agreed that it would say, most case
17 files revealed that investigators did not have
18 discretion to pursue investigative steps that
19 they deemed appropriate based on the facts of a
20 particular allegation.

21 COLONEL WEIR: And then also, at the
22 last paragraph on Page 18, we decided to delete

1 the agency that was mentioned.

2 So, turning to Page 19, I have a
3 question mark next to Ms. Garvin's comment.

4 MS. GARVIN: That was removed
5 yesterday. I withdrew it.

6 COLONEL WEIR: Okay, thank you. So,
7 there is nothing further on Page 19.

8 Page 20, we made, those were technical
9 edits made by the staff. The same with Page 21.
10 The same with Page 22. 23. 24 and 25. 26 and
11 27. 28 and 29. As well as Page 30.

12 Page 31, Ms. Garvin had a comment that
13 raised deliberation. And so, it was in the
14 second full paragraph there that starts, the DAC-
15 IPAD acknowledges. And I'll turn it over to the
16 Chair.

17 MS. BASHFORD: So, the sentence Ms.
18 Garvin is concerned about is, the committee is
19 most concerned -- the questioned sentence is, the
20 committee is most concerned about those cases
21 reviewed in which the victim's preference to go
22 forward with the trial prevailed even though

1 there was insufficient inadmissible evidence to
2 obtain and sustain that conviction. Can you tell
3 us your concern?

4 MS. GARVIN: Yes. It's actually with
5 that very word, concerned. It's literally over
6 that verb.

7 Not having been a part of the case
8 review working group, I am not sure at this
9 juncture of our understanding of the cases that I
10 am concerned. I am interested in further
11 analyzing these cases and understanding whether
12 there was a robust enough investigation that
13 could have led to admissible evidence.

14 But at this juncture, based on the
15 testimony we've heard and the pieces I've been
16 personally privy to, I am not concerned. I am
17 curious and I'm interested in further analyzing.

18 MS. BASHFORD: Thoughts from members
19 of the committee.

20 MS. GENTILE LONG: I think that that's
21 valid to raise since we have some thoughts about
22 whether or not we were able to review the

1 complete record, even as given. So to flag it as
2 something, we need to go use a term that
3 indicates we want to go back and look.

4 First of all, to make sure. Because
5 I think this does reach the conclusion that there
6 was insufficient evidence as a matter of the case
7 versus that what we reviewed did not meet the
8 standard.

9 And we had talked about, and know this
10 will implicate something else that we didn't
11 always watch the reviews and there was other
12 evidence we didn't see. We would just take the
13 reports summarizing it. So I don't know what the
14 verb is, though.

15 MS. BASHFORD: Any other comments,
16 suggestions?

17 MS. CANNON: It seems appropriate, the
18 amendment. I don't have a problem with that.

19 MS. BASHFORD: I'm not sure what the
20 amendment was.

21 BGEN SCHWENK: Change concern to
22 interest.

1 MS. GARVIN: In further, yes, in
2 analyzing or further analyzing. Because I am
3 interested in digging in. There is clearly
4 something we need to look at that I don't feel
5 like we've finished.

6 So the amendment was that the sentence
7 would read, the committee is interested in
8 further analyzing those cases.

9 MS. CANNON: Yes, I agree. I think
10 that's more accurate for what we are trying to
11 get to.

12 MS. BASHFORD: So with that amendment,
13 is the committee, sorry, does the Committee
14 endorse that amendment?

15 (Show of hands.)

16 MS. BASHFORD: Everybody here says
17 yes. On the line?

18 MS. TOKASH: Yes, no problem.

19 HON. GRIMM: Yes.

20 MS. BASHFORD: Unanimously passes.

21 COLONEL WEIR: Okay, that was all that
22 was on Page 31. If we turn to Page 32, there was

1 just technical changes that we handled yesterday.

2 Looking at Page 35, it was a Staff
3 change. It's the first full paragraph there in
4 blue. And the issue is halfway down in that
5 paragraph. On Page 33, excuse me.

6 The implementation of the judge
7 advocate consultation and vice provision of the
8 new disposition guidance should be followed up on
9 thorough site visits to ensure judge advocate
10 advice is being conveyed to the initial
11 disposition authority at a time and in an
12 appropriate manner to inform the decision about
13 what action, if any, to take on an allegation.

14 The troubling word was ensure. And so
15 I think that was, I'll turn it over to the Chair
16 to discuss what wordsmithing should be done to
17 help the Committee in that paragraph.

18 MS. BASHFORD: I think ensure was,
19 it's really not the job to ensure that the advice
20 is, our job to ensure that the advice is being
21 conveyed. I think it's more to see, to observe
22 if the advice is being --

1 BGEN SCHWENK: Assess.

2 MS. BASHFORD: Assess. Assess is
3 wonderful. Thank you.

4 BGEN SCHWENK: To assess whether.

5 MS. BASHFORD: If we move, if we take
6 out ensure and just add assess, does the
7 Committee think that that change is, that's
8 appropriate?

9 PARTICIPANT: Yes.

10 MS. TOKASH: Yes.

11 HON. GRIMM: Yes.

12 MR. KRAMER: I think you have to have
13 the word whether there to --

14 BGEN SCHWENK: Assess whether, yes.

15 MR. KRAMER: Whether.

16 BGEN SCHWENK: Assess whether --

17 MR. KRAMER: Whether.

18 BGEN SCHWENK: -- staff judge advocate
19 advice is being conveyed.

20 MR. KRAMER: Right.

21 PARTICIPANT: Yes.

22 MS. BASHFORD: Okay. Okay, in favor?

1 (Show of hands.)

2 MS. BASHFORD: Okay. We already heard
3 from Judge Grimm and Ms. Tokash.

4 COLONEL WEIR: So, just to make sure
5 that the Staff is clear, meaning me, so the word
6 ensure will be removed and the sentence, will
7 site visits to assess whether judge advocate
8 advice is being conveyed.

9 BGEN SCHWENK: Right.

10 COLONEL WEIR: Okay.

11 BGEN SCHWENK: And that's not, W-E-A-
12 T-H-E-R, which you might think otherwise.

13 (Laughter.)

14 COLONEL WEIR: Thank you, sir.

15 BGEN SCHWENK: You're welcome.

16 COLONEL WEIR: And that was all the
17 changes on Page 33. We looked at Page 34 and the
18 Staff was going to add a footnote after that
19 first paragraph. And we discussed that, so we'll
20 add that into the final draft.

21 Turning to Page 35, there were no
22 additional comments, those were technical edits,

1 which I mentioned earlier about conformity
2 throughout the report.

3 So turning to page 36, under
4 Observation 6, the sentence starts, the DAC-IPAD
5 was troubled. To see in some cases, the comment
6 was, was troubled. Was that the correct language
7 to be used in that sentence.

8 And think this just is a wordsmithing
9 change in that paragraph. So I'll turn it over
10 to the Chair for discussion.

11 MS. BASHFORD: I know, Ms. Garvin, you
12 suggested curious. I'm not sure that curious
13 really captures what we thought when a
14 preliminary hearing officer said, no PC, and yet
15 charges were in fact referred.

16 MS. CANNON: How about, has concerns.
17 Has concerns regarding this and could like to --

18 MS. GARVIN: Further analyze. I mean,
19 if we could go back to that language is, I'm
20 okay, potentially, even with the has concerns
21 here, as long it's, would like to further
22 analyze. Particularly in light of everything

1 we've heard about how these hearings are going
2 and what's happening in them. I feel like it's
3 just the next investigative moment for us.

4 So I'm not, I'm okay with, even in
5 this situation, has concerns and would like to
6 further analyze. I would be okay with that. I
7 just don't want it to be a period, essentially,
8 after the verb. Which grammatically it kind of
9 is right now.

10 Sister Amadis, my 6th grade teacher,
11 would be very happy that I'm focused on verbs
12 right now.

13 BGEN SCHWENK: What's a verb?

14 (Laughter.)

15 MS. GARVIN: Conjunction junction.

16 MS. BASHFORD: So, let's see if this
17 gets too wordy. The DAC-IPAD has concerns
18 regarding cases where charges of specifications
19 for a penetrative sexual offense were preferred -
20 -

21 MS. GARVIN: When.

22 BGEN SCHWENK: That.

1 MS. BASHFORD: -- that the preliminary
2 hearing officer determined were not supported by
3 evidence establishing probable cause to believe
4 the accused committed the offense, period. The
5 DAC-IPAD will continue to investigate this issue.

6 MS. CANNON: Would it be more proper
7 to use the word where as opposed to that? Where
8 the preliminary officer, hearing officer.

9 MS. BASHFORD: I'm agnostic regarding
10 that. I said, I'm agnostic regarding that.

11 MS. GARVIN: Yes, cases in which, I
12 think.

13 MS. BASHFORD: So, cases in which
14 charges and specifications?

15 MS. GARVIN: Yes.

16 MS. BASHFORD: Then continue on with
17 that sentence. And then the DAC-IPAD will
18 continue to investigation this issue.

19 MS. GARVIN: I would be fine with
20 that.

21 BGEN SCHWENK: So can somebody read
22 the whole thing as we've revised it?

1 MS. BASHFORD: The DAC-IPAD has
2 concerns regarding cases in which charges and
3 specifications for penetrative sexual offense
4 were preferred, that the preliminary hearing
5 officer determined were not supported by evidence
6 establishing probable cause to believe that the
7 accused committed the offense. The DAC-IPAD will
8 continue to investigate this.

9 Although I -- but then you interrupt
10 the next sentence which continues, the majority
11 of these charges and specifications were not
12 referred to court-martial.

13 (Simultaneous speaking.)

14 MS. GALLAGHER: -- would be put at the
15 very end of the paragraph. And changed to, the
16 DAC-IPAD will continue to investigate these
17 issues because there are two more issues
18 identified in the paragraph.

19 MS. GARVIN: And you would put that at
20 the end of the paragraph?

21 MS. GALLAGHER: Yes.

22 MS. BASHFORD: Sounds --

1 MS. GARVIN: That works.

2 MS. BASHFORD: Yes.

3 MS. GARVIN: Yes, thank you.

4 MS. BASHFORD: Okay. All in favor of
5 that amendment?

6 (Show of hands.)

7 MS. BASHFORD: Judge Grimm, Ms.

8 Tokash?

9 HON. GRIMM: Yes.

10 MS. TOKASH: Yes, no problems.

11 MS. BASHFORD: Okay. So that passes
12 unanimously.

13 COLONEL WEIR: Okay, moving down to
14 the, almost the bottom, the last sentence in that
15 paragraph that we were just working on. After
16 Footnote 110.

17 The CRWG reviewers express concern.
18 That paragraph. It was determined yesterday that
19 that was one long, almost non-understandable
20 sentence. So what the Staff did was draft a
21 potential, broke it down into more manageable
22 pieces.

1 So that sentence would read, CRWG
2 reviewers express concern about cases referred to
3 trial by general court-martial that the
4 preliminary hearing officer had determined lacked
5 probable cause to believe the accused committed a
6 penetrative sexual offense.

7 If such referrals were based on
8 evidence not presented at the hearing, the
9 benefits of the hearings adversarial process were
10 lost.

11 MS. BASHFORD: Is that a Staff edit?

12 COLONEL WEIR: Yes.

13 MS. BASHFORD: Okay. All in favor?

14 MS. GARVIN: I'm sorry. I apologize,
15 could you reread it, sir?

16 COLONEL WEIR: Absolutely. So, case
17 review working group reviewers express concern
18 about cases referred to trial by general court-
19 martial that the preliminary hearing officer had
20 determined lacked probable cause to believe the
21 accused committed a penetrative sexual offense.

22 If such referrals were based on

1 evidence not presented at the hearing, the
2 benefits of the hearings adversarial process were
3 lost.

4 MS. GARVIN: Sir, that clarified it
5 for me and now I have my notes that I can read
6 from yesterday too. Sorry.

7 MS. BASHFORD: Okay.

8 MS. GARVIN: Thank you.

9 MS. BASHFORD: So all in favor of that
10 proposed edit?

11 (Show of hands.)

12 MS. BASHFORD: Judge Grimm, Ms.

13 Tokash?

14 HON. GRIMM: Yes.

15 MS. TOKASH: Yes.

16 MS. BASHFORD: Okay, that's unanimous.

17 COLONEL WEIR: So all right, turning
18 to Page 37. We took care of those edits
19 yesterday. And Page 38, took care of that
20 yesterday.

21 Turning to Page 39. Observation 8.
22 There was some discussion about the observation

1 itself which states, many sexual assault cases
2 are being referred to courts-martial when there
3 is insufficient evidence to support and sustain a
4 conviction.

5 And I believe, Ms. Long, you had
6 concerns about using the word many in that
7 observation?

8 MS. GENTILE LONG: I did, based on the
9 limits of our review. So, my suggested language,
10 I tried to revise by replacing many with, or
11 inserting before many, based on information the
12 CRWG reviewed in the investigative file. That's
13 probably too clunky but basically saying, based
14 on what we reviewed, we found this.

15 But again, I think it's one of those,
16 we probably need to look at it more deeply
17 because we know our review is limited at times.
18 That was my --

19 COLONEL WEIR: So I believe that, let
20 me see if I have this sentence right. Based on
21 information reviewed, and that's before many. So
22 it would be, based on information reviewed, many

1 sexual assault cases are being referred.

2 MS. GARVIN: Sir, what if it, and
3 everyone, what if we did it the other way which
4 is, many of the sexual assault cases that were
5 referred by the working group.

6 MS. BASHFORD: What about, based on
7 the CRWG's review, many sexual assault cases.

8 MS. GENTILE LONG: I just wanted to
9 flag though, Chair, that to flag in there that
10 our review is limited. Just so nobody draws a
11 conclusion that it was true given we know we
12 didn't look at some things.

13 That was my push back. But if I am
14 the outlier I am happy to just be a dissenter on
15 this.

16 MS. BASHFORD: Did we address what was
17 in the case files earlier in the report that we
18 did not either have access to or were able to
19 review the tapes of the statements either --

20 COLONEL WEIR: What we stated --

21 MS. BASHFORD: -- provide a defense or
22 the --

1 COLONEL WEIR: What we've stated
2 earlier is that our review by the case review
3 working group was we reviewed those
4 investigations that were provided to use and
5 based our analysis on the case file that was
6 presented. That was reviewed.

7 MS. GENTILE LONG: But that's really
8 not the full picture, because if we didn't watch
9 the tapes, which we didn't, then we didn't review
10 what was given to us.

11 BGEN SCHWENK: What if put a footnote
12 on that and down in the bottom refer back to the
13 pages where we actually addressed that point, and
14 also the other point about the limitations based
15 only on the investigative case files being
16 gauged, whatever.

17 And then the one where I added that
18 sentence about, we didn't know, we relied, I
19 think we we said we relied on the investigators
20 putting the key information into the summary.
21 And we were up front about that. That's what we
22 did.

1 MS. GENTILE LONG: Yes.

2 BGEN SCHWENK: So if we rely, if we
3 footnote to those two pages, prior in the report,
4 then anybody that looks at that and raises their
5 eyebrows will look at the footnote, then they'll
6 read the other stuff.

7 MS. GENTILE LONG: That's fine with
8 me.

9 BGEN SCHWENK: Okay.

10 MS. BASHFORD: So the Staff will have
11 to find that to footnote it. Is that fine with
12 the Committee as a whole? Represented that way.

13 HON. GRIMM: Yes.

14 MS. BASHFORD: Ms. Garvin?

15 MS. TOKASH: Yes. Yes.

16 MS. BASHFORD: Okay, that passes.

17 MS. GARVIN: Ms. Tokash.

18 MS. BASHFORD: Oh, I'm sorry.

19 (Laughter.)

20 BGEN SCHWENK: It's almost like you're
21 not here.

22 MS. GARVIN: Oh, my comments are

1 coming.

2 COLONEL WEIR: That was all the edits
3 or deliberation on Page 39.

4 There was no -- on Page 40 it was just
5 technical edits. Moving to Page 41, there was
6 some comments about Observation 9. And Ms.
7 Garvin had a comment, so I'll turn it over to the
8 Chair for discussion.

9 MS. BASHFORD: Yes, Ms. Garvin, can
10 you tell us what your concern was?

11 MS. GARVIN: Yes. The observation
12 talks about that pretrial advice would be more
13 helpful to, and this is quoting, to convening
14 authorities if it included explanations of the
15 staff judge advocates conclusions.

16 And that is, we had not yet, I didn't
17 believe we have heard from convening authorities
18 telling us that fact. This is us assuming that
19 it would be more useful to them.

20 And I thought that clarification point
21 might be useful so that it's not misconstrued as
22 a testimonial statement based on facts. But

1 that's my recollection.

2 MS. BASHFORD: What I remember we saw
3 a lot was a check box, the forms, that we have
4 jurisdiction over the accused, the forms and
5 specifications are correct and there was one
6 more. There was like three checks.
7 Jurisdiction, forms with specifications, oh, and
8 probable cause. But it was like a check box.

9 So, again, we're basing it on what we
10 saw in the file. Like, we have heard in
11 testimony that there's a lot of oral advice
12 that's not documented that's given.

13 But since it's not documented we don't
14 know what it is. Thoughts?

15 MS. CANNON: Would the word could, as
16 opposed to would, solve the problem?

17 MS. GARVIN: Absolutely.

18 MS. BASHFORD: So, instead of, instead
19 of the very last sentence of Observation 9, we
20 could say the Article 34 pretrial advice could be
21 more helpful?

22 MS. GARVIN: Yes.

1 MS. BASHFORD: As amended, in favor?

2 (Show of hands.)

3 MS. BASHFORD: Ms. Tokash --

4 MS. TOKASH: Yes.

5 MS. BASHFORD: -- Judge Grimm?

6 HON. GRIMM: Yes.

7 MS. TOKASH: Yes.

8 MS. BASHFORD: Okay, that's unanimous.

9 And it's amended.

10 COLONEL WEIR: There was nothing else

11 on Page 41 that needed to have any discussion.

12 Turning to Page 42, Ms. Garvin had a comment that

13 needs to be discussed.

14 MS. GARVIN: Chair, do you want me to

15 --

16 MS. BASHFORD: Yes, can you explain

17 that please?

18 MS. GARVIN: So, my reading of the

19 final two sentences, and it mostly hangs on the

20 clause at the last sentence. So the last two

21 sentences read, better practices to provide,

22 sorry, three sentences, to provide written

1 explanations with further explanation as needed.

2 A written legal analysis and rationale
3 could enhance further, could enhance fairness,
4 due process and transparency in the military
5 justice system. And then an em dash that says,
6 benefits that do not seem to be outweighed by a
7 need for confidentiality.

8 And it's that last, following the em
9 dash, that benefits that do not need, that do not
10 seem to be outweighed by a need for
11 confidentiality, that I wasn't sure we had enough
12 evidence to make that statement. But again,
13 maybe the working group got more information that
14 they could share to explain that piece.

15 MS. BASHFORD: Thoughts?

16 MS. CANNON: We could just omit it.
17 I don't recall that specific point of
18 confidentiality being discussed.

19 MS. BASHFORD: I believe it was
20 discussed when, it was in a discussion about
21 somebody tipping their hands.

22 BGEN SCHWENK: Right.

1 MS. BASHFORD: The prosecution said,
2 well then the defense will know what we know and
3 the defense is like, we already know where you're
4 going and the prosecution already knows where the
5 defense is going, something like that.

6 But if we could just put a period
7 right after system and leave out anything after
8 the dash, if that works?

9 MS. GARVIN: Yes.

10 MS. BASHFORD: All in favor of that?

11 (Show of hands.)

12 MS. BASHFORD: Judge Grimm --

13 MS. TOKASH: Yes.

14 MS. BASHFORD: -- Ms. Tokash?

15 MS. TOKASH: Yes.

16 HON. GRIMM: Yes.

17 MS. BASHFORD: Okay, that's
18 unanimously adopted.

19 COLONEL WEIR: Let's make sure. So a
20 written legal analysis and rationale could
21 enhance fairness due to process and transparency
22 in the military justice system, period.

1 Now we're moving on to Chapter 2,
2 which is titled, Article 32 UCMJ Preliminary
3 Hearings and the Court-martial Referral Process.
4 There's nothing further on Page 42 or 43, 44, 45,
5 46, 47, 48, 49, 50, 51, 52.

6 There were changes on 53 that we
7 discussed yesterday, and those were technical
8 edits. Same with Page 54, 55 and 56.

9 Now, if you will please turn to Tab 5
10 in your materials. These are the charts that
11 would go with the Chapter. So what we needed you
12 all to do yesterday when we came to these charts
13 I said, it's a lot to digest in five seconds that
14 you're looking at them so take a look at them
15 tonight and determine whether or not you think
16 there are, if there are any changes that need to
17 be made to them.

18 And we discussed some quick changes to
19 the charts, which was Figure 1. Where the 19, I
20 think that was General Schwenk, the 19 was
21 outside the box.

22 And so the concurrence was that we

1 would just move the numbers inside the boxes to
2 make it more understandable to the reader. And
3 that was the only change on that chart. And we
4 had agreed to that yesterday, I believe.

5 BGEN SCHWENK: Grade and rank.

6 COLONEL WEIR: Oh, right. Looking at

7 --

8 MS. CANNON: Excuse me. There was
9 also a question with regard to the numbers on the
10 left, zero up to 30. Given the nature of the
11 numbers in the graphs.

12 BGEN SCHWENK: We were going to put a

13 --

14 MS. CANNON: That there is some --

15 BGEN SCHWENK: We were going to put
16 something on the left-hand side that explained
17 what that column meant. Like total cases or
18 something.

19 MS. CANNON: It doesn't match up with
20 the number, well, scale. Scale is off.

21 COLONEL WEIR: I think when you add
22 nine and 19 it's two shy of 30, which is the

1 graph. The confusion, I think is when 19 was
2 above it. Because we all looked at 19 and saw it
3 in the middle of the 30.

4 I mean, if this chart is unclear, or
5 doesn't add anything, we can certainly delete it.

6 MS. BASHFORD: I think if you put
7 those top numbers into the column, it will take
8 care of that. Because the lower numbers are in
9 the column itself. So the nine below the 19 is
10 in there. It's making it look as though the
11 total is 19.

12 COLONEL WEIR: We will redraft or
13 rework this slide and get it back out to you.
14 But --

15 BGEN SCHWENK: I've seen cases just
16 like this where they put the nine in the box, the
17 19 in the box and they put 28 on top. So that
18 everybody sees that it's there the total, 28.

19 COLONEL WEIR: Is that a change that
20 everyone can agree to?

21 MS. BASHFORD: Yes.

22 COLONEL WEIR: Excellent.

1 MR. KRAMER: I think it was good to
2 think outside the box though.

3 (Laughter.)

4 COLONEL WEIR: So we'll make those
5 changes to that chart.

6 Looking at the chart on the next page,
7 we looked at the dark gray and the light gray and
8 the decision was made to merge those. It made it
9 easier to read and more understandable since we
10 were talking about dismissed by a convening
11 authority. Is that everyone else's recollection
12 to those charts?

13 BGEN SCHWENK: Will we then use a
14 medium gray for that?

15 MS. GARVIN: Yes.

16 BGEN SCHWENK: All right, never mind.
17 I withdraw.

18 COLONEL WEIR: So we'll make that
19 change.

20 And then the same with the following
21 chart. It's just a reproduction of the chart
22 that's Fiscal Year '17. And the next one is

1 Fiscal Year '18. So we'll make the same changes
2 on those charts.

3 Any questions about the charts?

4 Great.

5 BGEN SCHWENK: Can we go back to the
6 round circle chart? Down in the bottom right-
7 hand.

8 It says dismissed by the GCMCA and
9 dismissed by the SPCMCA. Did we yesterday say we
10 were going to merge those two?

11 COLONEL WEIR: Yes, sir.

12 BGEN SCHWENK: Okay. So it's just
13 going to say dismissed?

14 COLONEL WEIR: (No audible response.)

15 BGEN SCHWENK: Okay.

16 COLONEL WEIR: Okay. Turning back to
17 Page 58. There were no changes.

18 Looking at Page 59, the first
19 paragraph, there was some discussion about
20 whether it should be DoD or SAPRO. Changing the
21 wording there. So I'll turn that over to the
22 Chair for discussion.

1 MS. BASHFORD: Yes. General Schwenk,
2 what did you mean here?

3 BGEN SCHWENK: The sentence says, the
4 DoD does not collect information on the legal
5 outcome of cases in which the victim is the
6 spouse of an intimate partner. Then it goes on
7 from there.

8 And I just point out, DoD does collect
9 information on the legal outcome of all cases and
10 so it doesn't really matter who the victim is.
11 DoD meaning the services as part of DoD.

12 And I believe the people from the, or
13 Chuck was there from the data working group and
14 he said that the DAC-IPAD gets their information
15 that this refers to from the sexual assault
16 prevention and response office, SAPRO, in the
17 Department of Defense. And that SAPRO does not,
18 the sentence is true for SAPRO, which is where we
19 get our information from.

20 So it was my understanding that the
21 proposal was, change DoD to SAPRO, and if there
22 was a feeling on behalf of the Staff to explain

1 that, and that's where we get our information
2 from, you would do so. So that's --

3 MS. BASHFORD: Thoughts? I'm not sure
4 SAPRO is where we get all of our information from
5 though.

6 DR. MARKOWITZ: Wasn't there an issue
7 about FAP also not collecting that data?

8 BGEN SCHWENK: Right. Because --

9 DR. MARKOWITZ: So do we need to
10 clarify that it's DoD, SAPRO and also the family
11 advocacy programs?

12 BGEN SCHWENK: Yes, we can say SAPRO
13 and FAP don't collect it. I mean, they'd have to
14 go to their services and have them pull through
15 all their records to get them.

16 DR. MARKOWITZ: Yes. I just want to
17 make sure we're clarifying that.

18 BGEN SCHWENK: Okay.

19 MS. BASHFORD: I think the point is
20 that for those years, 2012 to 2014, we don't have
21 that information. We do have it for the
22 following years.

1 COLONEL WEIR: That's correct, Chair.
2 The reason, this is in the methodology of the
3 working, the data working. How the data came
4 out.

5 And so that's just explaining why the
6 2012 to '14 data is not as accurate as the rest
7 of the data that we've collected for the case
8 adjudication report.

9 MS. BASHFORD: Why don't we just say
10 then, the statistical data for Fiscal Years 2012
11 through 2014, collected by the JPP, do not
12 include the legal outcomes of cases in which the
13 victim is the spouse or an intimate partner.

14 BGEN SCHWENK: Good.

15 MS. BASHFORD: And will not be
16 included in the historical discussion to follow.

17 COLONEL WEIR: So the sentence that
18 reads, the Department of Defense does not collect
19 information would be deleted?

20 MS. BASHFORD: Yes. We would start,
21 we would start out with, the statistical data for
22 Fiscal Years 2012 through 2014, collected by the

1 judicial proceedings panel, do not include legal
2 outcomes of cases in which the victim is the
3 spouse or an intimate partner.

4 Then you continue on to, and will not
5 be included in the historical discussion to
6 follow. As amended, all in favor?

7 (Show of hands.)

8 HON. GRIMM: Yes.

9 MS. TOKASH: Yes.

10 MS. BASHFORD: That is passed
11 unanimously.

12 COLONEL WEIR: If I could, if you
13 could turn your attention to Tab 6. These are
14 the charts that will go in the report.

15 And once again, the same discussion
16 was had about giving you time yesterday evening
17 to digest these charts. There's a lot of
18 information there.

19 DR. SPOHN: That's the total number of
20 cases?

21 For the first bar chart on Page 1, is
22 that the total number of cases each year?

1 PARTICIPANT: Yes, ma'am. It's the
2 total number of cases that we have in the
3 database at this point.

4 DR. SPOHN: So do you need a title for
5 that figure?

6 PARTICIPANT: There should be a title
7 that would be actually in the text for the
8 heading part.

9 DR. SPOHN: Oh, it will be in the
10 text.

11 PARTICIPANT: Yes, ma'am.

12 DR. SPOHN: Okay. No, that's --

13 PARTICIPANT: There will be a table --

14 DR. SPOHN: That's not the right
15 heading.

16 BGEN SCHWENK: On Page 59, down at the
17 very bottom, it says, Figure 3.1, which I guess
18 is that next figure.

19 Cases documented by the DAC-IPAD. So
20 that's the lead in.

21 COLONEL WEIR: And the chart at the
22 bottom of that page just breaks out, once again,

1 the percentages of service members in each
2 service. And as a percentage of sexual assaults
3 per service for the population.

4 And if you look at Page 60 it says,
5 Figure 3.2, military service of the accused.
6 Then, the following tables provide an overview of
7 the cases involving penetrative sexual assault,
8 sexual offense and contact offenses completed by
9 the military services in Fiscal Year 2018.

10 Anybody have any questions or concerns
11 about either of those charts on Page 1 of Tab 6?

12 Moving to the next page. Table 1,
13 dispositions.

14 MS. BASHFORD: Colonel, I would just
15 note that it seems on Page 62 we say Table 3.1.
16 And, oh, I'm sorry, the difference between
17 figures and tables.

18 COLONEL WEIR: Yes.

19 MS. BASHFORD: That was duplicative.
20 Anybody have any comments, suggestions? Good.

21 COLONEL WEIR: Now on Page 66, there
22 were no edits on Page 66. No edits on 66, 67, 68

1 or 69.

2 Looking at Page 70 we had some
3 discussion. I want to make sure that we're,
4 everyone is clear. It was on Paragraph 2 that
5 starts, false allegations of sexual assault.

6 And we discussed that in the body of,
7 there is, and I think Ms. Garvin highlighted the
8 fact there should be, it should be consistent
9 with what's in the body of the, when it refers to
10 sexual assault. False allegations of sexual
11 assault.

12 And I think, but I want to be sure, I
13 think that we said it could be with the
14 apostrophe on each side of that sentence or not.
15 Quotes I mean.

16 MS. GENTILE LONG: And weren't you
17 going to rename it consistent with Paragraph 1,
18 inconsistencies --

19 DR. SPOHN: Yes.

20 MS. GENTILE LONG: Okay.

21 DR. SPOHN: Inconsistencies in
22 defining, quote, allegations of sexual assault,

1 unquote.

2 COLONEL WEIR: Is everyone comfortable
3 with that technical change?

4 MS. BASHFORD: Yes. All in favor?

5 (Show of hands.)

6 MS. TOKASH: Yes.

7 HON. GRIMM: Yes.

8 MS. TOKASH: Yes.

9 MS. BASHFORD: Judge Grimm?

10 HON. GRIMM: Yes.

11 MS. BASHFORD: Okay, that's unanimous.

12 MS. TOKASH: Yes.

13 COLONEL WEIR: All right. There was
14 no changes on 71. If we look to Page 72, if you
15 could go to Tab 7. And these are charts that
16 deal with the incidents of collateral misconduct.

17 So what you see in Table 1 is broken
18 down by service. And then what type of action
19 was taken.

20 And then further in Table 2, it's also
21 broken down by service and then the type of
22 alleged misconduct. And also broken further down

1 into the number for each type of collateral
2 misconduct and then as a percentage of the total
3 of collateral misconduct.

4 BGEN SCHWENK: Is there somewhere
5 where we explain the difference between, quote,
6 accused, unquote, and accused, underlined? As we
7 use in Table 4.1.

8 COLONEL WEIR: Could you say that
9 again, sir?

10 BGEN SCHWENK: Okay. In Table 4.1 in
11 the left-hand column, the second one down says,
12 number of service members quote, accused,
13 unquote, of collateral misconduct. Same in the
14 third one down.

15 But the fourth one down says, accused,
16 underlined. And the next one on the next page,
17 which I guess is the fifth one down, says
18 accused, underlined.

19 So we have a tie score. Two with
20 quotes and two with accused. And I'm wondering,
21 do we mean something different, is that why we
22 did that? Do we need to explain it or -- there

1 must be a reason.

2 MS. BASHFORD: It doesn't seem that it
3 matters much which way it is, it should just be
4 consistent across the table.

5 MS. CARSON: I think I can explain it.
6 The reason it's accused in quotes in the first
7 two is because that's the way the term was used
8 initially in the report.

9 And then it wasn't carried through and
10 it was underlined in the next two because the
11 next two are just getting the percentages of,
12 first, just the accused, and the second, the
13 accused to receive an adverse action is sort of
14 our emphasis.

15 So I would suggest here, we could take
16 it out. There's nothing wrong with just taking
17 it all out, having it all one way or the other.

18 MS. HAM: And it's both the first time
19 the body of the report explains that accused, of
20 course, is a technical term in the military. So
21 the services define that differently for purposes
22 of providing numbers so it was less than thought.

1 MS. CARSON: So it's not important of
2 them, however, for consistency you want it --

3 MS. BASHFORD: Any thoughts on it,
4 Meg?

5 MS. GARVIN: I think the quotations
6 are relatively important in light of the
7 disparate definitions. And so, for consistency
8 if they could all be quotes, I think that
9 triggers recognition of disparate definitions as
10 opposed to underlining, which is pure emphasis.

11 MS. BASHFORD: That's administrative,
12 we don't need to vote on that. That's fine.

13 MS. GENTILE LONG: I have a
14 substantive question. On Table 4.2, false
15 report, I think we also need to indicate, because
16 as it reads it would read like what one would
17 think is a false report, but based on the
18 inconsistent definitions, I don't know if we just
19 footnote that table back to the page where we
20 talk about it or if you need to put it in
21 quotations.

22 It says, as defined by each military

1 service, but even a footnote maybe would just --

2 MS. CARSON: You want it in
3 quotations?

4 MS. GENTILE LONG: Or just the
5 footnote back to where you talk about it in the
6 report.

7 SGT. MARKEY: Jen, just out of
8 curiosity, it calls it false allegations, and
9 then this says false report.

10 MS. GENTILE LONG: I know, but I think
11 this is the same data. Unless this is, this
12 table is different data, but I don't recall
13 hearing any testimony about a true false report.
14 A clean false report.

15 COLONEL WEIR: When we were going
16 through the collateral misconduct report, the
17 drafts that we received from the services, and
18 then we brought that to the attention of the
19 Committee, you all discussed that their
20 definitions of what a false allegation, a false
21 complaint wasn't clear.

22 And I recall if a victim made an

1 allegation, and then there was a cross complaint,
2 remember that discussion. There was some --

3 MS. GENTILE LONG: Where some of the
4 third party made it --

5 COLONEL WEIR: Right.

6 MS. GENTILE LONG: -- and then the
7 victim said it wasn't, that was a false report?

8 COLONEL WEIR: Right. And so, based
9 upon what you all discussed, we decided to not
10 include that as collateral misconduct. Because
11 it wasn't clearly defined.

12 MS. GENTILE LONG: So then this thing
13 in there is a true/false report in that table?

14 MS. BASHFORD: No. I think it's as
15 each service defines it.

16 MS. GENTILE LONG: Defines it.

17 MS. BASHFORD: Which is very
18 different. I think we also thought that if it's
19 a true/false report it's not collateral
20 misconduct, it is misconduct.

21 MS. GENTILE LONG: Right.

22 MS. BASHFORD: So that's why I think

1 we're not including them, counting them.

2 MS. GENTILE LONG: But am I missing
3 something because it's in the table? I mean,
4 it's in that table.

5 COLONEL WEIR: It depends on how you
6 want to capture that information. What you
7 decided that, it wasn't, as the Chair said, it
8 really wasn't collateral misconduct. And then
9 there really wasn't a clear definition what that
10 meant across the services.

11 And so, the decision was made that you
12 all would not put it in the collateral report as,
13 I mean, collateral misconduct report as
14 collateral misconduct. But you would note, which
15 we did in the false allegation paragraph we
16 talked about.

17 So we can either leave it in if you
18 think it's helpful or just delete that section
19 right there in the graph.

20 MS. BASHFORD: It seems to me, since
21 we're not counting it, we could probably just
22 delete that last block. Thoughts?

1 Delete the last block? Favor?

2 (Show of hands.)

3 MS. TOKASH: I say delete it.

4 MS. BASHFORD: I'm sorry?

5 MS. TOKASH: Delete it. Ms. Tokash.

6 MS. BASHFORD: Judge Grimm?

7 HON. GRIMM: I agree.

8 MS. BASHFORD: So that passes, with
9 Ms. Tokash dissenting.

10 BGEN SCHWENK: No, she said agrees.

11 MS. BASHFORD: Oh, I'm sorry, I
12 thought she said she dissents. Okay.

13 COLONEL WEIR: She said delete it.

14 MS. BASHFORD: Oh, okay.

15 MS. TOKASH: I said delete it. I
16 agree.

17 (Laughter.)

18 COLONEL WEIR: And I --

19 MS. BASHFORD: So it passes
20 unanimously.

21 COLONEL WEIR: And I believe the
22 Paragraph 2 on Page 70 fully discusses your

1 concerns that you had so I don't think it's,
2 based upon that I don't think it's relevant.

3 Any discussion on Table 3? And that's
4 just a breakout of what was the result of the
5 collateral misconduct versus what they received
6 as a result of committing collateral misconduct.

7 MS. BASHFORD: Any opposition,
8 thoughts, comments? Moving on.

9 COLONEL WEIR: And then the next chart
10 is a pie chart. I don't know whether this is
11 helpful to you all or to the reader but that's
12 something you can --

13 MS. CARSON: This is the exact same
14 information as Table 1. So the question for you
15 is, do you prefer Table 1, do you prefer this
16 Table 1 or the first Table 1 or do you --

17 There are just two ways, and then the
18 graphic design are presenting the same
19 information.

20 MS. BASHFORD: Personally, I find the
21 pie chart with the wedge coming out very
22 confusing, but that may just be me. So I defer

1 to the Committee as a whole.

2 COLONEL WEIR: My recommendation is
3 you go with Table 1, not the pie charts, because
4 it's consistent the way the other charts are laid
5 out by service.

6 MS. BASHFORD: In favor of the table,
7 not the pie?

8 (Show of hands.)

9 (Laughter.)

10 MS. BASHFORD: Judge Grimm, Ms.
11 Tokash?

12 HON. GRIMM: Yes, I mean, you can have
13 your pie but you can't eat it too.

14 MS. TOKASH: I agree.

15 MS. BASHFORD: Okay, unanimously
16 passes.

17 COLONEL WEIR: If you go to Page 75,
18 there were no edits there. Page 76, 77, 78, 79,
19 80, 81, 82, 83. And that ends the collateral
20 misconduct.

21 Chapter 5, Military Installation Site
22 Visits and Member Observations of Sexual Assault

1 Courts-Martial in 2020. Chapter 5 is just a
2 chapter we added in here to discuss the site
3 visits and the court-martial observation.

4 So we're on Page 84. And there was a
5 Staff edit on Page 85 where we took out the dates
6 when we would be going to those places. And we
7 discussed that yesterday.

8 And that seemed to be what everyone
9 wanted to do was just take the dates out. And
10 the staff edit was approved.

11 And then we looked -- Page 86, no
12 changes. And that brings us to the end of the
13 review of the draft report.

14 And at this time I believe the Chair
15 can take over and we'll have a vote on the
16 acceptance of the report that as amended, with
17 your amendments and changes.

18 MS. BASHFORD: I so move that we
19 accept the report.

20 DR. MARKOWITZ: Second.

21 MS. BASHFORD: All in favor?

22 (Show of hands.)

1 HON. GRIMM: Aye. Yes.

2 MS. TOKASH: Aye. Yes.

3 MS. BASHFORD: Okay, it unanimously
4 passes.

5 COLONEL WEIR: Okay, ma'am, what we'll
6 do next as a staff --

7 BGEN SCHWENK: Wait, time out. I just
8 want to say, on behalf of all the members, thanks
9 to the Staff for putting this together.

10 PARTICIPANT: Absolutely.

11 BGEN SCHWENK: I don't believe we
12 wrote one percent of this or less. Point
13 something percent. Even with all of our edits.

14 And so, I thought it was another great
15 job for another year. And I recommend that your
16 contracts be extended for another year.

17 (Laughter.)

18 COLONEL WEIR: Thank you.

19 HON. GRIMM: Agree.

20 COLONEL WEIR: Well, you don't realize
21 how much you did help because what we do to write
22 the report is we go back and look at the

1 transcripts and the conversations that you all
2 have had when you're discussing these issues.
3 And so you'll look at the footnotes and you'll
4 see where you're footnoted.

5 And a lot of the information contained
6 is stuff that you said and did. So, I think
7 that, so the way forward, the Staff will make
8 those changes, we will get that all out to you.

9 Just so you have a comfort level that
10 we did make the changes. And then we will send
11 that to the printer and out to the various
12 organizations that get the draft report.

13 Secretary of Defense and the members
14 of the Senate Armed Services Committee and House
15 Armed Services Committee are the folks that get
16 this.

17 So, while I'm up here and I don't have
18 to move, I just want to let you know what's going
19 to happen on the 18th. The Chair is having an
20 office call with the Secretary of Defense. So
21 she will have the opportunity to discuss the fine
22 work that you all are doing as a Committee.

1 He's received some of the read ahead
2 materials to brief him on what you all are doing,
3 and some talking points. So that's going to
4 happen on the 18th.

5 And part of the 2020 NDAA, which
6 Colonel Pflaum may talk about, is that you all,
7 the DAC-IPAD has been extended for five years.
8 So, that requires decisions on your part.

9 And we'll get back to you individually
10 as to whether you want to continue in this
11 excellent mission to make the military justice
12 system better. So that will be forthcoming.

13 But if you want to, are willing to,
14 and what's good about this is you all know what
15 the time involvement is. And now I know some of
16 you are retiring, you'll even have more time to
17 involve yourself with this worthwhile goal.

18 So, the Staff would like to thank you
19 for your input and the ease of this. Really, the
20 ease working with you all is amazing.

21 I came in at the tail end of some
22 other committees where they didn't have the

1 cohesiveness and the discussions that you all are
2 having. And that's vital for the Staff to be
3 able to work and put together a product that you
4 all are vitally important to help us do that.

5 So thank you once again. And we're
6 not done for today, but -- oh yes, you voted on
7 the report.

8 MS. BASHFORD: Yes, we did. The only,
9 depending on the date of the transmittal letter
10 to the Secretary of Defense, there would be one
11 other edit in the introduction where you have to
12 insert the word former, if it's after March 20th.

13 COLONEL WEIR: Yes.

14 MS. BASHFORD: If it's before, you're
15 aces.

16 COLONEL WEIR: I don't know if you are
17 all aware, but I don't think she'll mind me
18 telling you that the Chair is retiring after 40
19 years in the Manhattan DA's Office.

20 And so once again, she'll have a lot
21 of time to cruise, fly around the United States
22 and observe courts-martial and site visits. So

1 we'll make that edit when we go --

2 MS. BASHFORD: As needed.

3 (Laughter.)

4 MS. BASHFORD: We're scheduled for a
5 break but we've really only been back for an
6 hour, so if people don't mind, why don't we forge
7 through with Mr. Hines and the site visit.

8 MR. HINES: This will be a brief
9 update. I'm not going to rehash what we covered
10 at the last meeting.

11 Just to let you know that the site
12 visit planning is proceeding. The staff is
13 putting together question packets on the various
14 topic areas that you will be questioning the
15 practitioners and the various stakeholders that
16 you're going to meet with on the trips.

17 We have at least four Committee
18 Members now going on each trip, which is very
19 good, a very good participation rate. So we're
20 very appreciative of your willingness to take
21 time out of your busy schedules to go on these
22 trips.

1 And we've been working closely with
2 our Service Representatives to line up our local
3 points of contact on the ground, onsite, so that
4 we can facilitate our movement, do all those
5 little logistical things that people don't think
6 about.

7 And the Service Representatives have
8 been very responsive and very good at giving us
9 the names of those people on the ground. And
10 that's a continuous process and will proceed as
11 we go through.

12 So unless there are any questions,
13 that's really the extent of my update.
14 Everything's proceeding fine. We haven't --
15 actually, there is, there was one development
16 that I should probably let you know about.

17 The Navy did notify us that that
18 portion of the Europe trip that includes meeting
19 with the Navy, as we had the trip set, the Navy
20 folks were going to have to drive seven hours to
21 meet us.

22 And so what we decided, we weren't

1 going to ask them to do that. So that group is
2 going to go ahead and go on down from the first
3 installation down to the Navy, because at Naples,
4 they have a very robust, not only operational
5 presence there, but legal presence there as well.

6 There's a RLSO there. That's where
7 the Navy Judge In-Theater sits and has their
8 courthouse.

9 And that's about it. Are there any
10 questions about any of the site visits? I know
11 that --

12 MS. CANNON: I don't understand --

13 MR. HINES: -- I've talked to some of
14 the members --

15 MS. CANNON: -- what you just said.

16 MR. HINES: -- including Ms. Cannon,
17 about your personal travel and that's something
18 we can talk about and handle, she's not the only
19 one, but we can handle offline with our staff.
20 And that's how we're going to --

21 BGEN SCHWENK: What is the -- Glen,
22 what's the process for determining what questions

1 we're going to ask each particular group at each,
2 if we're going to do this, I thought originally
3 we were talking about the idea of coming up with,
4 like, five questions --

5 MR. HINES: Sure.

6 BGEN SCHWENK: -- for the trial
7 counsel, five questions for the defense counsel,
8 five questions for each group, that everybody
9 would ask, so that when we got back and you guys
10 compiled it, you'd have answers from across the
11 board.

12 And so the question then is, out of
13 the 50 million questions we could ask trial
14 counsel, for example, what are the five that are
15 the most important to us, to make sure we all
16 ask?

17 So I just wondered if we have a
18 process to figure that out.

19 MR. HINES: Yes, sir. Yes, sir. We,
20 as a staff, are working on that issue right now,
21 and have been working on it.

22 And it's just a process of soliciting

1 everyone's ideas, so that we can come to what we
2 call question packets, which was very similar to
3 what we used for the Judicial Proceeding Panel.

4 And those tend to get refined after
5 you do a couple of site visits. You find that
6 there are some questions that are maybe better
7 than others and some topics that are more robust
8 for discussion than others.

9 And so the staff is working on that.
10 And it's our intent to route that around to get
11 your input, so that we have a final product when
12 we get out there.

13 I've also had discussions with Dr.
14 Wells about -- because there has been, there's a
15 concern presented that you need to make this as
16 objective a feedback as we possibly can. So
17 we've been talking with Dr. Wells on how to
18 refine the questions and even use instructions
19 that are part of every site visit, so that when
20 you get that information back, you can put it in
21 a form or a format that's more objective and less
22 susceptible to being called anecdotal, if you

1 understand. Does that answer your question, sir?

2 BGEN SCHWENK: Yes, thank you.

3 MR. HINES: Yes, ma'am?

4 MS. CANNON: I didn't understand what
5 you meant about Europe, since there are two
6 locations in Europe. One is Germany, one is
7 Italy.

8 MR. HINES: Yes, ma'am, good question.
9 We had such positive response on that particular
10 trip that we determined, with the Staff Director
11 and the Deputy, that we were not going to have
12 everyone go to both sites. And so we've got
13 basically half of the members going to Germany
14 and half going to Italy.

15 BGEN SCHWENK: So when they come back
16 from Naples talking about the admiral's villa
17 that they had their meeting in, overlooking the
18 bay in Capri and everything, you're not going to
19 be on that one.

20 (Laughter.)

21 COLONEL WEIR: Just for --

22 BGEN SCHWENK: You're going to Germany.

1 COLONEL WEIR: -- for that site visit,
2 for Italy, if you signed up for that, if you
3 signed up for the site visit to go to Italy, that
4 seven-hour trip that Glen was talking about,
5 we'll probably fly, but that's going to take an
6 extra day of travel, which we didn't anticipate
7 doing.

8 So I would look at your calendars and
9 make sure you have the additional day or two to
10 make that trip. Because one of the things we're
11 trying to do on these site visits is make it a
12 little as possible impact on the units we want to
13 talk to. And clearly having folks drive seven
14 hours is not, so we're going to just travel all
15 day and then get those folks the next day, so
16 that we're not impacting them.

17 MR. HINES: And I don't think -- it's
18 not going to cause, shouldn't cause too much of a
19 problem, because that trip is the week of July
20 26, and it was already scheduled to end on
21 Thursday. And so if we had to add one more day,
22 it would still be -- it wouldn't be going over

1 into the following weekend or the following work
2 week. Any other questions on the site visits --

3 SGT. MARKEY: Glen, I just had one.

4 HON. GRIMM: This is --

5 MR. HINES: -- before I turn it over?

6 SGT. MARKEY: In addition to developing
7 the questions that we want to present --

8 MR. HINES: Yes.

9 SGT. MARKEY: -- are -- have we
10 identified specifically which components of the
11 system that we're -- who are we going to talk to
12 in particular, what disciplines they are? And
13 that we're going to have a representative sample
14 of those at the sites?

15 MR. HINES: Yes, Mr. Markey. So each
16 day, we'll have, much like our public meetings or
17 our prep meetings, there will be an agenda that
18 we prepare.

19 And then in addition to the agenda,
20 each of those sessions will be with a different,
21 the term I use is stakeholder. So trial counsel
22 will be in one session, defense counsel in

1 another, VLC, if we meet with the VLCs,
2 investigators, commanders, convening authorities.

3 In the two training bases, there will
4 also be a period where we're going to meet with
5 recruits or trainees in entry-level training.

6 So we're working with the Service Reps
7 to make sure that we get the right people for
8 each panel, but we also get a sufficient number
9 of them, and hopefully a sufficient number of
10 them with the requisite level of experience that
11 will be of the most value for you when you're
12 speaking with them.

13 MS. BASHFORD: Thank you very much.

14 HON. GRIMM: Could I ask a question?

15 Well I just did.

16 MS. BASHFORD: Judge Grimm?

17 HON. GRIMM: Could I ask another
18 question, just one followup on the trip? Would
19 it be possible to have you circulate a little
20 chart perhaps that has the dates of the trips,
21 the people that you have as indicating a desire
22 to attend, and maybe a point of contact, if the

1 individual members have some questions about
2 travel arrangements, to get some background
3 information?

4 Some of us, myself included, our
5 schedules may have shifted, as a result of work
6 exigencies that created situations that didn't
7 exist before. And I just want to have the most
8 recent information about these site trips to
9 confirm availability, if that's possible.

10 MR. HINES: Yes, Your Honor. If I
11 heard you correctly, were you just asking about
12 the current schedule of when the trips are and
13 which members and which staff are going to be
14 attending each trip?

15 HON. GRIMM: Correct. And then maybe
16 a point of contact, so that if we have questions
17 about travel arrangements, for example, we could
18 contact and get some information on that.

19 MR. HINES: Yes, sir. Our staff will
20 be putting together your travel. So I'll
21 absolutely get you that information as soon as
22 possible.

1 HON. GRIMM: Thank you so much.

2 MR. HINES: You're welcome.

3 MS. BASHFORD: Thank you. Unless
4 anybody minds, why don't we forge ahead? Which
5 would be Colonel Pflaum with the 2020 NDAA.

6 MS. GALLAGHER: If you wanted to hear
7 just a very, very brief update on your court-
8 martial observations, I can provide that.

9 MS. BASHFORD: Great.

10 MS. GALLAGHER: Yes. The court-martial
11 observations are still ongoing. Holidays slowed
12 us down a little bit, but we had two more members
13 attend courts-martial since the last meeting.

14 We are now into some of the members
15 attending second courts-martial, of a different
16 Service. And everyone is finding the experience
17 very valuable.

18 I just sent out a list of over 80
19 courts-martial that are sexual assault courts-
20 martial scheduled to take place between now and
21 really June. And some people have already
22 responded with the dates they may have available.

1 If everybody else can take a look at that and
2 just get with me on that. If there's no
3 questions, that's it.

4 MS. BASHFORD: Okay, thank you.
5 Colonel Pflaum, welcome.

6 COLONEL PFLAUM: Thank you very much,
7 it's great to be back. If you recall, I
8 testified before this group back in August, as
9 part of the initial hearings that we conducted
10 back in August.

11 But by way of introduction, I'm
12 Colonel Pat Pflaum, I'm the Chief of the Criminal
13 Law Division for the Office of the Judge Advocate
14 General for the United States Army.

15 And I've been asked to provide an
16 update or sort of an overview of the key
17 provisions of the 2020 National Defense
18 Authorization Act.

19 And I'll hit several items that of
20 course impact this body directly, and some of
21 which have already been mentioned in the earlier
22 hearings, but also some other provisions that are

1 in the Act that may be of interest to this group
2 as it looks at the investigation, prosecution,
3 and defense of sexual assault in the Armed
4 Forces.

5 For, I guess, the larger audience, I
6 won't, of course, hit every item that's in the
7 2020 NDAA. It's a comprehensive document that is
8 of course the, it's the 1,000-page statutory
9 provisions that provide the authorization for the
10 Department of Defense writ large. These are only
11 the provisions that basically address military
12 justice, and specifically sexual assault, in the
13 Armed Forces. So with that, next slide.

14 The first section that is worth noting
15 is of course Section 535, that extends the DAC-
16 IPAD from its initial five-year charter to 10
17 years. So congratulations, you've been extended
18 until 8 February 2026, where previously the
19 expiry was 18 February 2021.

20 The next item of interest is Section
21 550, that actually appoints a new Defense
22 Advisory Committee. This one is the Defense

1 Advisory Committee on the Prevention of Sexual
2 Assault. So this charter of this committee is
3 that it shall advise the Secretary on the
4 following.

5 The prevention of sexual assault,
6 including rape, forcible sodomy, other sexual
7 assault, and other sexual misconduct involving
8 members of the Armed Forces, as well as the
9 policies, programs, and practices of the
10 Department as it relates to the prevention of
11 sexual misconduct.

12 And so the key note here is that there
13 are of course going to be matters of joint
14 interest with both of these bodies. And the
15 statute actually requires coordination between
16 these two separate Defense Advisory Committees.
17 Next slide.

18 The next section that is important and
19 specifically addresses the DAC-IPAD is a
20 requirement to conduct an assessment of racial,
21 ethnic, and gender disparities in the military
22 justice system.

1 So this statutory provision actually
2 has two portions of it. The first is a task to
3 the Department of Defense, and it requires the
4 Armed Forces to record the race, ethnicity, and
5 gender of the victim and the accused.

6 It also requires the Department to
7 gather any other demographic information about
8 the victim and the accused as the Secretary
9 determines to be appropriate.

10 And then it also requires the Services
11 to include this data in a report that the Armed
12 Services each produce each year under Article
13 146a that basically records the data of courts-
14 martial each year. It's been called,
15 colloquially, it's called the CAF report, but
16 now, it is called the Article 146a report.

17 But then that will then drive a task
18 to the DAC-IPAD, which requires an assessment of
19 three things, two of them are listed here on the
20 slide.

21 But a review and assessment by fiscal
22 year of the race and ethnicity of members of the

1 Armed Forces accused of penetrative sexual
2 assault or contact sexual assault offenses in an
3 unrestricted report. Then the next is the same
4 assessment, review and assessment by fiscal year
5 of the race and ethnicity of members of the Armed
6 Forces against whom charges were preferred.

7 And then the final task that's not
8 listed on the slide, but is in the statute, is an
9 assessment of the race and ethnicity of those
10 members of the Armed Forces who were convicted of
11 a penetrative sexual assault or other contact
12 sexual assault offenses.

13 And then it requires a report from the
14 DAC-IPAD informing the Secretary of Defense and
15 the House Armed Services Committee and the Senate
16 Armed Services Committee setting forth the
17 results of those reviews and assessments.

18 And again, the portion of this
19 provision is to record this data and then
20 determine if there are any disparities that
21 require action by the Department of Defense or by
22 Congress. Next slide.

1 Outside of this statute, there are two
2 tasks -- there are actually three, I'll address
3 the third a little bit later, but General Schwenk
4 brought it up earlier today.

5 But there are two assessments in the
6 conference report to the National Defense
7 Authorization Act. So this is outside the
8 statutory language, but it's included in the
9 report of the conferees from the HASC and SASC on
10 the National Defense Authorization Act.

11 And the first is a task to the DAC-
12 IPAD to conduct an assessment of other justice
13 programs -- for example, mediation or restorative
14 justice programs -- that might be appropriate to
15 assist the victim of alleged sexual assault,
16 particularly where that sexual assault may not
17 have proceeded to a criminal prosecution.

18 So in essence, an assessment of other
19 programs that might assist victims in the
20 process.

21 The next is an assessment under RCM
22 1001(c) of victim impact. So as you may already

1 know, and of course, General Schwenk brought this
2 up earlier, RCM 1001(c) affords victims a special
3 right to provide input to the court-martial with
4 respect to two items: victim impact and also
5 mitigation. They can do this in one of two ways.
6 They can do it through a sworn statement or an
7 unsworn statement.

8 And the conferees are concerned that
9 some of the military judges have interpreted this
10 rule too narrowly, and as a result it's limiting
11 what survivors are permitted to say during
12 sentencing hearings in a way that doesn't fully
13 inform the court of the impact of the crimes on
14 the survivors.

15 So what the conferees have asked the
16 DAC-IPAD to do is to conduct their own assessment
17 as part of their review of courts-martial cases
18 to determine whether this may be the case.

19 There's also a third task in the
20 conference report that's related to guardians ad
21 litem, and I'll talk about that a little bit
22 later, with respect to a separate study the

1 Department of Defense has to conduct with respect
2 to guardians ad litem.

3 Next is a series of provisions that do
4 not have any specific task to the DAC-IPAD, but
5 may be of interest. And these result to victim
6 notification. And so the first is Section 536,
7 that is a special statutory provision that
8 requires the DoD to establish procedures to
9 enable the return of personal property that's
10 been collected from a victim as part of a sexual
11 assault forensic examination.

12 And so currently, those procedures may
13 not be as clear or as formalized as the statute
14 would or as Congress would like, and so, they've
15 directed the Department of Defense to establish
16 procedures by which a victim can seek return of
17 personal property and also, too, making sure that
18 they're informed perhaps of the consequences that
19 the collection of that personal property may have
20 on their case.

21 Next is Section 538, which requires
22 the notification of the victim of each

1 significant offense in the prosecution of the --
2 in the military justice system or the military
3 justice process and the processing of their case
4 specifically.

5 It requires two things, additionally.
6 It requires documentation in the case file of the
7 victim notifications. And also, too, it
8 specifically also requires documentation of a
9 victim's preference, whether they prefer their
10 case to be handled through the military justice
11 system or the civilian system.

12 Next is it requires status updates,
13 specifically as a case makes its way through the
14 system. And so the commander, as the commander
15 who is making determinations, they must
16 periodically notify the victim of the status of a
17 final determination on further action and on
18 their case.

19 So basically, again, it requires
20 status updates to the victim on the case, as it
21 proceeds to final determination, whether that
22 final determination be court-martial or non-

1 judicial punishment under Article 15 in the
2 Uniform Code of Military Justice, another
3 administrative action, or no action at all. So
4 again, statutorily requiring victim notification.
5 Next slide.

6 The next two sections that I'll
7 address, I've consolidated them into sort of one
8 bullet, but two sections that basically by
9 statute increase the manpower allocated to the
10 investigation and victim assistance in sexual
11 assault cases.

12 And so the first is a requirement that
13 Military Criminal Investigative Organizations
14 increase their number of defense forensic
15 examiners by at least 10 over about the next --
16 by at least 10, since the number that was in
17 existence on 30 September 2019. So a statutory
18 increase of ten defense forensic examiners.

19 Next is an increase in number of
20 sexual assault investigators. And so that
21 doesn't, the statute doesn't prescribe a specific
22 number, but what it does prescribe is a standard.

1 And so the standard is that Military
2 Criminal Investigative Organizations are to have
3 enough investigators such that they can process
4 their cases to the extent practicable within six
5 months from the report. Or I should say, the
6 initiation of the investigation.

7 DR. MARKOWITZ: Colonel Pflaum, excuse
8 me?

9 COLONEL PFLAUM: Yes, ma'am?

10 DR. MARKOWITZ: Can you just clarify
11 the MCIOs will increase the number of defense
12 forensic examiners or digital forensic examiners?

13 COLONEL PFLAUM: I'm sorry, you're
14 exactly right, it's digital forensic examiners.

15 DR. MARKOWITZ: Okay.

16 COLONEL PFLAUM: Yes, DF --

17 DR. MARKOWITZ: Two different things.

18 COLONEL PFLAUM: -- or DFES, right.

19 DR. MARKOWITZ: Okay.

20 COLONEL PFLAUM: Yes, I misspoke there,
21 thank you, ma'am.

22 Finally, it requires an increase of

1 VWLs, Victim/Witness Liaisons, across all the
2 Services. In essence, the Services are directed
3 to fill all of their shortages. So there may be
4 allocations out there that aren't filled for one
5 reason or the other, and that the Services are
6 required to fill their shortages by 19 December
7 2020.

8 Next is Section 540C, that requires
9 the Secretary of Defense to establish a policy to
10 ensure timely disposition of sexual assault
11 prosecution decisions, most importantly a
12 decision not to prosecute a particular case.

13 And so that policy is required by June
14 of 2020. And again, the policy is designed to
15 ensure timely disposition of those non-
16 prosecutable sexual related offenses.

17 The next three sections that I'd like
18 to address address training. And so these three
19 provisions are statutory provisions that direct
20 the Department of Defense to conduct specific
21 training.

22 The first is to initial disposition

1 authorities, IDAs. So the statute requires
2 specific training for initial disposition
3 authorities. And those are the authorities that
4 were established in an April 2012 Withholding
5 Policy from the Secretary of Defense.

6 So you may be familiar that the
7 Secretary of Defense withheld disposition of
8 certain types of sexual offenses to O-6s with the
9 special court-martial convening authority power.
10 And so this requires specific training for these
11 initial disposition authorities that basically is
12 designed to train them on the exercise of their
13 disposition authority.

14 Next is Section 540B, which directs
15 specific training on the role of commanders in
16 the military justice system. And so commanders
17 across all of the Services are instructed to, are
18 required to receive uniform training on the role
19 of commanders in all stages of the military
20 justice process.

21 That training is to include
22 investigation, prosecution, victim and assistance

1 rights, retaliation prevention, healthy command
2 climate to facilitate reporting, and any other
3 matters that the Secretary of Defense may deem as
4 appropriate.

5 That training is also required to
6 include best practices, and the Department is
7 also required to conduct periodic surveys to
8 identify those best practices, and then, again,
9 incorporate them into the training.

10 And again, all the Services are
11 different in terms of how they train their
12 officers and their commanders, but the statute
13 requires the Secretary to ensure, to the extent
14 practicable, uniformity across all of the
15 Services.

16 Finally, a section on this, with
17 respect to training, is Section 540D. The
18 Secretary of Defense is to establish and develop,
19 or to develop and issue a comprehensive policy to
20 reinvigorate the prevention of sexual assault.

21 And so this is complementary to the Defense
22 Advisory Committee that the statute creates.

1 This also directs the Secretary to establish
2 policy to reinvigorate prevention.

3 And so that's -- the policy is
4 designed to include education and training and
5 programs designed to encourage and promote
6 healthy relationships, empowerment of
7 noncommissioned officers, fostering of social
8 courage to promote intervention, processes and
9 mechanisms to address behavior on the continuum
10 of harm, prevention of alcohol abuse, and any
11 other matters that the Secretary deems
12 appropriate.

13 And so within 180 days after the
14 issuance of that policy -- so that policy is
15 required by 17 June 2020. Within 180 days after
16 that, the Secretaries of each of the Services
17 have to have their own policy. Next slide.

18 These next three provisions are those
19 that I best categorize as affecting the
20 prosecution of sexual assault. And so the first
21 is Section 540J, that requires a pilot program
22 for defense investigators. You heard that

1 mentioned by one of the panel members earlier,
2 that the statute requires each of the Services to
3 conduct their own pilot program.

4 There are two specific aspects of
5 those that are worth mentioning. And the first
6 is that the programs are supposed to be as
7 uniform as possible across all of the Services.
8 But also, too, by statute, it requires that a
9 defense investigator may not speak to a victim of
10 an offense, except through a request made through
11 the Special Victims Counsel or another counsel,
12 if the victim does not have their own Special
13 Victim Counsel.

14 So that is one sort of aspect of the
15 program that, as the Services are conducting
16 their pilot programs, that will be required as a
17 part of this new statute. And then after the
18 pilot program, the statute requires a report
19 after three years on those.

20 And I will note that the Army has
21 already begun a program to institute defense
22 investigators, and it will hire 12 over -- and

1 it's in the process of hiring 12 right now.

2 Next is Section 543. And so Section
3 543 amends 10 USC 1567a. So just -- I apologize,
4 and I'll send a corrected copy back, but it's
5 1567a, Subparagraph A. And so what Section 1567a
6 does is require notification to law enforcement,
7 to local law enforcement, when a commander issues
8 a military protective order, when either the
9 victim or -- when either party, I will say, to
10 the military protective order lives off of the
11 military installation.

12 So it requires notice. This provision
13 requires that notice to take place within seven
14 days of the issuance. It also establishes a
15 reporting requirement that the Services will
16 track the number of military protective orders
17 issued and the number that are reported to
18 civilian authorities.

19 Section 550 is an additional provision
20 to protect disclosures that are made as part of
21 the Catch a Serial Predator or Catch a Serial
22 Offender Program. So this is a program under the

1 Department of Defense whereby victims who have
2 made a restricted report can still provide
3 details with respect to their offender or the
4 offense to law enforcement to enable the
5 investigation of serial offenders.

6 So this provisions provides two
7 protections back to victims who choose to
8 participate in this program. And the first is
9 that anything that a victim says or discloses as
10 part of this program is protected from disclosure
11 under the Freedom of Information Act.

12 BGEN SCHWENK: Is there such a program
13 now?

14 COLONEL PFLAUM: There is such a
15 program now, yes. It has been started. I don't
16 recall the exact specific date, but it is in
17 effect right now. Next is -- Section 550 also
18 makes clear that anything that a victim says as
19 part of this disclosure with respect to this
20 program does not affect the status of their
21 restricted report. Again, it protects their
22 restricted report even though they choose to

1 participate in this program. Next slide.

2 So this is Section 541. So these
3 provisions address basically the victim, I want
4 to say, legal counsel that's provided to victims.
5 And so first, Section 541 makes clear that
6 Special Victims Counsel or Victims Legal Counsel
7 must assist, consult and assist victims within
8 incidents of retaliation.

9 So they are to assist victims in
10 understanding their rights, assist victims in
11 filing any complaints, and also assist victims
12 through any other resulting military justice
13 proceedings.

14 This provision, Section 541, also
15 directs, by 20 December 2024, that staffing
16 levels for Special Victims Counsel or Victims
17 Legal Counsel are such that, to the extent
18 practicable, the average client load is 25 cases
19 for these counsel.

20 Section 542 mandates that a Special
21 Victims Counsel or Victims Legal Counsel will be
22 made available to a victim within 72 hours of

1 notification, or I'm sorry, 72 hours of the
2 request absent exigent circumstances.

3 So the statute gives authority to the
4 Secretaries to articulate what those exigent
5 circumstances are, but basically, again, mandates
6 that the Special Victims Counsel be made
7 available within 72 hours.

8 And if the Secretary determines that
9 a Victims Legal Counsel cannot be available
10 within that 72 hours, that the Secretary ensure
11 that the counsel be provided to the victim as
12 soon as possible.

13 Section 548 is a new statute, and I'll
14 address this also later in the reporting
15 provision. But what this does is expand the
16 availability of counsel to domestic violence
17 victims.

18 And so as long as the domestic
19 violence victim is otherwise entitled to legal
20 assistance under 10 USC 1044, that's the statute
21 that authorizes legal assistance, they would also
22 be entitled to counsel. That leaves to the

1 Services the ability to determine whether that
2 will be provided out of the Service's legal
3 assistance function or the Special Victim Counsel
4 function.

5 However, what it does also require is
6 a report back to Congress, actually coming up
7 very quickly, within 120 days of the passage of
8 the statute, which would be in April, on how the
9 Services are going to implement this, what
10 resources they may need, what training or other
11 statutory provisions may be necessary to expand
12 and to make this program happen.

13 But it also specifies that these
14 counsel are to receive special legal training in
15 the legal issues commonly associated with
16 domestic violence offenses. And also, too, it
17 directs, to the extent practicable, that they
18 serve as counsel in this role for not less than
19 two years. It also makes clear that this
20 relationship is to be an attorney-client
21 relationship, versus some other type of
22 relationship.

1 Finally, Section 550C makes clear that
2 when a counsel is assigned as a Special Victim
3 Counsel, that they're to receive special training
4 on the local laws that are applicable in the
5 jurisdiction in which they practice.

6 What this is designed to facilitate is
7 the educated and informed advice that they may
8 give to a victim on whether to elect the handling
9 of their case through the military justice
10 process or through the civilian jurisdiction.

11 And so that training must include
12 victim rights, prosecution of criminal offenses,
13 sentencing for conviction of criminal offenses,
14 and protective orders. Again, the local laws
15 that address those four items.

16 MS. BASHFORD: Can I just make one
17 comment --

18 COLONEL PFLAUM: Yes, ma'am.

19 MS. BASHFORD: -- about that? It takes
20 a fair amount of time to learn all of those
21 things about a local jurisdiction. People get
22 transferred from installation to installation. I

1 just also note, you could have soldiers in Fort
2 Dix come to Manhattan for the weekend. So
3 knowing New Jersey law, to the extent you can
4 learn it that quickly, is really not going to
5 help you very much. I think it's well-
6 intentioned, but it's not an easy task, is what
7 I'm trying to point out there.

8 COLONEL PFLAUM: Yes, ma'am, thank you
9 very much. No, and I think it will be incumbent
10 on the Services to look at those nuances of this
11 election and make sure that we tailor our
12 programs appropriately.

13 MS. GARVIN: Sir, if I may, just a
14 quick question also? That training on the law
15 and policies, with regard to the state systems,
16 that doesn't expand the SVC/VLC's role to
17 representing in those systems, does it? It's
18 just if the survivor, the victim goes that route
19 and prosecutions that route, then the SVC and VLC
20 is not representing in that system still,
21 correct?

22 COLONEL PFLAUM: That's right. I --

1 MS. GARVIN: Okay.

2 COLONEL PFLAUM: -- do not -- yes. I
3 do not read it that way. Again, it's solely to
4 assist the Special Victim Counsel in advising
5 their client in making an informed decision as to
6 which process to choose. Next slide.

7 The next eight provisions over the
8 next two slides are reports that the Department
9 of Defense is required to provide back to
10 Congress on various aspects of the military
11 justice system. So the first one is a
12 recommendation as to the establishment of a
13 separate sexual harassment punitive article. So
14 currently under the military justice system,
15 sexual harassment is generally punished in one of
16 two ways -- I'll say addressed in one of two
17 ways.

18 The first is through Article 93 of the
19 UCMJ, which is a provision that prevents cruelty
20 and maltreatment to subordinates. The second way
21 is through violations of any applicable Service
22 regulations or policies that address sexual

1 harassment.

2 What this provision is asking the
3 Department of Defense to do is to provide an
4 assessment on whether, for lack of a better word,
5 the pros and cons, the issues involved in an
6 actual separate UCMJ article that would address
7 sexual harassment.

8 Next is Section 540F, and if I may
9 editorialize, I think this is the most
10 significant study that the Department of Defense
11 has to conduct, both in scale and in consequence.
12 But what this is is an assessment of the
13 feasibility and advisability of an alternative
14 military justice system for felony level
15 offenses, where an O-6 judge advocate with
16 significant criminal litigation experience
17 outside the chain of command of the accused makes
18 preferral or referral decisions.

19 So that is a very comprehensive study
20 that also, by the statutory terms, requires an
21 assessment of other military justice systems
22 throughout the world. And that is -- the

1 Department of Defense has been given 300 days to
2 conduct that study.

3 Next is Section 540H. And this is the
4 study to assess the feasibility and advisability
5 of establishing or expanding a policy that's
6 currently applicable only within the Air Force,
7 with respect to what's called Safe to Report.

8 And so what this would do is provide
9 immunity to victims who may have engaged in
10 collateral misconduct during or predicating their
11 sexual assault, or also if there was collateral
12 misconduct discovered within the investigation of
13 the sexual assault. What this provision would do
14 would be to provide immunity to victims who
15 report with such collateral misconduct.

16 Of note, though, a bill has been
17 introduced in both the House and the Senate
18 within the past two weeks that would create this
19 provision by statute. Next is Section 540 -- and
20 so --- and that would be considered as part of
21 the 2021 National Defense Authorization Act.

22 Next is Section 540K. And the purpose

1 of this study is to conduct an assessment as to
2 the feasibility and advisability of expanding the
3 protections available to victims who make
4 restricted reports. In other words, when a
5 victim makes a restricted report, that restricted
6 -- they can only make that restricted report and
7 have it remain restricted to certain individuals.

8 What this is -- requires the
9 Department of Defense to assess the feasibility
10 and advisability of expanding that. In other
11 words, victims could make restricted reports to
12 other particular members.

13 For example, one of the questions by
14 statute that we're asked is whether they might be
15 able to make a restricted report to law
16 enforcement. So they make a report to law
17 enforcement, but say that they want the report to
18 be restricted.

19 And also, too, to members of their
20 chain of command or a military sponsor. And so
21 again, they could make those reports, and they
22 would still be considered restricted for purposes

1 of that policy.

2 BGEN SCHWENK: Or a third party.

3 COLONEL PFLAUM: I'm sorry?

4 BGEN SCHWENK: Or a third party.

5 COLONEL PFLAUM: Yes, and the third
6 party, as I understand the statute, is that if a
7 third party were to report a sexual assault, that
8 the victim themselves isn't reporting the third
9 party is making that, then the victim could still
10 ask that that be a restricted report.

11 Next -- and what's important also on
12 this one is that, as DoD is conducting this
13 study, that DoD is required to consult with the
14 DAC-IPAD on this. That report is due in June of
15 2020.

16 The next is Section 540L. And what
17 this provisions asks or what this provision asks
18 DoD to study -- actually it asks both DoD to
19 study, as well as the DAC-IPAD to study the
20 feasibility and advisability of establishing a
21 guardian ad litem program. And General Schwenk,
22 you mentioned this earlier in the discussion with

1 the judges.

2 The military, the DoD study is
3 basically limited to determining whether a
4 guardian ad litem program would be appropriate
5 for military dependents who are victims or
6 witnesses in a crime under the UCMJ.

7 So that requires a couple things by
8 the statutory terms that we're asked to look at
9 is what -- if the victim is under 12 or if the
10 victim has a mental impairment or incapacity in
11 some way, shape, or form.

12 The next -- what the DAC-IPAD though
13 is required to study -- and by the way, I will
14 say that DoD has a year to provide our study, the
15 DAC-IPAD only has six months to conduct its
16 study. But what the DAC-IPAD is directed to
17 study is the advisability of providing a guardian
18 ad litem upon the report of any sexual related
19 offense for any victim who has not attained the
20 age of 18.

21 So it would be a much broader, sort of
22 broader group of folks that would be entitled to

1 a guardian ad litem under the DAC-IPAD study.

2 MS. GARVIN: May I ask a clarifying
3 question? The DAC-IPAD though is just victims
4 not witnesses, and DoD is victims and witnesses?

5 COLONEL PFLAUM: That's the way I
6 understand it.

7 MS. GARVIN: Okay.

8 COLONEL PFLAUM: Yes, ma'am. Next is
9 540M. This is not a Department of Defense study,
10 it's actually a GAO study. But it is noteworthy
11 that the Congress has tasked the Comptroller
12 General of the United States -- again, likely it
13 would be the GAO that conducts this study -- but
14 it's a report on the implementation of the
15 statutory requirements on sexual assault
16 prevention and response in the military over the
17 period of 2004 to 2019.

18 So this is, again, a very
19 comprehensive study governing 15 years' worth of
20 statutory and policy changes that have occurred
21 in the sexual assault arena during that time.
22 Section 542 directs a study on the feasibility

1 and advisability of establishing and maintaining
2 civilian positions to support Special Victim
3 Counsel or Victims Legal Counsel.

4 And so in those Services that don't
5 have, by policy, civilians assigned to, in
6 essence, as paralegals or other legal assistants
7 to help their Victim Legal Counsel or Special
8 Victim Counsel, this asks a study as to whether
9 that might be appropriate to maintain continuity
10 of representation, in the representation of
11 victims, and also the preservation of
12 institutional knowledge when it comes to
13 assisting victims in this capacity.

14 Next is Section 548, which I mentioned
15 earlier, but again, to the extent that -- well
16 the statute does require the Services to provide
17 counsel to domestic violence victims.

18 This requires the Services to report,
19 well actually DoD to report how the Services are
20 going about the implementation, any additional
21 resources that might be necessary, and any
22 additional law or policy changes that are

1 required to implement that.

2 And then finally, I'll end with the
3 mention of the change to Article 37. And that,
4 previously, that section was previously called
5 unlawfully influencing the action of the court.
6 Under the new statutory title, it's called
7 command influence.

8 This is the most significant to the
9 unlawful command influence statute since 1968.
10 There's been quite a bit of case law that's
11 evolved since then, but it's the most significant
12 statutory change.

13 A couple key points from this that are
14 worth mentioning, for your awareness, is that it
15 now protects preliminary hearing officers, and
16 Special Victims Counsel has been previously, I
17 won't say excluded, but not specifically
18 mentioned in the statutory protections against
19 unlawful command influence. And it provides two
20 significant expansions that had previously not
21 been included in this statute.

22 And the first is, it allows for -- it

1 expressly authorizes statements regarding
2 criminal activity and offenses that do not
3 advocate for a particular disposition or a
4 particular court-martial finding or sentence, or
5 do not relate to a particular accused.

6 So in essence, a commander could talk
7 about -- it authorizes commanders to talk more
8 freely about criminal offenses in their
9 formation, with the intent to dissuade or deter
10 those types of offenses. It makes it clear that
11 that, in and of itself, is not unlawful command
12 influence.

13 BGEN SCHWENK: So this puts into
14 statute the old crimes not criminals, or yes,
15 crimes not criminals, process not results?

16 COLONEL PFLAUM: Yes. You may --

17 BGEN SCHWENK: It's now in statute?

18 COLONEL PFLAUM: -- have heard it as
19 lawful command emphasis, as the counterbalance to
20 unlawful command influence, but yes, sir, I think
21 that's accurate.

22 Next, it also allows more, it also

1 specifically allows more communication between
2 superior and subordinate authorities, in
3 discussing military justice matters, as long as
4 the superior does not direct a specific
5 disposition or substitute the subordinate's
6 discretion. So again, it allows a subordinate to
7 see counsel and mentorship, but still protects a
8 case from a superior commander directing a
9 particular disposition.

10 The next major expansion of this
11 article is that it requires an accused to show
12 prejudice to receive relief. In essence, the
13 violation must materially prejudice a material
14 right of the accused in order to obtain relief
15 under Article 37, which is, again, a change to
16 the current state of the law.

17 And so with that, I appreciate your
18 patience. I ran through a number of provisions
19 of the 2020 NDAA, I hope it wasn't too dry or too
20 much of a recitation of the statutory language.
21 But again, I tried to identify those that
22 specific address the DAC-IPAD, as well as other

1 provisions that, again, may be relevant to you as
2 it address the investigation, prosecution, and
3 defense, and I would also say, victim support
4 through the military justice process.

5 So with that, I'm able to answer any
6 questions, if you have any, or I'll yield the
7 floor.

8 DR. MARKOWITZ: Yes, I have --

9 HON. GRIMM: So it seems like --

10 DR. MARKOWITZ: -- a quick question.

11 Related to Section 538, notification of
12 significant events, does that include submission
13 of kits, analysis of the kit, things like that,
14 or is this just strictly related to
15 investigatory, like the actual investigation and
16 moving it through the actual process?

17 COLONEL PFLAUM: I read this to solely
18 address process, and as it moves through sort of
19 each step of the process. I don't know if the
20 drafters were thinking of sort of what I would
21 call investigative steps that are outside of the
22 normal flow of a case, but it is certainly a

1 point worth noting.

2 DR. MARKOWITZ: So USACIL is not
3 considered part of the calculus right now, where
4 538 is concerned?

5 COLONEL PFLAUM: That is my
6 understanding, --

7 DR. MARKOWITZ: Okay.

8 COLONEL PFLAUM: -- but I'm willing to
9 stand corrected if I'm wrong.

10 DR. MARKOWITZ: Okay, thank you.

11 MS. BASHFORD: Judge Grimm, did I hear
12 that you had a comment or question?

13 HON. GRIMM: No, I was just going to
14 say, it doesn't sound like Congress is very
15 concerned about this area that we're dealing
16 with. That was sarcastic.

17 MS. BASHFORD: Oh, okay. I'm sorry,
18 Judge Grimm, did you have a comment or no?

19 HON. GRIMM: No, no, no, no, I was just
20 observing that there's obviously a great deal of
21 Congressional interest in this area that we are
22 looking at.

1 MS. BASHFORD: Okay. Well --

2 MS. TOKASH: I heard you, Judge Grimm.

3 MS. BASHFORD: Meghan, do you have a
4 comment?

5 MS. TOKASH: I don't --

6 HON. GRIMM: No, that's all right.

7 That's --

8 MS. BASHFORD: Okay.

9 HON. GRIMM: -- all right. It's too
10 hard to hear, it was just an observation that
11 there's obviously a lot of Congressional interest
12 in this area that we are focusing on.

13 MS. BASHFORD: Okay.

14 BGEN SCHWENK: We got it, Judge Grimm,
15 thank you.

16 MS. BASHFORD: Colonel Pflaum, thank
17 you so much. I hope you have an enormous wall
18 calendar for all of these due dates, and I hope
19 you don't plan to sleep.

20 (Laughter.)

21 COLONEL PFLAUM: Thank you, ma'am.

22 Thank you very much.

1 MS. BASHFORD: We're just going to take
2 a brief like stretch in place break while the
3 staff arranges for our public comment.

4 (Whereupon, the above-entitled matter
5 went off the record at 3:05 p.m. and resumed at
6 3:09 p.m.)

7 MS. BASHFORD: Welcome, Jennifer
8 Elmore, is that correct?

9 MS. ELMORE: Yes.

10 MS. BASHFORD: Thank you very much for
11 coming to speak with us. I know you've made a
12 request for public comment, and we look forward
13 to hear what you have to say.

14 MS. ELMORE: Thank you so much. I
15 realize I am what stands between you and being
16 adjourned, so I will be brief as I can be.

17 MS. BASHFORD: Take all the time you
18 want.

19 MS. ELMORE: Thank you. I would like
20 to thank the esteemed members of this Committee
21 for the opportunity to be here today before you.

22 My name, as you shared, is Jennifer

1 Elmore, and I am a survivor of sexual assault,
2 military sexual assault committed by my father, a
3 now retired United States Army Major General.

4 For the past five years, I've lived
5 and am still living as a victim through the
6 investigation, the prosecution, and the defense
7 of my sexual assault, first through the military
8 justice system, and now through the civilian
9 justice system.

10 Today though I'm not here as an
11 individual, but as a representative for a broader
12 group of military sexual assault survivors known
13 as Survivors United. We are a group that has
14 come together to provide a room for voices of
15 victims and their experiences navigating the
16 military justice system.

17 It is because of those firsthand
18 experiences that we are well-equipped and eager
19 to be active participants in creating fair and
20 comprehensive change.

21 We are more than our stories. We want
22 more than just to be told, we are sorry for what

1 you've experienced. We want to be as actively
2 sought after and respected for the contribution
3 we can make to improvement as are so many others
4 -- legislators, experts, judges, prosecutors,
5 defenders -- who are committed to the building of
6 a system which is fair and functional.

7 One way in which we've sought to
8 participate is through ongoing conversations with
9 legislators on specific concerns, observations,
10 and ideas that are based on our experiences.

11 Last year, we spoke with legislators
12 on specific topic of sentencing and the
13 restrictions placed on victims in that process.
14 The restrictions severely limit what a victim may
15 include in their victim impact statements, as
16 well as how those statements are delivered.

17 Specific experiences we've had
18 include: redlining of statements before being
19 given, not being allowed to complete the
20 statement in delivery, being cut off by judges,
21 the inability to say anything about our
22 preference or desire for sentencing.

1 While I have not yet had a chance to
2 give an impact statement, I was close enough in
3 the Article 32 process to have been asked to
4 begin preparing my thoughts. Preparing myself
5 for that moment to sit in a room with my father,
6 look him in the eye, and tell him the impact of
7 his actions was of extraordinary importance. To
8 have been restricted as to what I could or could
9 not have said was a re-enactment of the very
10 message of insisted silence of my perpetrator.

11 What we know anecdotally we strongly
12 believe represents a common experience of
13 survivors of military sexual assault that get to
14 this stage in the process. We do not, however,
15 have the data to support that belief. We hope as
16 this Committee continues to gather informing data
17 in many areas, that this specific topic would be
18 included in those efforts.

19 Victims are watching this process.
20 They are making the determination of whether or
21 not it is safe to come forward. Is the process
22 fair? A victim having the freedom to speak

1 freely at sentencing is the one way that they can
2 know -- or one way they can know the answer is
3 yes.

4 In closing, I'd like to share with you
5 the appreciation for various members of Survivors
6 United who have had the opportunity to come
7 before you in the past. Personally, I have
8 experienced the results of the hard work by you
9 and others in -- hard work for the Armed Services
10 in making improvements. I did want to share a
11 story of a life experience with the prosecutor in
12 my case.

13 In the first meeting with the
14 prosecutorial team, without my having said
15 anything, I walked into a room and they knew the
16 impact of being in a room filled with members of
17 the Armed Services in uniform, and they showed up
18 in civilian clothes. It was profound --
19 profoundly kind.

20 By the time we got to the preliminary
21 hearing, and I was to go before the judge and be
22 cross examined and give a testimony, uniforms are

1 required. And the fancy ones, not the
2 comfortable ones. And I was standing nervously
3 in the hallway and the Army Captain, main
4 prosecutor, came up to me and silently whispered
5 to me, with her hand over her Army badge and
6 said: this is your Army, we choose you.

7 Thank you for the work you are doing
8 to put the broader facts together that allow for
9 real change to happen. We look forward to
10 working with you on an ongoing basis. Thank you.
11 And I'm happy to take questions.

12 HON. GRIMM: Thank you.

13 MS. BASHFORD: Thank you, Ms. Elmore.
14 Does anybody have questions for her?

15 BGEN SCHWENK: So one of the areas that
16 you're concerned about having victims restricted
17 is a specific sentence recommendation, or however
18 specific they want to be. Is another -- we
19 heard, remember, I asked -- I don't know if you
20 were here, but I asked the judges earlier for
21 their thoughts and read them the statute.

22 And one of the other areas they said

1 they had limited victims testimony was when there
2 is a piece of evidence that the judge, during the
3 trial, ruled was inadmissible, and the victim --
4 to the victim, it was a significant matter that
5 they wanted --

6 MS. ELMORE: Yes.

7 BGEN SCHWENK: -- because it helped
8 explain the impact of --

9 MS. ELMORE: Yes.

10 BGEN SCHWENK: -- the offense on them.

11 MS. ELMORE: Yes.

12 BGEN SCHWENK: Is that something else
13 that you think we should look at?

14 MS. ELMORE: Absolutely.

15 BGEN SCHWENK: Okay.

16 MS. ELMORE: I have a very passionate
17 answer to that, just because the completion of my
18 experience with sexual assault spans over a
19 period of 15 years. And so the totality of those
20 experiences sets the context for any one
21 experience. And so the importance of evidence
22 being admitted more broadly than just what

1 otherwise might make sense is incredibly
2 important, in my opinion, in these cases.

3 BGEN SCHWENK: Okay. Do you have any
4 other -- if you do now know of other categories,
5 that's great. Please let us know what they are.

6 MS. ELMORE: You shouldn't have asked
7 me that, I have a list of 20 back here.

8 (Laughter.)

9 BGEN SCHWENK: Well then could you give
10 us or give the staff a list, and --

11 MS. ELMORE: Yes.

12 BGEN SCHWENK: -- that way, there are
13 specific things that we can then talk to people
14 about --

15 MS. ELMORE: Yes.

16 BGEN SCHWENK: -- because we're about
17 to go on site visits and --

18 MS. ELMORE: Yes.

19 BGEN SCHWENK: -- and ask people in the
20 field and talk to Special Victims Counsel and
21 Victims Legal Counsel and --

22 MS. ELMORE: I'd be happy to.

1 BGEN SCHWENK: -- that would help us as
2 we step forward. And so --

3 MS. ELMORE: I'd be very happy to.

4 BGEN SCHWENK: -- thank you very much
5 for being here, I --

6 MS. ELMORE: Thank you.

7 BGEN SCHWENK: -- appreciate it.

8 MS. BASHFORD: Mr. Kramer?

9 MR. KRAMER: Thank you for being here,
10 I had a question. You were here all day, I --

11 MS. ELMORE: About halfway through the
12 day --

13 MR. KRAMER: Okay.

14 MS. ELMORE: -- so I missed the judges'
15 testimony.

16 MR. KRAMER: So I have -- okay. The
17 judges told us that they don't give reasons at
18 sentencing for why they have imposed the
19 sentence, they just say evidently a term of
20 years.

21 And I thought, both for the defendant
22 who's been convicted and the sentence is imposed,

1 as well as the victim, --

2 MS. ELMORE: Yes.

3 MR. KRAMER: -- that they would want to
4 know the reasons the judge imposes the sentence.
5 I'm just curious if -- obviously from the
6 victim's viewpoint -- if you would want to hear
7 the reasons why the judge imposed the sentence,
8 or if just --

9 MS. ELMORE: Or acquitting.

10 MR. KRAMER: -- the ultimate sentence?
11 Yes.

12 MS. ELMORE: It is something we've had
13 a lot of sentiment about and have experienced
14 firsthand, and it is very frustrating for there
15 to be silence on either side, whether it's a
16 conviction, acquittal, or for that matter, any
17 judgment that is made.

18 One of our group members, in fact, had
19 a full acquittal in her case and has nothing to
20 point to as to why that was the case and really
21 is shut down even in asking the question. Right?
22 There's no dialogue. So extraordinarily painful.

1 And again, back to my comment about
2 victims watching, I know one of the things that
3 Department of Defense and the Armed Services are
4 focusing on are getting accurate numbers of how
5 many -- what exactly is the extent of this
6 epidemic? And I believe it is.

7 I believe people are watching. And I
8 -- the facts come together and for victims that
9 see these things, where I'm going to really put
10 myself out there and incur a huge cost to tell a
11 story, and I know my chances are one direction or
12 the other of there ever becoming a conviction,
13 and then not to have an explanation is very heavy
14 on the side of not saying anything.

15 MS. BASHFORD: Ms. Tokash, did you have
16 a question?

17 MS. TOKASH: I didn't have a question,
18 I just wanted to say thank you very much for
19 coming in to speak to us today. We really
20 appreciate it.

21 HON. GRIMM: And this is Paul Grimm,
22 Chair, if I could have one comment to add to echo

1 entirely what Ms. Tokash said.

2 In the federal courts, I know that
3 there are statutory victims' rights that have
4 been enacted by Congress in the last few years.
5 And it is very frequent to have both written
6 submissions in federal court that are provided in
7 sentencing.

8 And that it is not at all infrequent
9 for me to read from, if not the entirety,
10 sometimes unfortunately I get dozens of them, and
11 reading from all of them is not possible, but to
12 help the defendant understand the impact of the
13 conduct.

14 And also an opportunity to speak in
15 person. And whether or not the victim chooses to
16 do it or not, it has been my personal observation
17 that the ability of the victim to have their
18 experience shared with the defendant is something
19 that is instructive not only to the defendant,
20 but also -- even if the outcome is a lesser
21 sentence than what the victim might have hoped
22 for -- helps them understand.

1 And I have been enormously impressed
2 by the grace and dignity of the victims under
3 these circumstances, and sometimes, quite
4 candidly, their forgiveness.

5 MS. BASHFORD: Thank you.

6 MS. CANNON: Thank you for being here.
7 I believe you mentioned that you testified, if
8 I'm not correct, correct me, but you testified at
9 a 32 hearing?

10 MS. ELMORE: The preliminary hearing --

11 MS. CANNON: Right.

12 MS. ELMORE: -- before the 32.

13 MS. CANNON: Yes. And how did you feel
14 about that? Because we're looking into questions
15 about that, and we want to know your feelings
16 about that.

17 MS. ELMORE: My -- the advice and
18 counsel that I was given prior to the preliminary
19 hearing was that much work had been done to
20 protect victims from having to testify at the
21 preliminary hearing.

22 In this particular case, the advisors,

1 the prosecutorial team felt it was very important
2 for the judge to hear from me in the preliminary
3 hearing. And so it was my choice to either take
4 the protection that I'm afforded or to testify,
5 and I chose to testify.

6 And it was -- there's a lot to say.
7 It was extraordinarily difficult, and I've had a
8 vision in years gone by that that moment of
9 sitting in a courtroom and being allowed to
10 answer questions truthfully would make a
11 difference and fix something.

12 And it was important, but then to be
13 subject to cross examination and having judgments
14 made on different aspects and different
15 activities, that for me were devastating, some
16 thrown out, some kept in, and know that my
17 testimony was having a lot to do with what was
18 given validity and what wasn't, was a learning
19 experience.

20 MS. CANNON: One of our concerns is if
21 you don't testify at the preliminary hearing, and
22 it does go to court-martial, you have no idea and

1 it's kind of like --

2 MS. ELMORE: Yes.

3 MS. CANNON: -- a blind side, in --

4 MS. ELMORE: Yes.

5 MS. CANNON: -- some respects. So

6 given that --

7 MS. ELMORE: I would have been better
8 prepared for the 32, had we made it there.

9 MS. CANNON: Okay, thank you.

10 MS. ELMORE: Yes.

11 MS. GARVIN: Thank you for being here;
12 it's good to see you. I want to make sure I
13 understood part of your statement. You mentioned
14 that one of the things that some of your members
15 have experienced is, I think you talked about
16 redlining or --

17 MS. ELMORE: Yes.

18 MS. GARVIN: -- cutting out, which
19 certainly used to happen in the civilian system a
20 couple of decades ago. But you're saying some of
21 your members actually --

22 MS. ELMORE: Yes.

1 MS. GARVIN: -- have had people
2 redline?

3 MS. ELMORE: That's correct.

4 MS. GARVIN: Okay, thank you.

5 MS. BASHFORD: Thank you very much for
6 --

7 MS. ELMORE: Thank you so much.

8 MS. BASHFORD: -- coming and sharing
9 your experience, it will be very helpful to us as
10 we continue our work in this area.

11 MS. ELMORE: Thank you --

12 MS. BASHFORD: Thank you.

13 MS. ELMORE: -- so much, I appreciate
14 it. Thank you.

15 MS. BASHFORD: Colonel Weir, do you
16 have any last matters?

17 COLONEL WEIR: I just want to draw your
18 attention to the next public meeting is May 15th,
19 but I know the working groups have had some
20 conversations about meeting before or in-between
21 that public meeting.

22 BGEN SCHWENK: No.

1 COLONEL WEIR: There's some more work
2 to be done. So the staff will be contacting you
3 to take care of that.

4 Next week, I'll shoot out an email
5 that gives you almost the next year and a half's
6 dates that have been selected for the public
7 meetings, but they're going to fall roughly in
8 the same months.

9 I just want to emphasize the
10 importance of these courtroom or court-martial
11 observations, because what we envision as a
12 staff, you've heard a lot of information about
13 what transpires in a courtroom. So when you all
14 go out and observe courts-martial, observe
15 courts-martial from different Services.

16 And then what we would like to have,
17 if not everybody, a large number of the
18 Committee, that has gone and witnessed two,
19 three, four, however many you can fit into your
20 schedule, and then come back and have a
21 discussion about what you saw, the good, the bad,
22 not specifically pointing out Prosecutor Weir was

1 horrible, but generally what you saw in those
2 courts-martial.

3 I think the members who have seen
4 trials already have a frame of reference when
5 they're listening to what the military judges are
6 talking about. And so I think that's vitally
7 important.

8 Remember, for the site visits, you all
9 can submit questions about what you think is
10 important. So if you are a former high speed
11 investigator, that would be the person who would
12 submit questions for investigators.

13 (Laughter.)

14 COLONEL WEIR: So what we will do is
15 gather all those questions up in a format, and
16 there will be prosecutor questions by the various
17 types of folks we want to talk to. And then
18 we'll try to come up with a, I won't say a one to
19 whatever it is, number one's the most important,
20 but we'll try to get those questions in some type
21 of order that makes sense, as far as trying to
22 make sense out of the site visits.

1 And I think it's important that, as
2 was pointed out by Glen, that Dr. Well says these
3 site visits can have research, analysis can be
4 done on those questions. And so it would make
5 sense to have all the same questions asked, or
6 refined as we go to various installations.

7 Ma'am, that's all I have.

8 DR. SPOHN: Just for planning purposes,
9 the site visits, you have them listed for three
10 days. Is that two days of travel and one day of
11 site visit, or is that a three-day site visit?

12 COLONEL WEIR: That's including travel.

13 DR. SPOHN: Including travel. Thank
14 you.

15 MS. BASHFORD: Mr. Sullivan?

16 MR. SULLIVAN: This meeting is closed.

17 (Whereupon, the above-entitled matter
18 went off the record at 3:26 p.m.)

19

20

21

22

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