

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

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PUBLIC MEETING

+ + + + +

THURSDAY
APRIL 21, 2022

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The Advisory Committee met via Virtual Meeting, at 2:45 p.m. EDT, the Honorable Karla Smith, Chair, presiding.

PRESENT

Hon. Karla Smith, Chair
MG(R) Marcia Anderson
Ms. Martha Bashford
Ms. Meg Garvin
Hon. Suzanne Goldberg
Hon. Paul W. Grimm
Mr. A.J. Kramer
Ms. Jennifer Gentile Long
SGT(R) James Markey
Dr. Jennifer Markowitz
Hon. Jennifer O'Connor
Dr. Cassia Spohn
BGen(R) James Schwenk
Ms. Meghan Tokash
Hon. Reggie Walton

ALSO PRESENT

Mr. Dwight Sullivan, Designated Federal Officer

DAC-IPAD Staff:

**Colonel Jeff Bovarnick, U.S. Army, Executive
Director**

Ms. Julie Carson, Deputy Director

Mr. Dale Trexler, Chief of Staff

Ms. Audrey Critchley, Attorney-Advisor

Dr. Alice Falk, Technical Editor

Ms. Theresa Gallagher, Attorney-Advisor

Ms. Nalini Gupta, Attorney-Advisor

Ms. Amanda Hagy, Senior Paralegal

Mr. Chuck Mason, Attorney-Advisor

Ms. Marguerite McKinney, Analyst

Ms. Meghan Peters, Attorney-Advisor

Ms. Stacy Powell, Senior Paralegal

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri Saunders, Attorney-Advisor

Ms. Kate Tagert, Attorney-Advisor

Ms. Eleanor Magers Vuono, Attorney-Advisor

Mr. Pete Yob, Attorney-Advisor

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Adjourn. 135

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

2 (2:46 p.m.)

3 MR. SULLIVAN: Good afternoon. The --
4 this first meeting of the Reconstituted Defense
5 Advisory Committee on Investigation, Prosecution,
6 and Defense of Sexual Assault Armed Forces is
7 officially open.

8 I am Dwight Sullivan. I am the
9 Designated Federal Officer of the Committee,
10 colloquially known as the DAC-IPAD. Before I
11 turn the proceedings over to the Chair, I would
12 like to reiterate something that was said in the
13 earlier administration -- administrative session.

14 The original Chair of the DAC-IPAD,
15 Ms. Bashford, was term-limited, and so we have a
16 new Chair of the DAC-IPAD. But, I would want to
17 thank, on behalf of the Department of Defense,
18 Ms. Bashford, for her outstanding stewardship of
19 the DAC-IPAD, when she was -- when she served for
20 four years, as the Committee's Chair.

21 As the Chair, she had -- she had a
22 significant amount of additional work, beyond

1 those of the other members, in preparing for the
2 meetings and -- and exercising her leadership of
3 the Committee, and the Department is -- is very
4 grateful to Ms. Bashford, for her outstanding
5 stewardship of the Committee.

6 And with that, I will turn the
7 proceedings over to the new Chair, Judge Karla
8 Smith of the -- of the Montgomery County Circuit
9 Court. Judge Smith, you have the con.

10 CHAIR SMITH: All right. Thank you,
11 Mr. Sullivan, and good afternoon, everyone. I
12 want to welcome the Members and all attendees to
13 the 22nd Public Meeting of the Defense Advisory
14 Committee on Investigation, Prosecution, and
15 Defense of Sexual Assault in the Armed Forces, or
16 DAC-IPAD, as it's known.

17 To comply with Department of Defense
18 Guidelines for Operations, during the COVID-19
19 pandemic, today's meeting is by video conference,
20 via Zoom, and our Administrator will mute
21 non-DAC-IPAD attendees to prevent background
22 noise or disruptions.

1 For all others, please keep your lines
2 muted, when you are not speaking. If we have
3 technical difficulties, we will break for 15
4 minutes and move to a teleconference line and the
5 instructions to rejoin will be posted on the
6 DAC-IPAD Website.

7 The Secretary of Defense created the
8 DAC-IPAD, in accordance with the National Defense
9 Authorization Act for Fiscal Year 2015. The
10 DAC-IPAD statutory purpose is to advise the
11 Secretary of Defense on the investigation,
12 prosecution and defense of allegations of sexual
13 assault and other sexual misconduct, involving
14 members of the Armed Forces.

15 Today is the Committee's first
16 meeting, since December 4th, 2020. The Secretary
17 appointed 16 members to the reconstituted
18 committee, on January 30th, 2022, including four
19 new members and reappointment of 12 former
20 members, all for four-year terms.

21 On behalf of the Committee, I want to
22 extend our deepest gratitude to three previous

1 members, who concluded their service in January,
2 2021. Federal Magistrate Judge Leo Brisbois, Ms.
3 Kathleen Cannon, who is a criminal defense
4 attorney, and former Chief Master Sergeant of the
5 Air Force Rod McKinley.

6 We thank each of them for their
7 leadership and contributions to this Committee's
8 -- to this Committee and DoD's ongoing mission to
9 respond to sexual assault in the Military.

10 I would like to introduce myself. I'm
11 Karla Smith. I'm a trial judge in Maryland and
12 I'm honored that Secretary Austin appointed me to
13 serve on this Committee and to serve, as its
14 Chair.

15 I want to recognize the outgoing
16 Chair, Ms. Martha Bashford, who had an extremely
17 successful and productive term, as the
18 Committee's first Chair. Thank you and I intend
19 to seek your advice.

20 I want to welcome my fellow members.
21 I look forward to working with you in the months
22 and years to come. For the members of the public

1 joining us today, you can find the Committee
2 Member bios posted at the DAC-IPAD Website.

3 I understand that representatives from
4 each of the Military Service Criminal Law
5 Divisions, who serve as the DAC-IPAD's
6 service-specific experts and liaisons to their
7 respective-legal organizations have joined us.
8 Welcome, to all of you. We thank you for your
9 service and look forward to working with you.

10 And, finally, I would like to
11 introduce the DAC-IPAD's current Executive
12 Director, Army Colonel Jeff Bovarnick, who joined
13 the DAC-IPAD Staff last July, from his last
14 assignment as the Executive Officer to the Under
15 Secretary of the Army. The Committee also thanks
16 Colonel Laura Calese, the former Director, for
17 her service.

18 Today's public meeting will be a
19 relatively-brief introductory session, including
20 an update on events, since the last DAC-IPAD
21 meeting, a briefing on DoD's March 2022 Report on
22 the DAC-IPAD, and Committee deliberations and a

1 planning session.

2 This meeting is being recorded and
3 transcribed and the complete written transcript
4 will be posted on the DAC-IPAD Website, at
5 www.dacipad.whs.mil.

6 If a meeting attendee wants to make a
7 public comment, please submit your name and phone
8 number, if you are calling in to
9 whs.pentagon.en.mbx.dacipad@mail.mil, no later
10 than 4:00 p.m. Eastern Time.

11 Comments will be heard, at my
12 discretion, at the end of the meeting. We've
13 received one request for oral public comment,
14 prior to today's meeting. Written public
15 comments may be submitted at any time for
16 Committee consideration.

17 To assist the Court Reporter in
18 identifying speakers and to avoid multiple people
19 speaking at the same time, Committee Members
20 should signal if they have a question or wish to
21 speak, by stating your name and waiting to be
22 acknowledged, before proceeding.

1 Thank you to everyone, for attending
2 today. Now, Colonel Bovarnick, over to you to
3 start the meeting. Thank you.

4 COL BOVARNICK: Good afternoon. Oh.
5 Thank you, Judge Smith. Good afternoon,
6 everyone. Unfortunately, our team here at the
7 DAC-IPAD Headquarters is only by voice, we lost
8 our video capability. Anyway.

9 It's the first session of the
10 afternoon, scheduled for 45 minutes, is an update
11 and summary of events, since the last meeting,
12 presented by Ms. Eleanor Vuono, one of our
13 DAC-IPAD attorney advisors, and she'll be
14 followed by Mr. Dwight Sullivan, our Designated
15 Federal Officer, from the DoD Office of the
16 General Counsel. So over to you, Ms. Vuono.

17 MS. VUONO: Thank you. And, we'll
18 take just a moment for Terri Saunders to load my
19 slides, for the visual part of this presentation.
20 They should be shared here in just a second.
21 And, great. I can see them, I hope everyone else
22 can, as well.

1 So during this next hour, Mr. Sullivan
2 and I will share with you the key events and
3 legislative changes from the last two years,
4 relating to sexual misconduct in the Armed
5 Forces.

6 Slide 2, please. First, I will talk
7 with you about the events that were surrounding
8 the Fort Hood Independent Review Committee and
9 the 90-day Independent Review Commission on
10 Sexual Assault in the Military that was
11 established by Secretary of Defense Austin.

12 After my presentation, Mr. Sullivan
13 will discuss the most recent legislative changes
14 that grew out of these reports and were passed by
15 Congress, in the Fiscal Year '22 National Defense
16 Authorization Act.

17 We hope to leave a few minutes for
18 questions, but feel free to raise your hand, as
19 we go, or you can use the chat room and -- and
20 you can interrupt me, at any time.

21 Slide 3. On April 22nd, 2020, Army
22 Specialist Vanessa Guillen disappeared from her

1 place of duty, at Fort Hood. Her remains were
2 found later in June, by a river outside of the
3 post.

4 It is now believed that she was killed
5 by a fellow soldier, Specialist Robinson.
6 Specialist Robinson committed suicide the day
7 after her body was found.

8 Later, investigations concluded that,
9 although, there was no evidence that the murder
10 suspect had sexually harassed, or sexually
11 assaulted Specialist Guillen, there was evidence
12 that one of her supervisors had sexually harassed
13 and mistreated her.

14 There also was evidence that the
15 murder suspect, Specialist Robinson, was
16 responsible for sexually harassing another Fort
17 Hood soldier, who came forward, after she learned
18 of Specialist Robinson's suicide.

19 That same summer, the Secretary of the
20 Army appointed the Fort Hood Independent Review
21 Committee. The five civilian committee members
22 were tasked with assessing Fort Hood's command

1 climate and culture and its safe -- its effect on
2 its welfare and readiness of soldiers and units.

3 In 2020 of that year -- excuse me, in
4 December, of 2020, the Fort Hood Committee
5 published a scathing report on the local command
6 climate and culture, relating to sexual
7 harassment and sexual assault.

8 They made nine findings and 70
9 recommendations and, as you know, in the
10 read-ahead materials for the meeting, Tab 9,
11 there is an excerpt of that report.

12 Slide 4. I want to highlight for you
13 just a few of their recommendations and, first, a
14 definition. SHARP is the acronym for the Army
15 Sexual Harassment and Assault Response and
16 Prevention Program.

17 There is a SHARP office, at Fort Hood
18 that is tasked with handling complaints and
19 coordinating the responses to allegations of
20 sexual misconduct.

21 In the Fort Hood report, they found
22 that the SHARP Program and the well-being of

1 soldiers was not a priority at Fort Hood. And
2 I'd like to read to you a quote from the report.

3 Quote, mission readiness completely
4 overshadowed the SHARP Program. Rather than
5 viewing SHARP, as a critical component of soldier
6 safety, morale, and respect, officers and
7 non-commissioned officers treated SHARP, as a
8 perfunctory task, not a priority, end quote.

9 SHARP's personnel were typically
10 borrowed service members and they were assigned
11 to an office that was described in the report, as
12 chronically under-staffed, under-trained, and
13 under-funded.

14 The report also found strong evidence
15 that incidents of sexual assault and harassment,
16 at Fort Hood, were significantly under-reported.
17 And this finding was the result of group
18 interviews with soldiers, as well as, hundreds of
19 individual interviews and they conducted an
20 installation-wide survey.

21 The report documented many incidents
22 where reports were made verbally to a soldier's

1 immediate supervisor, but those supervisors did
2 not document the report, or any action taken.

3 The report identified, as an
4 additional problem, the fact that victims often
5 are engaged in collateral misconduct, typically,
6 involving alcohol.

7 Collateral violations were documented,
8 as having a chilling effect on reporting sexual
9 harassment and assault, in addition, fear of
10 retaliation, exposure, and ostracism were
11 documented as factors against reporting.

12 Fear of retaliation was highest among
13 enlisted soldiers and women. Of the over 31,000
14 respondents to this survey that was conducted, at
15 Fort Hood, 28 percent of women believed a person
16 would be ostracized for filing a sexual
17 harassment complaint.

18 Slide 5. The Fort Hood Criminal
19 Investigative Division, or CID, for short, is
20 responsible for felony-level criminal
21 investigations.

22 The report found that, at Fort Hood,

1 CID had staffing shortfalls, a lack of resources,
2 and a severe lack of experienced agents.

3 Investigations often took so long that subjects,
4 victims and, sometimes, both, had transferred or
5 even transitioned out of the Army, by the time
6 investigations concluded.

7 Other cases were dismissed or ended in
8 an acquittal, due to insufficient evidence. The
9 report highlighted the notion that justice
10 delayed is justice denied.

11 Problems arose when complaints took an
12 unreasonably long time to adjudicate. At Fort
13 Hood, the delays lead to a lack of trust in the
14 system.

15 Delays in the assignment of the
16 Special Victims Counsel -- or the program's
17 assignment of the Special Victims Council for
18 victims, contributed to delays with those victim
19 interviews.

20 Victims complained that they were not
21 informed of the progress of their cases and they
22 reported that Military protective orders failed

1 to protect them, while the case was being
2 adjudicated. Among the many disturbing findings
3 was the reported feeling among soldiers, at Fort
4 Hood that they were unsafe.

5 Focus groups reported a belief that
6 the leadership was so mission-focused towards the
7 war-fight that the health, safety and welfare of
8 soldiers was not a priority and several soldiers
9 reported feeling safer in Afghanistan than at
10 Fort Hood.

11 The report made clear that the
12 negative climate at Fort Hood was not the result
13 of one commander, or one staff. The report
14 concluded, and I'm -- and I'm reading a quote
15 from the report.

16 Quote, it was a culture that was
17 developed over time, out of neglect and persisted
18 over a series of commands. A toxic culture was
19 allowed to harden and set, end quote.

20 Slide 6, please. The Fort Hood report
21 included over 90 recommendations. And, while we
22 don't have time to discuss all of the proposals,

1 I wanted to highlight two policy reforms that the
2 Army has already implemented.

3 First, the Army announced a
4 comprehensive restructuring of CID, the Criminal
5 Investigative Division, across the board, not
6 just at Fort Hood.

7 And for the first time ever, an
8 experienced civilian investigator is leading CID.
9 And, in addition, sexual harassment complaints
10 will now be handled by investigating officers
11 outside of the subject's unit.

12 Slide 7. Next, I am going to only
13 briefly discuss the 90-day Independent Review
14 Commission that was appointed by Secretary
15 Austin.

16 Slide 8. As we've heard, earlier
17 today, one of President Biden's earliest actions
18 was directing the establishment of the 90-day
19 IRC.

20 There were 12 expert civilians and, as
21 we know, General -- General Schwenk and Ms.
22 Tokash, our own, two of our DAC-IPAD members were

1 members of those -- of that IRC.

2 They served on the team and their
3 mission was to conduct an independent, impartial
4 assessment of the Military's treatment of
5 sexually harassment and sexual assault.

6 In their report, the IRC made over 80
7 recommendations and they organized those
8 recommendations into four focus areas,
9 accountability, prevention, climate and culture
10 and victim support and care.

11 The Secretary of Defense has, since
12 issued guidance to the Department on the timeline
13 and how those recommendations will be
14 implemented. And, again, you have an excerpt of
15 that report, at Tab 10 of your meeting materials.

16 Slide 9. But I -- I would like to
17 highlight a few of the IRC recommendations that
18 directly impact the work of the DAC-IPAD. The
19 DAC -- excuse me. The IRC recommended creation
20 of an Office of a Special Victim Prosecutor, to
21 remove the chain of command from legal decisions
22 about prosecuting sexual misconduct.

1 Mr. Sullivan will discuss how Congress
2 has implemented that recommendation, through the
3 latest NDAA, and how the services are developing
4 these new prosecution offices.

5 The IRC also recommended a change in
6 personnel policies, to mandate initiation of
7 involuntary separation for all substantiated
8 complaints.

9 The IRC recommended amending the UCMJ
10 to require Judge-alone sentencing in all general
11 and special courts-martial, other than the
12 capital cases, and to establish sentencing
13 parameters of -- a form of guidelines for these
14 offenses. Again, Mr. Sullivan will share those
15 details with you, as -- in how Congress has
16 adopted that sentencing recommendation.

17 Slide 10. The IRC recommended that
18 the Secretary of Defense direct the DAC-IPAD,
19 this Committee, to undertake two studies of the
20 UCMJ, and the IRC's first recommended study
21 involves the -- involves the Military's
22 preliminary hearing process, what we call the

1 Article 32 Hearing. That's after Article 32 of
2 the UCMJ.

3 The IRC recommended that the DAC-IPAD
4 to study, whether a determination by the
5 preliminary hearing officer that there is no
6 probable cause to believe an accused committed a
7 charged offense, whether that decision should be
8 binding on the prosecution authority.

9 The IRC also recommended that the
10 DAC-IPAD should study, whether Military judges
11 and Military magistrates should serve as the
12 preliminary hearing officers in Article 32s,
13 rather than junior judge advocates, which is
14 sometimes the practice.

15 The second study that IRC recommended,
16 involves Article 34 of the UCMJ, and that is the
17 staff judge advocate, or the senior legal
18 advisors advice to the convening authority,
19 before making a decision to prosecute a case in a
20 court-martial. This is often called the Article
21 34 Advice.

22 The IRC, in its report, observed that

1 current law does not require that the prosecutor
2 believe that the admissible evidence will
3 probably be sufficient to obtain and sustain a
4 conviction.

5 And, as many of you know that is the
6 language in the Department of Justice's Justice
7 Manual and that's what guides federal prosecutors
8 in the exercise of their discretion, whether to
9 take a case to trial.

10 So the IRC recommended that the
11 DAC-IPAD study, whether this same federal
12 prosecution threshold should be required in
13 Article 34, as well.

14 And a note, for those, who are new to
15 the DAC-IPAD, the Article 34 issue is very
16 familiar to this Committee. In October, of 2020,
17 the DAC-IPAD in its previous iteration, had
18 addressed this exact topic in a report to
19 Congress.

20 And, at that time, the DAC-IPAD
21 recommended that Article 34 should be amended, to
22 require the same evidentiary standard used by

1 federal prosecutors, when deciding whether to
2 send a case to trial and that standard again, is
3 sufficient admissible evidence to obtain and
4 sustain a conviction.

5 So Congress has not, yet, acted on
6 that DAC-IPAD recommendation, with respect to
7 Article 34. You can find this and all of the
8 DAC-IPAD's previous recommendations, up to this
9 point, at Tab 13, it's in Appendix D, of your
10 meeting materials.

11 Slide 11. The IRC made many
12 recommendations on ways to improve support and
13 care for victims of sexual misconduct. First,
14 the IRC recommended that the DAC-IPAD should
15 study the methods that our allies' militaries
16 have used, to make amends to victims.

17 And -- and the two areas that they
18 particularly pointed out to study, included
19 restorative engagement programs for victims and,
20 also, victim compensation. The IRC also
21 recommended that the DAC-IPAD should study the
22 processes that the services administrative boards

1 use.

2 So for example, how are boards of
3 inquiry and grey determination boards handling
4 the retention, or the separation of Service
5 Members, after they receive non-judicial
6 punishment, or a letter of reprimand? So this
7 is, again, the administrative process outside of
8 the court-martial process.

9 The IRC heard, anecdotally, from
10 victims that administrative boards are not
11 impartial. They, often, decide to retain Service
12 Members, even after a conviction, or after a
13 substantiated incident of sexual harassment.

14 And, at the same time, the IRC
15 recognized the need to protect our Service
16 Members' due process rights, noting, there are
17 lasting effects of a board's decision to -- it
18 impacts the Service Member's career, their
19 reputation, their pay and their future benefits.

20 So given all of those different
21 considerations, the IRC recommended that the
22 DAC-IPAD conduct an extensive review of the

1 services varied at the administrative boards and
2 look at, whether there are systemic issues,
3 involving equity and accountability.

4 Slide 12. This is my last slide, and
5 just before I turn the screen over to Mr.
6 Sullivan, I want to mention three additional
7 independent review groups that are relatively
8 new, we've heard -- several -- several of these
9 have been touched on, or they're either new or in
10 the process of being created.

11 The first, is the Military Justice
12 Review Panel. That was created in the Military
13 Justice Act of 2016, but the Department of
14 Defense has only just established it, I think,
15 this month. The acronym is MJRP, M-J-R-P.

16 And the tasking is to conduct periodic
17 reviews of the entire health of the Military
18 Justice System, on a four-year reporting cycle.
19 The 13 named members of the MJRP are an
20 impressive group of professionals and will be led
21 by Dr. Elizabeth Hillman, who is President of
22 Mills College.

1 The Defense Advisory Committee for the
2 Prevention of Sexual Misconduct is a new advisory
3 committee that will provide independent advice
4 and recommendations to the Secretary of Defense
5 on prevention measures involving sexual
6 misconduct, by members of the Armed Forces.

7 And just last month, Secretary Austin
8 established the Defense Advisory Committee for
9 the prevention of suicide to address and prevent
10 suicide in the Armed Forces.

11 So with that, I thank you for your
12 time. We can save questions, or do them now, but
13 we are fortunate to have Mr. Sullivan here to
14 discuss the most recent legislative changes.
15 We'll take just a minute to swap out the slides,
16 for Mr. Sullivan.

17 MR. SULLIVAN: And then, hey --

18 (Simultaneous speaking.)

19 MR. SULLIVAN: Hey, this is Dwight.

20 So before I get started, I would encourage any
21 discussion or comments about Eleanor's
22 presentation. I'd encourage you to -- to do that

1 right now, while it's still fresh in people's
2 minds, before I've bored everyone.

3 (Laughter.)

4 MR. SULLIVAN: And I'll give you the
5 caveat, I can't see anyone. We've been having
6 technical difficulties here, so I can't see
7 anyone. So if anyone has anything to say, I
8 don't know, Eleanor, if you can see them, or just
9 --

10 (Simultaneous speaking.)

11 MR. SULLIVAN: -- but I encourage you
12 to just -- go.

13 (Simultaneous speaking.)

14 MS. VUONO: I think I was so clear and
15 concise that I have wrapped it all up and all
16 questions have been muted, apparently.

17 (Laughter.)

18 MR. SULLIVAN: Maybe the participants
19 have been muted. Hey, this is Dwight Sullivan, I
20 work at the DoD OGC. And so I'm going to be
21 talking about the really historic changes to the
22 Military Justice System that have -- that were

1 enacted by the National Defense Authorization Act
2 for Fiscal Year 2022, which the President signed
3 into law, on December 27th, of -- of 2021.

4 To try to avoid this, and so I -- I
5 realize, I'm just a disembodied voice, to try to
6 avoid this being the world's most boring podcast,
7 if anybody has any -- any input, as we go along
8 or any questions, any comments, any
9 counter-arguments, I would encourage you to -- to
10 do that, as we go.

11 So -- so now -- now I've lost even the
12 ability to -- to -- to see our slide deck.

13 Terri, are you working the slides?

14 MS. SAUNDERS: Yes, Dwight, I -- I'm
15 here, just tell me, though, in advance, of what
16 you want me to advance.

17 MR. SULLIVAN: Okay. So -- so could
18 I just ask you -- I -- I -- I'm sorry, we're --
19 we're -- we're do -- doing this behind the
20 scenes, what -- what was the number of my first
21 slide, the -- the black and white Capitol
22 Building? Are you -- you -- I'm sorry, the --

1 the -- the -- the white slide with the Capitol
2 dome, what -- what number was that for you?

3 MS. SAUNDERS: Let me see, hold on.
4 Sorry, I cannot see the number, let me go --

5 MR. SULLIVAN: Sure.

6 MS. SAUNDERS: -- let me hit escape.

7 MR. SULLIVAN: All right. I
8 understand. Okay. We're really flying blind
9 today. Okay. So if you want to just go on to
10 the -- to the third slide, Terri. So hopefully,
11 now, everyone is seeing General Washington.

12 So since the U.S. -- well, it wasn't
13 even the United States then, you know, since the
14 American Military Justice System began in 1775,
15 it has been a command-controlled system. It's
16 been a command-centric system.

17 So Military commanders are the
18 officials that -- that throughout American
19 history, have decided whether a charge will be --
20 will be tried by a court-martial.

21 Those commanders pick the
22 court-martial members, the functional equivalent

1 of the jury, and so it's been a command-centric
2 system. But, as we see on the next slide, now
3 it's going to be a bifurcated system.

4 So we're going to have both the --
5 both the commander in chief -- all right -- and
6 we're going to have, both, the Commander
7 continuing to exercise authorities, but we're
8 also going to have Military lawyers, judge
9 advocates, exercise authority.

10 And so you'll see that, on the judge
11 advocate side, there are going to be 11 offenses,
12 they're referred to in the statute, as covered
13 offenses, and we'll even -- we'll look at those
14 in greater detail.

15 But, you're going to have 11 covered
16 offenses that judge advocates will -- will
17 decide, whether to try those cases, by a special
18 court-martial or a general court-martial.

19 Now, if you sit down with the manual
20 and you add up all of the punitive articles of
21 the UCMJ, and then you add in all of the offenses
22 that the President of the United States has

1 designated, under Article 134 of the UCMJ, you
2 know, the -- the combined total is -- is about
3 104.

4 And so, of those 104 offenses, 93 are
5 going to remain with commanders, while these 11
6 covered offenses are going to go with the
7 Military -- with -- are going to go with judge
8 advocates, with Military lawyers.

9 And as the next slide, with the --
10 with the blue lines indicates, when I was
11 initially thinking of this system, I thought,
12 we're, you know, we're going to have two parallel
13 systems of justice.

14 We're going to have the one, the
15 command-controlled system of justice, for those
16 -- for those, you know, 93 offenses, and then
17 we're going to have the judge advocate-controlled
18 system for the 11 systems.

19 And I -- and I mentioned that thought
20 the other day, at a meeting of the Joint Service
21 Committee on Military Justice, which is meeting
22 to rewrite the rules and the manual for

1 courts-martial for the new system, and I was
2 corrected.

3 And, as the next system -- the -- the
4 next slide in -- indicates, it isn't really two
5 parallel systems, because these two systems are
6 going to continually interact.

7 So really, it's like a Military
8 Justice double-helix, where we're going to have a
9 command-controlled part of the system and we're
10 going to have a judge advocate-controlled part of
11 the system and those two parts are going to
12 interact.

13 All right. So -- so what are these
14 covered offenses? As I mentioned, there are 11
15 covered offenses. And then, in addition to the
16 covered offenses, themselves, there's also the --
17 the -- the judge advocates will also handle any
18 attempts to commit one of those 11 offenses, any
19 conspiracy to commit one of those 11 offenses, or
20 any solicitation to commit one of those 11
21 offenses.

22 Okay. So, Terri, do we have the list

1 of 11 offenses up, now?

2 MS. SAUNDERS: We do.

3 MR. SULLIVAN: Terrific. Great. So
4 here are the 11 covered offenses. So the 11
5 offenses that have moved -- that -- that -- when
6 the -- the -- when these reforms take effect,
7 these are the -- these are the offenses that will
8 move from being commander-controlled to -- to
9 having these new offices of Special Trial Counsel
10 make decisions about whether to refer these cases
11 to court-martial and to exercise, pretty much,
12 all of the discretionary prosecutorial authority
13 over the case, many of which, are currently
14 exercised by commanders. I'll talk more about
15 that in a little bit.

16 So -- so here -- here are the 11
17 covered offenses. So first, wrongful broadcast
18 or distribution of intimate visual images.
19 That's the Military's revenge porn statute. It's
20 broader than merely revenge porn, but it's often
21 thought of as a revenge porn statute.

22 Second, Article 120, which is the

1 Military's rape and sexual assault provision.
2 And then -- and then, Article 120(b), which is
3 rape and sexual assault of a child.

4 So all rapes, all penetrative sexual
5 assault cases, all contact sexual assault cases
6 will -- will be in the Military lawyer lane, to
7 decide whether these cases are going to go to
8 court-martial.

9 Then, you have a UCMJ provision,
10 Article 120(c) that's actually called other
11 sexual offenses, and so what that other sexual
12 offenses statute covers are cases of indecent
13 viewing visual recording or broadcasting,
14 forcible pandering and indecent exposure. Okay.

15 Another covered offense is domestic
16 violence, Article 128(b). Also, stalking and
17 retaliation. Now, you'll notice that the first
18 seven of those offenses are listed in black and
19 the -- and the other four are listed in blue.

20 So the reason for this demarcation is,
21 when this legislative proposal went over to
22 Congress, from DoD, we proposed eight covered

1 offenses, so the seven that are on that slide,
2 plus sexual harassment.

3 And what happened was, first, Congress
4 took away sexual harassment. I -- it -- you
5 know, we interact with the member -- with -- with
6 -- with the PSMs, quite a lot, I've never -- I --
7 I still to this day do not know why they took --
8 why they took out sexual harassment. It's -- and
9 it's -- and it's unusual that we haven't gotten
10 some feedback. But, they dropped sexual
11 harassment.

12 And then, there was a lot of
13 discussion on Capitol Hill, about pink courts.
14 There was the -- there was the thought that, if
15 we just included those seven offenses there, the
16 eight that we -- that we suggested, minus sexual
17 harassment, that this justice system would be
18 thought of, as a pink justice system, a separate
19 justice system and the fear was, it would be
20 thought of, as a lesser justice system.

21 So one of the big issues that -- on --
22 that went on in Capitol Hill this year, was what

1 was going to be the scope of the change?

2 So -- and a number of members of
3 Congress, most prominently, Senator Gillibrand,
4 has been proposing moving some prosecutorial
5 discretion over some group of offenses, from
6 commanders to Military lawyers, since 2013, and
7 there have been various scopes of offenses
8 proposed.

9 So one of the -- so -- and -- and
10 then, until this past year, DoD has consistently
11 resisted that. But what happened was, in the
12 last legislative cycle, DoD supported that
13 change, after the report of the IRC, after the
14 Fort Hood report, those two reports that Eleanor
15 discussed.

16 After that happened, DoD's position
17 changed. During the Presidential campaign,
18 President Biden had endorsed the idea of moving
19 prosecutorial discretion for some offenses from
20 commanders to lawyers, so -- so a lot changed and
21 -- and DoD's position changed.

22 So -- and now, instead of the fight

1 being, should -- should commanders retain
2 complete control over prosecutorial discretion,
3 one of the big fights was the scope of the
4 change.

5 And so again, we proposed eight,
6 Congress dropped sexual -- sexual harassment, and
7 then, to avoid these courts being pink courts and
8 -- and, for some other reasons, Congress added
9 these four additional covered offenses, murder,
10 manslaughter, kidnaping, and child pornography.

11 Child pornography is actually an
12 offense, under Article 134. Article 134 is the
13 general article of the Uniform Code of Military
14 Justice and it prohibits three things.

15 First, it prohibits conduct that is
16 prejudicial to good order and discipline.

17 Second, it prohibits conduct that it of a nature
18 to discredit the Armed Forces.

19 Third, it prohibits misconduct that
20 violations another provision of the Federal Code
21 that isn't capital, so any 18 U.S.C. offense, any
22 21 U.S.C. offense that isn't capital, can be

1 tried under Article 134.

2 Well, what's happened over time is
3 various Presidents of the United States have
4 designated particular ways that Article 134 can
5 be violated, so particular activity that is
6 likely to be prejudicial to good order and
7 discipline, particular activity that is likely to
8 be service-discrediting and expressly enumerated
9 those in Part 4 of the Manual for Courts-Martial,
10 which is -- which is the rule -- our -- our rule
11 book for our Military Justice System.

12 And so one of those
13 Presidentially-prescribed offenses is child
14 pornography. So in addition to it being, you
15 know, a federal offense, it's also a
16 Presidentially-prescribed offense.

17 So those are our lists of 11 covered
18 offenses. But -- but, just like Ginsu knives,
19 but wait, there's more. Okay. So we have the 11
20 covered offenses.

21 As we earlier mentioned, we also have
22 a attempts, conspiracy, and solicitations, but we

1 also have two other classes of cases, where the
2 -- where it'll be the -- the new Special Trial
3 Counsel, these new judge advocates that will
4 exercise this authority, and so those are known
5 and related offenses.

6 So -- so let's just explore that
7 concept. So this is going to be an instance,
8 where those new judge advocates, Special Trial
9 Counsel cases, where they will be the
10 prosecutorial authority over a case that's among
11 those 93 that, generally, have been retained by
12 -- by -- by the commanders.

13 All right. So -- so take a murder
14 case. So -- so let's take a -- and then -- so
15 one of the DAC-IPAD Members, Brigadier General
16 Jim Schwenk, is a retired Member of an active
17 component of the Military and that means, a
18 retired Member of an active component, he remains
19 subject to the Uniform Code of Military Justice.
20 Now, interestingly, there's a whole side issue
21 about that that fascinates me.

22 That's an issue that's under active

1 litigation. In 2020 -- in November, of 2020,
2 Judge Walton's colleague, Judge Leon, came out
3 with an opinion that said, it's unconstitutional
4 for the Military to try a retired member.

5 Because that -- it -- it -- it's no
6 longer an instance, where Congress is truly
7 regulating the land and naval forces, and
8 therefore, there is not a constitutional
9 authorization to take away that person's Fifth
10 Amendment grand jury right, Sixth Amendment petty
11 jury right, and therefore, it's unconstitutional.

12 That was in a case called Larrabee
13 versus -- versus Braithwaite. That case is now
14 on appeal, in front of the D.C. Circuit. In the
15 meantime, the Court of Appeals for the Armed
16 Forces has heard that exact same issue, in a case
17 called Begany.

18 And the -- the Court of Appeals for
19 the Armed Forces concluded, it's perfectly
20 constitutional to try a retired member of the --
21 of the Military.

22 So -- so you -- so you have Judge

1 Leon's opinion on appeal to the D.C. Circuit, you
2 have CAAF's opinion, but for the moment, for the
3 moment at least, General Schwenk remains subject
4 to UCMJ jurisdiction.

5 So let's hypothesize that, one day, I
6 say one bad pun too many and General Schwenk has
7 reached his breaking point and he kills me. And
8 so he is now suspected of murder.

9 So we know that murder is a covered
10 offense. He's subject to the Code, so he can be
11 tried for that, under our new system, he would be
12 -- that would be an offense that would be in the
13 lane that's covered by judge advocates.

14 Okay. Now, let's say that he goes and
15 he approaches Colonel Bovarnick, who as an Active
16 Duty Member of the Military, is subject to the
17 Code, and he says, Jeff, I killed Dwight, and I
18 -- I -- I want you to help me out, I want you to
19 tell everyone that, at the time of the homicide,
20 you and I were out having a hot chocolate.

21 And so -- and so Jeff goes and -- and
22 he tells that to the NCIS agents that are

1 investigating the murder. Well, so -- so he's
2 committed -- so -- so now, Colonel Bovarnick's
3 committed offenses, including obstruction of
4 justice, including false official statements,
5 those aren't covered offenses, but they're
6 related offenses.

7 Those offenses are related to the --
8 those offenses are related to the -- the
9 homicide, which is a covered offense, and
10 therefore, if a Special Trial Counsel wanted to,
11 they could also handle that prosecution of
12 Colonel Bovarnick.

13 Let me give you -- and -- and, you
14 know, that -- this concept of related offenses is
15 elastic and, interestingly, the statute gives the
16 sole authority to decide, whether an offense is a
17 related offense, to the Special Trial Counsel, so
18 the Special Trial Counsel gets to decide how
19 broad that authority is.

20 Let's take an instance, where
21 someone's on -- where a member of the Military is
22 in a location selling drugs and, while they were

1 in that location selling drugs, they witness a
2 homicide.

3 So the drug selling doesn't actually
4 have anything to do with the homicide, but it may
5 very well be that that Special Trial Counsel
6 wants to exercise authority over the drug sales,
7 because this person is an important witness in
8 the homicide case.

9 In that instance, the Special Trial
10 Counsel has the discretionary authority to say
11 that drug distribution is related to a covered
12 offense, therefore, I'm exercising authority over
13 it.

14 So once again, you know, it -- it's an
15 elastic concept. It would never be possible to
16 decide in advance, you know, to define in advance
17 the entire scope of what might be a related
18 offense.

19 Let me give you another example.
20 Let's -- let's take a sexual assault case.
21 Eleanor mentioned that there was a -- that
22 there's this recurring problem with an individual

1 who was engaged in some form of collateral
2 misconduct, at the time, when they are the victim
3 of a sexual assault.

4 So let's say that you have a victim,
5 who's underage drinking, and so that person is --
6 has, allegedly, you know, if that person was
7 drinking underage, they've committed a violation
8 of Article 92 with the UCMJ, which prohibits --
9 which prohibits violating a lawful general order,
10 there's a lawful general order that says don't
11 drink underage.

12 So the Special Trial Counsel may very
13 well and probably would, in that instance, say
14 I'm going to exercise authority over that
15 collateral misconduct, and so they would probably
16 take that into their authority, as well.

17 So once again, it can't be -- it can't
18 be defined in advance, so we simply have the
19 statutory phrase, the related offense, and then
20 we have the rule.

21 You know, so often in the law, the
22 most important question is, who decides? In this

1 instance, the law gives us the general rule and
2 then it tells us who decides, the Special Trial
3 Counsel decides.

4 So those are related offenses. Now,
5 we also have known offenses. So as -- so as
6 we've seen, General -- or -- or Colonel Bovarnick
7 is our obstructor of justice and our false
8 statement teller.

9 So in addition to those, let's just
10 hypothesize that -- completely unrelated to
11 those, like, you know, a -- a week before any of
12 that happened, he was late for work one day.

13 Well, in the Military, being late for
14 work is a criminal offense. So from my
15 background, from -- I was a Marine Judge
16 Advocate, from a sea service background, we would
17 think of that, as an unauthorized absence. In
18 the Army, would you call that a failure to
19 report?

20 COL BOVARNICK: FTR.

21 MR. SULLIVAN: Yes. So -- and so the
22 Army would call that a failure to report. And so

1 that -- so that's a known offense, right? It has
2 nothing to do with any covered offense, but it's
3 another offense that it -- that we know of, for
4 somebody that is being handled by the Office of
5 Special Trial Counsel.

6 So that known offense, the -- the --
7 the Special Trial Counsel can choose to exercise
8 jurisdiction over that, as well. So the Special
9 Trial Counsel can exercise jurisdiction over any
10 other offense, allegedly, committed by someone
11 over whom they're exercising authority.

12 So in our hypothetical, now, we have
13 Colonel Bovarnick being prosecuted by the Special
14 Trial Counsel, for related offenses and known
15 offenses, both.

16 He's not suspected of any covered
17 offense. He's not suspected of any -- any one of
18 those 11 offenses and, yet, he can be subject to
19 the jurisdiction and the exercise of authority,
20 by that Special Trial Counsel, for either a known
21 or related offense.

22 Okay. So I -- I've been talking a

1 really long time and I'm -- and I -- I hate to
2 break this to you, but I'm going to be talking
3 for a while longer, so any -- any thoughts about
4 what we've talked about, so far?

5 MEMBER TOKASH: Dwight, this is Meghan
6 Tokash.

7 MR. SULLIVAN: Hey. Greetings, how
8 are you?

9 MEMBER TOKASH: I'm good. Thank you
10 very much. Can you talk about right of first
11 refuse -- first refusal, as it applies to the
12 Special Trial Counsel? Over.

13 MR. SULLIVAN: I will be happy to. So
14 -- so there is a -- there's a concept and -- and
15 -- and -- and that is to say right now, we're
16 working on implementing rules.

17 So I'm going to use a term that --
18 that I suspect will be in the implementing rules
19 to -- to help -- to help flesh out what the --
20 what Meghan just raised.

21 So there will be cases, where the
22 Special Trial Counsel defers action, where

1 Special Trial Counsel says, yes it's a covered
2 offense, but I decide that I'm not going to act
3 on that covered offense.

4 So in those instances, the case will
5 then go back to a traditional commander convening
6 authority. And so that traditional commanding --
7 commander convenient authority may take certain
8 actions, with regard to that case.

9 They may choose to subject the -- the
10 service member to some form of administrative
11 discipline, they could counsel that individual,
12 they could give them extra Military instruction,
13 you know, they could -- they could do any number
14 of things.

15 They could decide, this person -- even
16 though, the -- the Special Trial Counsel decided
17 not to prosecute this case, I think this person
18 should no longer be a member of the U.S.

19 Military, and they could process that individual
20 for separation, based on the same misconduct that
21 went to the Office of Special Trial Counsel.

22 And when you think about it, you know,

1 an Office of Special Trial Counsel, in some
2 cases, they might say, okay I'm going to decline
3 that case, because I don't think it's a winnable
4 case, I don't think that -- I -- I don't think
5 that there is sufficient evidence to obtain and
6 sustain a conviction.

7 In other instances, they might say,
8 you know, that's just such a low-level instance,
9 you know, every one of these -- every one of
10 these cases has to -- that -- that's a covered
11 offense has to come to -- to the Office of
12 Special Trial Counsel, initially, but there might
13 be some cases where they say, you know what,
14 that's just such low-level misconduct, I don't
15 think that person should -- should end up with a
16 federal conviction, as a result of it, it's
17 something that's better done -- dealt with,
18 through lesser disciplinary systems.

19 So they might -- the Office of Special
20 Trial Counsel might defer on that basis, you
21 know, not sufficiently serious. And so it -- but
22 regardless of the basis, once the case goes back

1 to the command, the command's going to be able to
2 exercise certain authorities.

3 So they might take administrative
4 action. They might initiate administrative
5 separation proceedings. They might impose
6 non-judicial punishment.

7 So the UCMJ -- the Uniform Code of
8 Military Justice has an Article, Article 15 that
9 allows commanding officers to impose certain
10 punishments on their subordinate, without a
11 trial.

12 And so one of the -- one of the -- so
13 right now, it's interesting, the services have
14 inconsistent standards of proof for -- for the
15 imposition of NJP.

16 One of the IRC's recommendations,
17 which the Secretary adopted, was that all the
18 services should adopt a preponderance of the
19 evidence standard of proof for NJP.

20 So -- so the -- the -- so the case
21 could go back and become the subject of NJP. And
22 if we really want to go into, you know, graduate

1 level Military justice, we could talk about
2 refusal authority and what happens in those
3 instances.

4 I'll be happy to get into that with
5 anybody, offline, I don't -- I don't think I'll
6 get into that right now. But -- but the --
7 there's -- it's a -- so there's still a number of
8 actions the -- the -- the commander could refer
9 the case to -- for trial, by summary
10 court-martial.

11 But, the commander cannot refer the
12 case for trial, by special court-martial, or
13 general court-martial, even if the service member
14 has refused NJP, or summary court-martial.

15 Again, the -- the -- if anyone's
16 interested in that process, you can talk to me
17 offline. But -- but -- so the -- the commander
18 will have a lot of retained authority over those
19 cases, but not the authority to refer the case
20 for trial, by special court-martial or -- or
21 general court-martial. That power will be
22 reserved only to Special Trial Counsel.

1 There will be a different rule,
2 however, for known and related offenses. Again,
3 I don't want to get into that, if anyone wants to
4 discuss this offline, I love talking about this
5 stuff, I could talk about it all day. Most days,
6 I actually do. But -- but I won't subject you
7 all to -- you all to that right now.

8 Meghan, did that -- did that answer
9 your --

10 (Simultaneous speaking.)

11 MR. SULLIVAN: -- does -- did that get
12 to the issues that you wanted me to address?

13 (Simultaneous speaking.)

14 MEMBER TOKASH: Yes. Thank you, sir.

15 MR. SULLIVAN: All right. Terrific.
16 Thank you. It's good to hear your voice again.
17 So --

18 MEMBER TOKASH: Yours, as well.

19 (Simultaneous speaking.)

20 MR. SULLIVAN: So -- so Terri, if we
21 want to go to the next slide that -- that --
22 where the first paragraph discusses Office of

1 Special Trial Counsel.

2 So -- so the -- the rules and the --
3 the -- the statute, not only did it provide these
4 authorities to the Special Trial Counsel, but
5 with respect to DoD, it also provided a certain
6 framework for the exercise of these authorities.

7 And -- and so interesting, what I'm
8 about to discuss does not apply to the Coast
9 Guard, it only applies to the five Military
10 Services that are within the Department of
11 Defense.

12 So the statute says, each DoD Military
13 Service will set up what is called an Office of
14 Special Trial Counsel. And so this will be where
15 those new counsel reside, this will be the
16 framework under which they -- they perform their
17 duties, under which, they are -- they are
18 supervised, under which, they are evaluated.

19 They will be in these Office of
20 Special Trial Counsel and each Office of Special
21 Trial Counsel will be, led by a General, or flag
22 officer.

1 Okay. So -- so -- so, you know, the
2 statute says, General, or flag officer, so it
3 could be a Major General, it could be a
4 Lieutenant General, it could be a General, it
5 won't be, it's going to be a one-star, right?

6 So it's going to be led by, either, a
7 Brigadier General, or a Rear Admiral, lower half,
8 so it's going to be led by a very senior officer,
9 you know, more senior than we have doing
10 court-martial practice, for all practical
11 purposes today.

12 And so each of these -- so these
13 Generals, or flag officers, who lead these
14 offices, they're called a Lead Special Trial
15 Counsel.

16 And, because it's the Military and --
17 and everyone has to speak in acronyms, the
18 Special Trial Counsel -- the -- the Military
19 lawyers have already started calling them the
20 STC.

21 And the Office of Special Trial
22 Counsel, they've already started calling the

1 OSTC, and the Lead Special Trial Counsel they've
2 already started calling the LSTC. Because,
3 again, it's the Military, we are required to
4 speak in acronyms.

5 So the lead Special Trial Counsel, or
6 the LSTC, will report directly to the Secretary of
7 the Military departments and the statute says,
8 within no intervening authority.

9 So most judge advocates operate in a
10 chain where, ultimately, they are -- they're
11 supervised to some extent by the judge advocate
12 general of their particular Military department.

13 So that -- that chain will be broken,
14 in the case of -- of the Special Trial Counsel
15 that handled these covered offenses, instead of
16 being -- being in -- in that -- in that chain,
17 they will -- they will -- they will run in a
18 chain that goes only to a civilian authority.

19 So -- so the -- they will not be under
20 any Military chain of command, except for normal
21 administrative purposes, like, you know, for a
22 Marine judge advocate, they're still going to

1 have run their physical fitness tests and their
2 combat fitness tests, and there will be some
3 major and some admin battalion that -- that makes
4 sure that they do that.

5 But -- but for purposes of their work,
6 they're going to be in a civilian, pure civilian
7 chain of command, once you get past that General,
8 or flag officer, who is the LSTC.

9 All right, and then --

10 MEMBER O'CONNOR: Dwight?

11 MR. SULLIVAN: -- a --

12 MEMBER O'CONNOR: Dwight?

13 (Simultaneous speaking.)

14 MR. SULLIVAN: Yes? Please.

15 MEMBER O'CONNOR: This is Jenn
16 O'Connor, just a quick question. Is the person
17 they're reporting to a lawyer, or somebody else?

18 MR. SULLIVAN: Great question. So
19 this Lead Special Trial Counsel will be a judge
20 advocate. So -- so this -- that -- that
21 Brigadier General, or that Rear Admiral, Lower
22 half, will be a lawyer. It will -- it'll -- and

1 it's supposed to be somebody that's going to --
2 that's going to be an experienced prosecutor, who
3 will be leading -- and then, a -- a related
4 issue.

5 All of the Special Trial Counsel, so
6 the, you know, the -- the line prosecutors, they
7 will all be Military. So I would expect these
8 organizations will have some civilian,
9 highly-qualified experts, you know, former
10 experienced prosecutors, who will be an advisory
11 situation, but under -- under the legislation, as
12 passed by Congress, all of these individuals will
13 be uniformed Military lawyers.

14 Interestingly, when we sent our
15 legislative proposal over, we had suggested that
16 the -- that -- that Lead Special Trial Counsel
17 that we suggested giving the Secretaries in the
18 Military departments the discretion to choose,
19 either, a General, or a Flag Officer, or a
20 civilian SES Member.

21 And we thought that the civilian SES
22 Member might have some benefit, because they

1 could provide more continuity, than would
2 normally be the case with a -- with a Military
3 Officer, but Congress rejected that and they
4 decided that that LSTC must be a uniformed
5 Military lawyer.

6 So then -- and then -- so that person
7 will report to the Secretary of the Military
8 department, who obviously, you know, in practice,
9 may or may not be a lawyer, probably won't be,
10 but -- but everybody, from the LSTC, down, is
11 going to be a uniformed lawyer.

12 So does that respond to the question?

13 MEMBER O'CONNOR: It does, thank you.

14 MR. SULLIVAN: Thank you.

15 MEMBER TOKASH: Dwight, Meghan --

16 MR. SULLIVAN: Oh --

17 MEMBER TOKASH: -- Meghan Tokash,
18 again.

19 (Simultaneous speaking.)

20 MR. SULLIVAN: Hi.

21 MEMBER TOKASH: And just to clarify,
22 the -- the -- the LSTC will -- the LSTC reports

1 directly to the Service Secretary, who's a
2 civilian, correct?

3 MR. SULLIVAN: Correct. So -- so the
4 -- so the -- the -- the LSTC for the Marine Corps
5 will report directly to the Secretary of the
6 Navy, with no intervening authority.

7 The LSTC for the Space Force, and yes,
8 the -- the statute requires a separate Office of
9 Special Trial Counsel led by a lead -- lead
10 Special Trial Counsel for the Space Force, will
11 report directly to the Secretary of the Air
12 Force.

13 Yes, they -- so -- and -- and again,
14 the statute actually says, with no intervening
15 authority. You know, it was a -- that -- that
16 would've been the case, you know, just based on
17 their language that says directly report.

18 So that was in the nature of a foot
19 stomp, you know, Congress was emphasizing that
20 the -- that there will be no Military chain of
21 command for these individuals, you know, once you
22 get past the LSTC, it's going to be only

1 civilians up.

2 MEMBER O'CONNOR: Thank you.

3 MR. SULLIVAN: Thank you. All right.

4 So, Terri, are -- we are now on the -- on the
5 slide with the Army Jag Corps' crest on it?

6 MS. SAUNDERS: Actually, we have the
7 Secretary of Defense on this slide, I may have --

8 MR. SULLIVAN: Okay, can you go --

9 MS. SAUNDERS: -- advanced it --

10 MR. SULLIVAN: -- can you go --

11 MS. SAUNDERS: -- one --

12 MR. SULLIVAN: -- back on -- can go
13 back one, then? Thanks so much. I can't --
14 again, I'm sorry, I can't see what's -- what's on
15 the screen. So --

16 (Simultaneous speaking.)

17 MR. SULLIVAN: So we -- we've talked
18 about these covered offenses, we've talked about
19 the known offenses, we've talked about the
20 related offenses.

21 So in those cases, the Offices of
22 Special Trial Counsel will exercise prosecutorial

1 discretion, as we've mentioned. They'll lead the
2 prosecution effort, and then they'll also
3 exercise most of the discretionary authorities
4 formerly exercised by commanders.

5 So let me give you an example. In a
6 commander-controlled case, or currently, any --
7 any case, it's the commander that enters into a
8 plea bargain with an accused.

9 So if an -- if an accused and the --
10 and, you know, if the Government and the defense
11 want to enter into a plea bargain, the person on
12 behalf of the Government, who decides whether to
13 do that, is the officer who's convening the
14 court.

15 So it's -- from my background, as a
16 Marine, if it's a Special Court-Martial, it's
17 probably going to be a battalion commander, who's
18 going to be exercising that authority.

19 I realize, in most other services that
20 authority is exercised at a higher level, but in
21 the Marine Corps, it might be an O-5 battalion
22 commander.

1 For a general court-martial, you know,
2 for our most serious cases, the person that
3 decides whether to cut a deal, on behalf of the
4 Government, is the -- the officer, you know,
5 usually -- usually a general officer, or maybe a
6 Major General, who has -- who has convened that
7 court and referred the charges to it.

8 And so for covered offenses and any
9 other offense, over which, the Office of Special
10 Trial Counsel, the OSTC, is exercising authority,
11 the Special Trial Counsel will then exercise that
12 authority. It'll be the Special Trial Counsel
13 who decides, whether to -- whether to enter into
14 that plea bargain.

15 And so for most of the -- most of the
16 prosecutorial authorities that a convening
17 authority exercised, the statute shifted to the
18 lead -- the Special Trial Counsel.

19 Now, convening authorities do other
20 things, other than exercise prosecutorial-type
21 roles. They pick the members of the
22 court-martial, for example, who -- who serve as

1 the functional equivalent of jurors.

2 The -- the IRC recommended that we
3 move to a random selection method. Congress
4 didn't do that, so under our -- under the new
5 system, the commanding -- the convening authority
6 will continue to select the members.

7 And so that's, obviously, not a role
8 that you would give to the prosecutor. You
9 wouldn't let the prosecutor pick the members of
10 the jury, and so the prosecutor will not be given
11 that authority, commanders will continue to do
12 that, even in cases with covered offenses.

13 But, again, for -- for those -- for
14 those discretionary authorities that are
15 prosecutorial, those have all moved from the
16 commander to the new Special Trial Counsel. Now,
17 let me --

18 MEMBER SCHWENK: Dwight?

19 MR. SULLIVAN: -- quickly mention --
20 yes?

21 (Simultaneous speaking.)

22 MEMBER SCHWENK: Hi. Jim.

1 MR. SULLIVAN: Hey. Greetings.

2 MEMBER SCHWENK: Immunity.

3 MR. SULLIVAN: Yes, so immunity is
4 controlled by RCM, not by statute. So, the rules
5 governing the grants of transactional, and
6 testimonial immunity, that's not a grant of
7 authority that Congress made. So, in the Uniform
8 Code of Military Justice, there's an article,
9 Article 36, that is a general delegation of
10 authority from Congress to the President of the
11 rule making authority.

12 So, Congress has told the President
13 hey, you adopt the equivalent of the federal
14 rules of criminal procedure, which the President
15 did by promulgating the rules for courts-martial.
16 Congress said to the President, hey you designate
17 the Military rules of evidence, the Military
18 equivalent of the federal rules of evidence,
19 which again, the President has done.

20 So, most of the procedural rules of
21 courts-martial are actually done by the President
22 by executive order, and then all of those are

1 collected into a book called the manual for
2 courts-martial, which is every Military lawyer
3 carries a copy into court with him, or her every
4 time he, or she does a case. It's our rule book.

5 And so the immunity rules are actually
6 in the rules for courts-martial, not the UCMJ.
7 So, Congress didn't shift that, because again, it
8 wasn't in the statute to shift. That would be
9 something where we would expect the President to
10 say hey, in cases of covered defenses, it will be
11 the special trial counsel, not the convening
12 authority who decides whether to grant
13 testimonial, or transactional immunity. Does
14 that cover --

15 MEMBER SCHWENK: Yeah, thank you.

16 MR. SULLIVAN: And let me just quickly
17 mention the effective date of these changes. So,
18 these changes will apply with regard to offenses
19 that occur on, or after -- I'm sorry, that will
20 occur after December 27th, 2023. So, even on
21 28th December, 2023, a case that's being tried in
22 court-martial during that week, if we actually

1 hold courts-martial in the week between
2 Christmas, and New Year's.

3 Those cases would still be under the
4 old system, because those cases wouldn't be for
5 offenses that were committed after that date.
6 So, there's going to be -- not only is there a
7 two year phase in period under the statute, the
8 statute was passed on -- was enacted on December
9 27th, 2021, and it doesn't take effect until
10 December 28th, 2023.

11 So, not only is there that two year
12 period, but even once the new system takes
13 effect, there'll be a phase-in period as cases
14 which deal with offenses under the old system are
15 continued to be processed. And then there's no
16 statute of limitations for sexual assault. So,
17 you could have cases decades from now still be
18 tried under the current system under these rules.

19 All right, so I am just about out of
20 time, and I do want to stay on schedule, and this
21 block is supposed to end at 3:45, correct? So,
22 let me just quickly -- Terri, if you could turn

1 to the very last slide. So, the President of the
2 United States on January 26th, 2022 issued an
3 executive order that amended the manual for
4 courts-martial, that rule book I've been talking
5 about.

6 So, the President issued an executive
7 order amending that rule, and let me just quickly
8 brief the members of the DAC-IPAD on the four
9 things that that amendment did. First, there was
10 a provision in the NDAA that said that no later
11 than 30 days after enactment, the President will
12 promulgate a sexual harassment offense as one of
13 those article 134 offenses that I mentioned.

14 A Presidentially specified article 134
15 offense. A Presidentially specified offense
16 under that general article that prohibits conduct
17 prejudicial --

18 (Whereupon, the above-entitled matter
19 went off the record at 3:44 p.m. and resumed at
20 3:47 p.m.)

21 MR. SULLIVAN: It gave us the maximum
22 punishment, and other implementing rules for that

1 domestic violence offense that Congress created
2 for the Military in 2018. And then Congress in
3 2018 also created an express offense of
4 aggravated assault by suffocation, or
5 strangulation. Of course, aggravated assault by
6 suffocation, or strangulation was already an
7 offense.

8 But they created a specific offense of
9 aggravated assault by strangulation, or
10 suffocation. So, the President provided the
11 maximum punishment for that offense that was
12 enacted in 2018, plus certain other implementing
13 rules. So, that's what the EO did. So, I'm
14 afraid I'm a few minutes over time, but I will
15 pause here, and see if there are any other points
16 that any of the committee members would wish to
17 raise now.

18 All right, well thank you so much, and
19 with that I will pass the baton to Colonel
20 Bovarnick.

21 COL BOVARNICK: Thank you to Ms.
22 Vuono, and Mr. Sullivan. So, the next session,

1 and after this next session by the way, we'll
2 take a break. But we have a short session from
3 Ms. Carson, our deputy director, and she's going
4 to talk to you about the March 22 DoD report on
5 the DAC-IPAD, and because the committee was
6 suspended when the DAC-IPAD annual report became
7 due, DoD submitted a report last month.

8 And that's at tab 13 of your packet,
9 and Ms. Carson will cover the highlights now.

10 MS. CARSON: Good afternoon Chair
11 Smith, and committee members. I'm Julie Carson,
12 the DAC-IPAD's deputy director, and in this
13 section I'll be briefing you on the March 22
14 annual report on the activities of the DAC-IPAD.
15 Next slide. The DAC-IPAD is required by its
16 authorizing statute to submit an annual report to
17 the Secretary of Defense.

18 And to the Committees on Armed
19 Services of the House, and Senate by March 30
20 each year that describes the activities during
21 the preceding 12 months. This slide shows you
22 the covers from each of the four annual reports

1 submitted by the DAC-IPAD in 2017, 2018, 2019,
2 and 2020. These reports are all available on the
3 DAC-IPAD's website.

4 Next slide. As you're aware, the
5 Secretary of Defense suspended the activities of
6 all of the department's federal advisory
7 committees in January 2021, and directed an
8 intensive bureau based review. This suspension
9 precluded the committee from completing its fifth
10 annual report, which that was due on March 30th,
11 2021.

12 In the interim, the acting deputy
13 general counsel submitted letters to the House,
14 and Senate Armed Services Committees in March,
15 and August of 2021 explaining the suspension of
16 the DAC-IPAD operations, and then providing a
17 follow up update on its status. Next slide. On
18 March 31, 2022, the due date for this year's
19 report, the general counsel submitted a report
20 from the Department of Defense to Congress.

21 That fulfilled the requirement to
22 describe the DAC-IPAD's activities from the

1 submission of its last annual report, which was
2 in March 2020, until its activities were
3 suspended in January of 2021. Noting that the
4 members of the newly reconstituted DAC-IPAD would
5 be sworn in during its initial meeting in April,
6 as have we just done today.

7 Since this report wasn't submitted by
8 the committee itself, you can see in the slide
9 that it was formatted somewhat differently than
10 previous reports have been. This report is
11 located at tab 13 in your material. Next slide.
12 This March 2022 report shows that in 2020, during
13 the height of the COVID-19 pandemic, the DAC-IPAD
14 was remarkably productive.

15 The committee held five public
16 meetings, and 16 preparatory sessions all via
17 teleconference, and the committee drafted, and
18 released there standalone reports that made 17
19 recommendations to Congress, and the Secretary of
20 Defense. These reports covered the topics of the
21 advisability, and feasibility of a guardian ad
22 litem appointment process. For child victims of

1 an alleged sex related offense in the Military.

2 Investigative case file reviews for
3 Military adult penetrative sexual offense cases
4 closed in FY 2017. And racial, and ethnic data
5 relating to disparities in the investigation,
6 prosecution, and conviction of sexual offenses in
7 the Military. Next slide. In conclusion,
8 following the principle that you should begin a
9 project with the end in mind, it isn't too early
10 here at your initial meeting to start thinking
11 about the next annual report, which is due in
12 March 30 of 2023.

13 That's less than a year from now, and
14 based on a schedule of quarterly meetings, that
15 will actually just be three, to four meetings
16 from today. As we get ready to move to the
17 deliberation section next, this slide includes
18 some topics that the 2023 annual report might
19 cover, and should help guide the strategic
20 planning for this year.

21 Including taking testimony from
22 stakeholders, the potential for site visits, and

1 court-martial observations. Whether, or not the
2 committee will have enough information to develop
3 any recommendations for the next year's report.
4 And what the committee's interest level in doing
5 case reviews before the next report is due, and
6 whether there's enough time to actually get that
7 done before next year.

8 So, with that I will conclude the
9 session on the briefing on the March 2022 report,
10 and turn it over to Ms. Saunders I believe, to
11 take us into the deliberation.

12 MS. SAUNDERS: Go ahead.

13 COL BOVARNICK: Sorry about that.

14 Colonel Bovarnick here. Judge Smith, I recommend
15 that we take a break now, and then reconvene at
16 4:05 p.m. So, hopefully folks, don't cut off
17 your systems considering the technical
18 difficulties we had. But maybe keep it on mute,
19 or cover your cameras. And then at 4:05 we'll
20 reconvene to go into that kind of deliberation,
21 but more like a decision point type discussion
22 that I'll guide.

1 CHAIR SMITH: Okay, sounds good, thank
2 you.

3 (Whereupon, the above-entitled matter
4 went off the record at 3:53 p.m. and resumed at
5 4:06 p.m.)

6 COL BOVARNICK: Okay, so welcome back
7 everyone. Before we get into this session, Judge
8 Smith, did you want to announce the date that
9 you've projected for the next session, the next
10 meeting?

11 CHAIR SMITH: Yes, sure. The next
12 meeting, we picked two dates, June 21st, and
13 22nd.

14 COL BOVARNICK: Got it ma'am, okay.
15 And now for the rest of the members, we'll
16 solidify at the next session, but generally
17 speaking September, then December, and we'll
18 adjust fire from there. But we'll have a plan to
19 do quarterly meetings out over the next couple of
20 years for the committee. So, during this
21 session, I'm going to obviously hand it back over
22 to the members.

1 But basically some topics for
2 discussion, one of them would be kind of your
3 project methodology, and what -- again, some of
4 the committee members have that experience with
5 subcommittees. So, any discussion you want to
6 open up on subcommittees. I realize it's going
7 to be a little difficult now. You don't have --
8 you've heard about these taskings that are coming
9 up.

10 And so perhaps at the next session in
11 June you could solidify what type of
12 subcommittees you want to do. And you'll also
13 have the terms of reference and the bylaws. So,
14 generally speaking, if anyone wants to talk about
15 subcommittees, and the value of subcommittees.
16 The other thing is, I'll throw out after that
17 discussion, the second topic will be what
18 stakeholders you want to hear from.

19 Our staff's recommendation for the
20 next meeting would be the service judge
21 advocate's general, or their senior
22 representatives. Senior representatives from

1 Military criminal investigative organizations,
2 kind of the updates, and changes that they've
3 implemented since -- certainly with the Army, we
4 know you heard from -- I think it was Ms. Vuono's
5 presentation.

6 That the Army totally revamped CID,
7 and whether you want to hear anything more on the
8 IRC, or Fort Hood reports. So, I think that may
9 be a good bit to have for the next session as far
10 as stakeholders. Another topic would be the
11 value of site visits. Again, we can plan in the
12 future, and then the value of observing courts-
13 martial.

14 And then, I think -- I don't know how
15 much discussion it'll take, but the decision to
16 basically offer the virtual option for all future
17 meetings for members that can't make it in
18 person. So, going back -- and then the other
19 thing is, to be clear, we will be sending out the
20 special victim counsel report. And the other
21 thing we'll plan on for the next session is Mr.
22 Yob can give a presentation.

1 Because you'll have it to read, and
2 review -- sorry, I'm getting a little feedback,
3 but if we keep pausing it, it feels weird hearing
4 yourself. So, Mr. Yob can give a presentation on
5 that, you'll have it to review in advance. And
6 then we'll setup kind of a process there where
7 you'll deliberate on that. And then whether
8 there's any feedback on changing recommendations,
9 tweaking them, accepting them, and whatever
10 that's going to be.

11 So, I think at the next session,
12 considering the deadlines set by the general
13 counsel, the next session, we kind of have to
14 lock that in. When you get the actual report,
15 you'll see how thorough, and detailed it is, I
16 think it'll make a lot more sense, that we're not
17 just throwing out this general topic to you,
18 hundreds of hours went into this report for your
19 consideration.

20 So, that'll be part of the next
21 meeting as well. So, with that, what I'll do is
22 kind of hand it back. I know it's obviously

1 awkward here, doing it this method, but do any of
2 the committee members want to introduce anything
3 on the topic of subcommittees, and thoughts on
4 that, and how that worked last time? Obviously
5 for the benefit of all the members, including our
6 new members?

7 CHAIR SMITH: So, I'll ask a question,
8 since it doesn't look like anyone's jumping to
9 it. With respect to the subcommittee, and I did
10 read that there had been subcommittees used in
11 the past. Did people choose the topics they were
12 interested in, and be a part of that
13 subcommittee? The subcommittee come back, and
14 report to the general committee, and you would
15 vote on what you wanted to do?

16 What was kind of the procedure for
17 doing that? And then also at what point did the
18 staff come in, and provide the reports?

19 MR. SULLIVAN: Dr. Spohn, do I
20 remember correctly that you were one of the
21 committee chairs? Subcommittee chairs?

22 CHAIR SMITH: Me? I wasn't on last

1 time.

2 MR. SULLIVAN: No, Dr. Spohn.

3 MEMBER SPOHN: Yes, I was one of the
4 subcommittee chairs for the data group, or the
5 data subcommittee. And people did volunteer to
6 serve on those subcommittees based on their own
7 interests. And then we also had, within the
8 subcommittees, we had working groups that would
9 actually do case file review, or other delegated
10 responsibilities.

11 CHAIR SMITH: All right, and then --
12 sorry, go ahead.

13 COL BOVARNICK: No, after you Judge
14 Smith, please.

15 CHAIR SMITH: I was just going to ask,
16 and then the subcommittees would come back, and
17 report to the general committee, and you would
18 vote from there?

19 MEMBER SPOHN: That's correct.

20 CHAIR SMITH: And is that something
21 everybody's interested in doing again? Working
22 with subcommittees, and having work groups?

1 MEMBER SPOHN: Yes, it was very
2 efficient.

3 CHAIR SMITH: Yes, okay.

4 MEMBER BASHFORD: Martha Bashford
5 here, I think without the subcommittee
6 substructure to the DAC-IPAD as a whole, you're
7 really limited in how much work you can get done
8 with simply quarterly meetings of two days, or a
9 day and a half. You really need the support, and
10 staff was assigned to various subcommittees --

11 (Simultaneous speaking.)

12 CHAIR SMITH: Okay, all right.

13 COL BOVARNICK: Sorry, if I could just
14 ask, if you're not speaking, if you could go on
15 mute. I think some folks may be getting some
16 feedback, we certainly are here. If you can just
17 kind of check yourself.

18 MEMBER SCHWENK: Yeah, this is Jim
19 Schwenk, Chair is it okay if I talk?

20 CHAIR SMITH: Absolutely.

21 MEMBER SCHWENK: Okay, thank you.
22 Yeah, so we had three subcommittees, we had

1 Cassia's data subcommittee, there was a policy
2 subcommittee, and there was a case review
3 subcommittee. The case review subcommittee got
4 caught up in that massive report that came out in
5 October of 2019 on the investigations of adult
6 penetrative sexual offenses for three years,
7 that's what they did.

8 The policy group was sort of the catch
9 all. If it wasn't data, and it wasn't case
10 review, whatever it was, it went to policy, and
11 policy would then work up recommendations,
12 sometimes draft a report, and then brief the
13 entire committee, answer questions, and then the
14 chair would take a vote of all the members to
15 modify, or approve, or disapprove the
16 subcommittee's work.

17 And I agree with what the previous
18 speaker said. I think it's essential that you
19 have subcommittees. So, which type of
20 subcommittee? I like the idea of having at least
21 one that's a general topic, like policy, so that
22 it gives you more flexibility as chair in

1 assigning taskings out. One of the specifics
2 things we're supposed to do is case reviews.

3 So, I suppose we need a case review
4 group that at least coordinates doing whatever
5 kind of case review that DAC-IPAD members
6 together decide ought to be done next. And I
7 don't know -- the data one, I guess that depends
8 on where we end up with our data briefing that'll
9 come in the June meeting.

10 But I would think, for now I would
11 recommend that we at least ask for policy, and
12 case review as two subcommittees. That's my
13 thoughts.

14 CHAIR SMITH: Okay, thank you. Does
15 anyone else want to comment on the idea of
16 policy, and case review? I mean it sounds like a
17 good plan to me, but anybody have another
18 subcommittee idea they want to share?

19 MEMBER TOKASH: This is Meghan Tokash.

20 CHAIR SMITH: Yes.

21 MEMBER TOKASH: Thank you. Yes, in
22 that regard, I believe that we should probably

1 create another subcommittee that involves special
2 projects. I was delighted to hear today the
3 general counsel welcome us so warmly, and tell us
4 that she, and the Department of Defense are
5 counting on our committee to help achieve
6 Congress's intent for us to improve the Military,
7 especially in light of the historic changes that
8 were brought about by fiscal year 22' National
9 Defense Authorization Act.

10 And I know Mr. Sullivan spent a lot of
11 time introducing this committee to the new OSTC.
12 And so to that end, I would like to raise three
13 topics that I believe could be covered under a
14 special projects subcommittee potentially. They
15 are a proposal for this committee to examine, and
16 advise the general counsel, and, or the SECDEF on
17 the newly created Office of the Special Trial
18 Counsel.

19 The second is reviewing the report on
20 Articles 32, and 34 that this committee
21 previously was studying. And third, to review
22 the IRC recommendations for the DAC-IPAD. And

1 so, just very briefly, a couple comments on each.
2 First, with respect to the OSTC. The DAC-IPAD
3 can, and should be tasked to assist the SECDEF
4 with policy development, work force strategy, and
5 implementation of newly created prosecutorial
6 functions.

7 And this committee should also play an
8 active role in recommendations with respect to
9 amending the rule for court-martials to reflect
10 the existence of these new offices. And again, I
11 don't want to belabor what Mr. Sullivan said, so
12 I'll keep my comments as brief as possible. But
13 I think it's important to note that the covered
14 offenses that Congress has now mandated be OSTC
15 covered directly affect this committee's
16 statutory mission.

17 That is rape, and sex assault, and
18 certain other types of sexual misconduct. So,
19 why should this committee help in advising, and
20 creating recommendations for the OSTC? First,
21 our statutory tasking is advising the Secretary
22 of Defense on rape, forcible sodomy, sex assault,

1 and other sexual misconduct. So, these covered
2 offenses fit squarely within our statutory
3 purview.

4 And then second, the depth, and the
5 breadth of our committee's individual experiences
6 in the field of investigation prosecution of
7 covered offenses could prove very valuable to the
8 general counsel, and to the SECDEF, and the
9 Military in general. Specifically on our
10 committee, we have four former judge advocates,
11 three former assistant district attorney, one
12 former assistant state attorney general.

13 One clerk of court in U.S. District
14 Court, bankruptcy court, two sitting district
15 court judges, one sitting state court judge, one
16 current AUSA, a career law enforcement officer,
17 the current federal public defender of the
18 District of Columbia, a nationally recognized
19 criminologist, and victim advocate, and a world
20 renowned sex assault forensic nurse examiner.

21 So, present company excluded, the
22 depth, and breadth, and magnitude of the

1 experience of this panel is quite literally
2 breathtaking, and this body should be tapped into
3 to help assist this first of its kind independent
4 prosecutorial office. So, I just wanted to raise
5 that, and then also briefly raise Article 32, and
6 34.

7 I know that Mr. Sullivan said the
8 initial thought was that since Article 32, and 34
9 cover the entire Military justice system, that
10 the Military Justice Review Group would be best
11 to review this issue. However, I believe that
12 the issue is now germane, again, to the DAC-IPAD.
13 Especially in light of the creation of the OSTC,
14 whose covered offenses marry up with this
15 committee's statutory mission.

16 So, how the charging, and referral
17 decisions impact our covered offenses are our
18 covered crimes is of critical importance, and we
19 as a committee should not only assess it, but we
20 should make recommendations for it. And I know
21 before our committee broke last year, the DLSA
22 staff was working very diligently on the

1 completion of an Article 32, and 34 report.

2 So, I would propose that we make
3 inquiries with respect to the progress of that
4 report, and that we ask to obtain the report in
5 whatever form it may be in, so that we can
6 assist. I'll forward my other comments to the
7 group, but with respect to witnesses at our next
8 public meeting, I would propose that we ask to
9 hear from the service secretaries, or their
10 designee for an update on the Office of the
11 Special Trial Counsel implementation.

12 I know it was recommended that the
13 judge advocate's general come, and speak. But
14 because the new Special Trial Counsel will be
15 reporting to a Lead Special Trial Counsel who
16 reports directly to the service secretaries, that
17 that might be more appropriate. It would
18 probably also be helpful to have members of the
19 Joint Service Committee.

20 Who are working on the current RCM
21 amendments, come, and brief us as to any updates
22 on those, and how they impact the creation of

1 DAC-IPAD charter, and covered offenses. I would
2 also suggest that we ask for representatives from
3 various outside agencies, such as the DOJ,
4 state's attorney's offices, district attorney's
5 offices regarding best practices for establishing
6 independent prosecutorial offices.

7 We should obtain a copy of the March
8 12th, 2022 SECDEF Policy Guidance for the OSTC
9 referenced by Mr. Sullivan. Again, we should
10 obtain a copy of the DLSA staff report on Article
11 32, and 34, and we should also make sure that we
12 are aware of the future JSC public comment
13 opportunities so that this body can weigh in.

14 And lastly, and I thank you all for
15 indulging me for taking this much time, but
16 because we need to be passed by either Congress,
17 the SECDEF, or the general counsel, I've prepared
18 a letter for this committee to sign if everybody
19 agrees, with respect to these special projects,
20 asking the general counsel, and, or the Secretary
21 of Defense to consider tasking us with respect to
22 these very, very critical pieces of historic

1 Military justice change.

2 And I'll send that in an email to all
3 the members now. Thank you, over.

4 CHAIR SMITH: Ms. Tokash has given
5 some thought to that, thank you very much. So,
6 obviously my background is different. I think
7 what you shared, and what you had to say makes
8 sense, especially because the Military hasn't had
9 an Office of Special Trial Counsel before, and it
10 is a big step, and it does seem that that is
11 right within our purview in terms of looking at
12 the charter.

13 Which is, I think at tab six. You
14 brought up one point Ms. Tokash, that I wanted to
15 bring to the attention of everyone, to just have
16 us start thinking about kind of the scope of DAC-
17 IPAD. I know it's spelled out in the charter.
18 One of the things that kind of, that caught my
19 eye, was that one of the things we're supposed to
20 be looking at is sexual misconduct.

21 And in my mind, I know we were talking
22 about rape, and penetrative offenses, and it

1 seemed maybe to a lesser extent, the contact
2 offenses. But one thing I would be curious about
3 is having us kind of discuss do we want to only
4 focus on adults? Do we want to include children
5 in our recommendations, or our reports, or
6 whatever we ultimately put together?

7 Are we looking at just penetrative
8 assault, are we also looking at contact? Are we
9 looking at sexual harassment? Because certainly
10 if I was a betting woman, which I'm not, but if I
11 was, I would say that probably the largest number
12 of issues that the Military faces really are
13 those sexual harassment, that climate, that tone.

14 And they don't necessarily rise to the
15 level of actual penetrative assaults. And is
16 that something that DAC-IPAD wants to consider as
17 well? Because it's considered sexual misconduct.
18 So, anyway, I'm kind of tossing that out there
19 for further discussion amongst the committee.
20 Anyone have anything else they want to say about
21 subcommittees?

22 MEMBER BASHFORD: It's Martha

1 Bashford.

2 CHAIR SMITH: Yes.

3 MEMBER BASHFORD: We had a number of
4 years ago, I think fairly near the beginning of
5 the DAC-IPAD, a robust discussion as to whether,
6 or not we should look at juvenile victims of
7 various sexual offenses, and it was decided that
8 we should not. It's been so many years ago, I
9 don't remember all the pros, and cons. I think
10 Jennifer Markowitz, and Meg Garvin, you were
11 pretty vocal in that.

12 Or, maybe I'm just completely
13 misremembering, but I do remember there was quite
14 a conversation about it.

15 CHAIR SMITH: Okay. I leave that to
16 everyone, if that's something that we want to
17 revisit. Ms. Bashford said it was several years
18 ago, and perhaps maybe it's as simple as looking
19 at what options, what does the Military do with
20 respect to minor victims. I don't know, so
21 that's just another thing that I think we could
22 address perhaps.

1 Should we move onto stakeholder
2 perspectives in terms of who we want to hear
3 from? I know Ms. Tokash -- yes.

4 COL BOVARNICK: Yes ma'am, I was going
5 to say -- sorry, you're on it, you're right. Ms.
6 Tokash mentioned a few, and are there others?

7 CHAIR SMITH: Yes. Does anyone want
8 to address that? Here are some options. MCIO
9 representatives, which of course now I can't
10 remember the acronym, I looked it up before.
11 Military criminal investigative organization
12 representatives might be an option for us. IRC,
13 the Independent Review Committee, have someone
14 come in, and discuss where we are with respect to
15 implementation of it.

16 I know that in looking at the report,
17 I think a lot of the things said for 2027, but
18 where are they now in the progress? Do we want
19 to have -- something that occurred to me as I was
20 reading, and it was mentioned I think by Mr.
21 Sullivan, protective orders. We could have
22 someone who spoke to us about how protective

1 orders are used in the Military.

2 I would be curious, I don't know if
3 anyone else is, to hear from maybe forensic nurse
4 examiners, SARCs, SAPRs, with respect to
5 prevention, and response, and what happens in
6 that arena. So, what I thought we could perhaps
7 do is have folks -- I don't know, I'm going to
8 ask you Colonel, how you would want to handle
9 this.

10 But have people kind of prioritize
11 what groups they would be interested in hearing
12 from. Obviously Ms. Tokash I think made a good
13 argument as to having service secretaries, I
14 think she said Joint Service Committee members,
15 outside agencies related to what she referred to
16 as special projects. Judge advocate generals was
17 another suggestion.

18 But I thought perhaps folks could
19 maybe give a top five list of what groups they
20 might be interested in hearing from, and then we
21 can go from there.

22 COL BOVARNICK: Yes ma'am, that's what

1 we'll do. And then I would -- we'd compile
2 those, and then I'd come back to you, and then
3 get your guidance on yeah, this is our priority,
4 we take the input from all the members, and then
5 we can take it from there. And certainly, as we
6 talk about the June meeting, prioritize, and then
7 obviously we go into September, and beyond, but
8 yes, we'll take care of that.

9 CHAIR SMITH: Okay, anyone have
10 anything else? This was really supposed to kind
11 of be brainstorming, but does anyone have
12 anything else that they want to say with respect
13 to that issue? No? Okay, so perhaps if folks can
14 put together just your idea of top five groups,
15 or persons that you would like to hear from, or
16 even ten, and then Colonel, and staff will take
17 care of pulling it together for us.

18 I think with an emphasis on what Ms.
19 Tokash said, simply because she had such a guided
20 idea.

21 MEMBER TOKASH: Thank you Chairwoman.
22 And I know the service secretaries are very busy

1 people, so that's why I also wanted to emphasize
2 or their designee. But I do think that it's
3 important, because these new offices are theirs.
4 And that they, for the first time, though the
5 Military is very different, if they will be
6 operating something akin to a district attorney,
7 or U.S. attorney in that oversight function.

8 So, I think it will be very
9 interesting to hear from again, either the
10 service secretaries, or their designee, A, on how
11 much buy in they have right now, since this is
12 their wheelhouse. And then B, what their vision
13 is, thank you.

14 CHAIR SMITH: I think it makes sense,
15 and certainly for DAC-IPAD to be involved at the
16 beginning before procedures are put into play
17 that maybe aren't best practices. I think it's
18 an excellent idea. Ms. Goldberg, did you have
19 something to say?

20 MEMBER GOLDBERG: Yeah, although I
21 think you actually just said a part of what I was
22 going to say, which is I appreciate the

1 suggestion, and I think there's also something
2 valuable about having that happen sooner, rather
3 than later to establish the ongoing relationship
4 with DAC-IPAD. So, that we can be there to
5 clearly offer support, and sounding board from
6 the get go.

7 CHAIR SMITH: Are folks --

8 MEMBER GOLDBERG: I think it makes
9 sense as an argument for having this next
10 meeting, rather than waiting.

11 CHAIR SMITH: Yes. Are folks in
12 agreement that this is the direction we want to
13 head in for the next meeting? It gives us a good
14 jumping off point, and I think we should hit the
15 ground running if we can do that. Yeah, okay.

16 MEMBER TOKASH: I would say yes,
17 considering the standup dates that Mr. Sullivan
18 told us all was this July, 2022. I mean
19 obviously the effective date is next December,
20 2023, but July will be one month after our next
21 meeting, so that would be my suggestion. Thank
22 you.

1 CHAIR SMITH: Okay, great. So, email about
2 your priority list with respect to who you want
3 to hear from. I think we should also -- I mean
4 we've already got a few subjects that it looks
5 like they're asking us to look at Article 32, and
6 34 has come up a few times, this issue with
7 respect to the letter from Senator Gillibrand.
8 The Special Victim Counsel I think it was the
9 SVC.

10 So, certainly those seem to be issues
11 that are shaping up. But if there are other
12 issues that folks think should be priorities for
13 us. If you could include that in your email,
14 kind of prioritize what you think are things that
15 we should be addressing, that would be terrific
16 as well. Anything else?

17 MEMBER SCHWENK: Yeah, this is Jim
18 Schwenk.

19 CHAIR SMITH: Yes.

20 MEMBER SCHWENK: It looks like we have
21 four taskings already, before we even got
22 started. We have the letter you just mentioned

1 from Senator Gillibrand, and Representative
2 Speier about the Special Victim Counsel. We have
3 the general counsel today asking us to look at
4 appellate decisions for recurring issues, which
5 could go to a case review.

6 Because they could read the records of
7 trial, and appellate records. Then there's the
8 restorative justice issue, which I believe
9 there's -- I think Colonel Bovarnick said there's
10 a draft report that we can look at, and victim
11 impact statements. So, there's four of those,
12 and we obviously need a way ahead on all four of
13 them in addition to looking for other topics, and
14 identifying other topics.

15 CHAIR SMITH: Yes. All right, so
16 right, the general counsel spoke about this for
17 topics. Mr. Sullivan I believe talked about the
18 Article 32, and 34. And then Ms. Tokash
19 reiterated that, so those are things certainly.
20 If there's anything else folks are interested in,
21 I would ask that you include that in your email.
22 All right, moving on I think.

1 MEMBER SCHWENK: I have a suggestion.

2 CHAIR SMITH: Yes.

3 MEMBER SCHWENK: Jim Schwenk again, I
4 have a suggestion on the Article 32, 34. Since
5 the MJRP, the Military Justice Review Panel has
6 been tasked with looking at that, and since the
7 previous iteration of the DAC-IPAD has done a
8 pretty substantial amount of work on it, and made
9 a specific recommendation on Article 34, maybe we
10 could task somebody, or a couple people on the
11 staff to put together a letter from you to the
12 chair of the MJRP.

13 Forwarding whatever our final
14 conclusions are, so that we could get it to them
15 right away, and wrap up the work that we've done
16 in the past with whatever we need to add now, and
17 move that along.

18 CHAIR SMITH: With respect to Article
19 34?

20 MEMBER SCHWENK: Yeah, Article 32, and
21 34.

22 CHAIR SMITH: So, it was -- so, was

1 there a final recommendation with respect to
2 Article 32, and 34? It sounded to me initially
3 like the work had begun, but there wasn't a final
4 result.

5 MEMBER SCHWENK: There was a
6 recommendation on one part of Article 34, which
7 is the advice letter that the senior lawyer gives
8 to the commander before the commander makes a
9 decision on whether to go to the general court-
10 martial, which is the highest level court-
11 martial. And that recommendation had to do with
12 the standard that should be applied.

13 Currently the standard is the lawyer
14 has to say there's probable cause to believe
15 there was an offense committed. And the
16 recommendation of the DAC-IPAD was that should be
17 changed to sufficient evidence that will probably
18 result in a conviction, sufficient admissible
19 evidence that will probably result in a
20 conviction, or likely result in a conviction.

21 So, there is that recommendation,
22 there may be others we want to add regarding

1 Article 34. And we of course never considered
2 Article 34 in light of the Office of the Special
3 Trial Counsel. So, there was one recommendation
4 on one part of 34, no recommendations on 32.
5 Megan's thought, as I got it was we really worked
6 hard on this, we should wrap this up, and send
7 our report forward.

8 And my suggestion was I thought that
9 was a good idea, and one way to send it forward
10 is the secretary has tasked the MJRP to look at
11 it, so send it forward to them with a copy to the
12 general counsel.

13 MR. SULLIVAN: Hey Jim, this is
14 Dwight. One additional consideration I would add
15 is there was a substantial amendment of Article
16 34 by section 537 of the NDAA for FY 2022. So,
17 the 34 will work entirely differently in a
18 covered offense context than the status quo. So
19 --

20 MEMBER SCHWENK: Yeah, so we'd have to
21 look at that. So, that's a substantial amount of
22 work, and that would be our fifth project besides

1 the other four. And so that's --

2 CHAIR SMITH: So, am I hearing you say
3 we shouldn't seek anymore? That's what I'm
4 hearing from you? Are you nicely telling me
5 don't ask people for any more ideas?

6 MEMBER SCHWENK: No, I think having a
7 list of ideas is really important.

8 CHAIR SMITH: Okay.

9 MEMBER SCHWENK: But I think the other
10 part is you've got to deal with the ones you've
11 been tasked to do to start off with. And I'm
12 just saying five is a lot to -- based on our back
13 years of experience, and being involved in other
14 advisory committees, that's a lot of issues to
15 work on at one time, especially looking at staff
16 support.

17 But we've got to figure out how to do
18 it, so I was just giving the suggestion on the
19 Article 32, Article 34.

20 CHAIR SMITH: All right, so let me ask
21 Mr. Sullivan.

22 MR. DOMINGUEZ: I'm sorry.

1 CHAIR SMITH: Yes, I'm sorry, go
2 ahead.

3 MR. DOMINGUEZ: I'm sorry, this is
4 Manuel Dominguez.

5 CHAIR SMITH: Mr. Dominguez, we have
6 not gotten to the point at which we're going to
7 hear public comments.

8 MR. DOMINGUEZ: I just want to
9 reiterate that your 2020 report had finding 21
10 that talked about those two issues with your
11 Article 32, and 34, that's all. I'm just trying
12 to help you guys out, you already have it in
13 there.

14 CHAIR SMITH: All right, thank you
15 sir. Okay, so I just wanted to ask Mr. Sullivan,
16 based on what General Schwenk said, would the
17 changes in the NDAA affect that one portion of
18 the Article 34 report that DAC-IPAD already put
19 together? That one --

20 MEMBER SCHWENK: Yes.

21 CHAIR SMITH: Okay, so it sounds like
22 then we'd have to revisit what the recommendation

1 was, even with respect to that one portion of
2 Article 34.

3 MEMBER SCHWENK: Yeah, it --

4 MEMBER TOKASH: It would just have to
5 -- sorry, this is Megan Tokash. It would just
6 have to account, chairwoman, for the change in
7 the role of the commander. Previously the
8 commander was the preferral -- correction, the
9 referral authority. Now under the fiscal year
10 '22 NDAA, it is one of these independent judge
11 advocates that Mr. Sullivan briefed us so well on
12 earlier.

13 CHAIR SMITH: Okay, so Ms. Tokash,
14 what are your thoughts with respect to what
15 General Schwenk just said, about the idea of the
16 letter with that one portion of 34 obviously
17 being tweaked based on the change in the law?

18 MEMBER TOKASH: Yeah, absolutely, I
19 like that idea from General Schwenk. I think
20 that the most important thing is the hard work
21 that Colonel Bovarnick, and his staff have done
22 on this. And I think that this staff, and

1 knowing how well they work probably have already
2 reacted to contact, since the law passed last
3 December, and could probably adjust that portion
4 of the report as it pertains to Article 34.

5 But I think we should all have a
6 natural curiosity to see what the Article 32
7 portion of the report is, and how we as a
8 committee could make an assessment, and
9 recommendations, especially for the covered
10 offenses under the new NDAA. Especially since
11 they marry up so closely with the DAC-IPAD
12 statutory charter, over.

13 CHAIR SMITH: Okay. So, Mr. Sullivan,
14 I'm going to ask you, how would we go about
15 addressing -- I guess staff could work on making
16 the Article 34 recommendation compliant with the
17 changes, and then the committee could review that
18 change, and we could go from there, and do a
19 letter sending that portion, if everybody's in
20 agreement on that?

21 MR. SULLIVAN: That would certainly
22 work, yes.

1 CHAIR SMITH: Okay, so I guess we'll
2 put that -- that should be something then,
3 hopefully everyone can get that before the June
4 meeting, so that we can make a decision that we
5 are in agreement as to the change, and as to
6 sending the letter to the other committee, of
7 which the name I can't -- MJRP?

8 MEMBER SCHWENK: MJRP, Military
9 Justice Review Panel.

10 CHAIR SMITH: All right, that wasn't
11 that bad, okay. So, anything else on that issue?
12 No. All right.

13 MEMBER SCHWENK: This is Jim Schwenk,
14 can I ask a question of the staff?

15 CHAIR SMITH: Yes, sure.

16 MEMBER SCHWENK: Hey Dwight, or
17 Colonel Bovarnick, or Julie, or somebody, are
18 those subcommittees that the DAC-IPAD used to
19 have still in existence, or do they need to be
20 reauthorized?

21 MR. SULLIVAN: This is Dwight. There
22 are no subcommittees right now.

1 MEMBER SCHWENK: And how many months
2 will it take to get subcommittees? It was a
3 couple of months last time.

4 MR. SULLIVAN: I would think that
5 there will be receptivity to doing it as quickly
6 as possible if the DAC-IPAD suggests
7 subcommittees.

8 CHAIR SMITH: So, maybe we should try,
9 and do that today if this is a process that takes
10 time. Does anybody want to be heard? From what
11 I'm hearing, and I trust our former -- our
12 members who have done this before. I'm hearing
13 policy, case review, and special projects as the
14 three committees, anybody want to be heard about
15 that?

16 Do we want to add a data? I don't
17 know whether we need a data necessarily, but if
18 it's a process that takes time, perhaps we go
19 ahead, and have a data, and go from there.
20 Anybody want to be heard with respect to one?
21 Either just doing the three, policy, case review,
22 special projects, or adding in the data? Ms.

1 Goldberg, yes.

2 MEMBER GOLDBERG: Judge for the --
3 sorry, you go ahead, I'll wait.

4 MS. TAGERT: I was just going to add
5 Judge Smith, as one of the tasks, we have been
6 asked to review appellate cases which may fall
7 under a case review working group, or
8 subcommittee, just something to keep in mind,
9 because it is something that the DAC-IPAD needs
10 to do.

11 CHAIR SMITH: Okay, thank you. So,
12 should we just stick with policy, case review,
13 special projects, and obviously the case review
14 would be the appellate cases?

15 MEMBER GOLDBERG: Can I just jump in,
16 and offer one thought?

17 CHAIR SMITH: Sure, sorry Ms.
18 Goldberg, I'm sorry, I skipped you, go ahead.

19 MEMBER GOLDBERG: No problem. And I
20 offer this somewhat reluctantly, because this is
21 my first meeting, so I have no -- I'm entirely
22 unencumbered by any real knowledge of anything

1 other than --

2 CHAIR SMITH: As am I, so we're in the
3 same boat here.

4 MR. DOMINGUEZ: So, accepting this can
5 be completely wrong, but it seems like apart from
6 the appellate case reviews, the special projects,
7 all of the other projects have policy dimensions.
8 And so I wonder, again, not knowing anything, but
9 I would worry a little bit about having all of
10 those go to special projects, and then wonder
11 what policy would do.

12 And so I'm just raising the question
13 whether it makes sense at least in a working way,
14 regardless of whatever they're called, to just
15 think about which projects to allocate to special
16 projects, and which projects to allocate to
17 policy. And maybe others who have more
18 experience will know what makes sense there, so
19 that the work can be spread out across everybody.
20 Since, this is a pretty substantial starting
21 docket.

22 CHAIR SMITH: Right, I don't think I

1 said that anything was going to anything
2 specific. Are you talking about the things that
3 Ms. Tokash brought up as being too many things
4 under special projects?

5 MEMBER GOLDBERG: What I was thinking
6 of, but again, I'm speaking with some reluctance,
7 or some hesitation here. Was that just the
8 projects that the general counsel laid out for us
9 in the beginning, other than the appellate
10 review, which seemed like data kind of to me,
11 that that other set of projects really might
12 usefully be allocated across the other two
13 committees.

14 And just really my only point, is that
15 I wouldn't let the name, from my perspective,
16 drive where those other projects go, because I
17 think it will lead to a lopsided allocation of
18 work.

19 CHAIR SMITH: Right, that makes sense.

20 MEMBER GOLDBERG: Just a thought.

21 CHAIR SMITH: I don't think I
22 necessarily had in my mind, and I don't know if

1 anyone else did, what bucket the different issues
2 were going to go in. Just more in terms of
3 obviously we're charged with looking at policy,
4 case review, and then we have the special
5 projects. But I wasn't thinking in terms of what
6 bucket the different issues would be going into.

7 And maybe that's the backwards way of
8 doing it, but I'm just being honest. So, do I
9 hear agreement? I'm going to ask if you disagree
10 with this idea of the three subcommittees,
11 policy, case review, special projects, speak up.
12 Otherwise we'll go with those three
13 subcommittees, start the approval process. And
14 then we can determine where everything is going
15 to go, so that we're equally dividing the work.

16 MEMBER BASHFORD: It's Martha
17 Bashford. I would strongly recommend setting up
18 a data subcommittee. The DAC-IPAD has been known
19 for not submitting reports based on anecdotes,
20 but submitting reports that are really grounded
21 in data. And even if we're not sure what data
22 crunching we might need to do at this point, I'm

1 sure there will be a point where we need to do
2 it.

3 And I'd rather have it setup, and
4 ready to go, rather than trying to launch it
5 further down our path.

6 CHAIR SMITH: I trust the former
7 chair. So, that would be four subcommittees.
8 Data, policy, case review, special projects. If
9 you are in disagreement with that idea, go ahead,
10 and speak up. Okay, I don't -- it's hard on
11 Zoom, but having seen no nays I'll say, then I
12 think that's what we should set out to do. Those
13 four committees, data, policy, case review, and
14 special projects.

15 And then we can decide what buckets
16 everything is going in after the fact. All
17 right, so next topic on the list, Colonel
18 Bovarnick, anything else you want to add?

19 COL BOVARNICK: No ma'am. I think
20 those other ones that I sent you, those just kind
21 of naturally fall in. I don't think you're going
22 to spend too much time on those. And just for

1 the members, Ms. Carson talked about the 2023
2 annual report, that'll naturally happen, site
3 visits will come up, and then we already talked
4 about having the virtual option always available.

5 I think that probably is a good thing
6 to get us started, for us to gather this info
7 from the members. Ms. Saunders will do a wrap up
8 when we're done here in a minute, and I'll hand
9 it back to you in a second, but I think we got a
10 good kind of way ahead for what we're going to
11 package up for a proposal for June. The June
12 meeting, as far as who we bring in, and things of
13 that nature.

14 So, I think as far as this session,
15 I'll hand it back to you ma'am. I think these
16 other things, I don't think we really have to
17 throw around, there's really not much --

18 CHAIR SMITH: All right, sounds good.
19 So, I think then that covers, unless someone has
20 something else that they want to address with the
21 committee for now, I think we can probably move
22 on, yes?

1 MEMBER TOKASH: Just the last thing
2 I'd like to say, this is Megan Tokash for the
3 record. Is again, because we haven't been
4 formally tasked by the general counsel, or the
5 SECDEF with respect to assisting with the
6 creation, the implementation, or subsequent
7 recommendations for the new prosecutorial
8 function that is the OSTC, I believe that we
9 would have to proactively seek that tasking.

10 So, I just didn't want that to get
11 lost somewhere between now, and the next meeting,
12 since we're on a really critical time crunch with
13 respect to implementation. So again, I just
14 wanted to state for the record, I forwarded a
15 suggested letter for the Honorable Caroline Krass
16 to consider whether she'd task us, or the
17 Secretary of Defense. Thank you very much.

18 CHAIR SMITH: All right, thank you.
19 And I trust Colonel Bovarnick, you'll update us
20 on that issue?

21 COL BOVARNICK: Absolutely ma'am. And
22 that's a great point from Ms. Tokash, and just

1 for the group. Even though you haven't seen them
2 yet, the terms of reference that we are going to
3 get, and again, that's the document that we get,
4 that you have to follow these, as opposed to the
5 bylaws, that's exactly the process that that
6 would happen.

7 So, we're actually doing something
8 that we're required to do, even though we don't
9 have the approved terms of reference. But the
10 answer is yes, when I get any draft letter, send
11 it to me, I'll finalize it for the chair's
12 signature, sign it, and boom, I'll process it up
13 through Mr. Sullivan to the general counsel,
14 which is exactly the process that's required.

15 CHAIR SMITH: Okay, great, thank you.
16 All right, so Colonel, are we ready for the
17 public comments?

18 COL BOVARNICK: Yes, we've received,
19 as you heard, one request for public comment at
20 this meeting. Navy Lieutenant Commander Manuel
21 Dominguez, and he'll have five minutes to provide
22 his comment, and then members are permitted to

1 ask questions. So, we'll kind of start the clock
2 here. I see Lieutenant Commander Dominguez is on
3 there. And so over to you.

4 MR. DOMINGUEZ: Thank you very much.
5 I first thank the staff, and committee for
6 granting me the opportunity to speak on such an
7 important matter for both the Military, and the
8 public. As stated, my name is Lieutenant
9 Commander Manuel Dominguez, and I have served in
10 the United States Navy for 19 years. I am also
11 part of the organizational culture striving
12 towards eradicating sexual assault from our
13 ranks.

14 Many of the policy changes enacted
15 over the last few years were overdue, and part of
16 a necessary refocus for all of us in the
17 Military. Unfortunately, in the quest to create
18 change, justice has become a zero sum equation.
19 The process has deprived a few service members of
20 fundamental rights in the pursuit of convictions,
21 because convictions drive the data that purports
22 quantitative change for members of Congress.

1 Given this shortened public forum, I
2 highlight three avenues I request the committee
3 to take action on. First, the Military justice
4 system remains a forum for which non-unanimous
5 verdicts are enough to convict a defendant. This
6 is not in line with basic constitutional rates,
7 state, and federal guidelines, and the Supreme
8 Court ruling in Ramos versus Louisiana.

9 I ask the committee to draft findings
10 on this matter, and publish them in a report.
11 Second, the committee reports deviate from prior
12 judicial panel proceedings when considering
13 barriers to the fair administration of justice in
14 sex assault cases. What I observe, and caution
15 against is a burgeoning trend of group, and
16 confirmation thinking.

17 I ask the committee to take on a more
18 comprehensive approach by inviting increased
19 varied perspectives from defense advocacy groups,
20 academic scholars, investigative journalists,
21 defense attorneys, and yes, convicted service
22 members. I specifically ask that the committee

1 include Military confinement facilities in their
2 site visits, and surveys.

3 If you want a sobering perspective,
4 speak to the inmates themselves, and not just
5 appointed facility representatives. You can
6 cross reference what they say against records of
7 trial, and appellate decisions. I also strongly
8 recommend that the committee make efforts to
9 attend court-martials. Third, prior reports have
10 cited a lack of data in child sex assault cases.

11 I ask the committee to continue
12 looking at these cases, inclusive of associated
13 context data. I ask the committee to publish
14 findings in their reports. One observation is
15 that the Military justice system has increasingly
16 adjudicated family law as opposed to, or in
17 addition to criminal law. This facet is
18 especially true when allegations involving child,
19 or minor victims arise in divorce, or custody
20 proceedings.

21 I'm aware that the committee has made
22 recommendations as far as a guardian ad litem,

1 this is an important, but singular facet in these
2 types of complex cases. Lastly, I address you
3 candidly, I am also a wrongly accused, and
4 convicted service member, who is free after
5 spending 22 months in prison. Thankfully the
6 appellate court ruled on the most fundamental,
7 and egregious issues in my case, and thus
8 reunited me with my wife, and family.

9 I have not seen, or spoken to my
10 children in over five years. Furthermore, I
11 persevered through anxiety, and depression due to
12 my wrongful imprisonment, and separation from my
13 children. Yes, this is what the Military justice
14 system looks like when we get it wrong. I can
15 personally attest to what the Military justice
16 system does with cases involving child, or minor
17 victim allegations.

18 I ask the committee to look at cases
19 such as mine. The U.S. versus Lieutenant
20 Commander Manuel Dominguez United States Navy,
21 and The U.S. versus Colonel Daniel H. Wilson
22 United States Marine Corps are just two examples

1 of injustice brought on by over correction in our
2 current prosecutorial environment. There are
3 more innocent service members who are wrongly
4 accused, investigated, prosecuted, convicted, and
5 incarcerated in our system.

6 As a note, I have provided the DAC-
7 IPAD staff with a copy of my appellate decision.
8 I express humble gratitude for your time, for
9 this forum to speak, and for all your challenging
10 work. It is my sincere hope that this meeting
11 prefaces real action, and this concludes my
12 comments.

13 COL BOVARNICK: Thank you very much
14 Lieutenant Commander Dominguez. Any members have
15 any questions?

16 MEMBER SCHWENK: This is Jim Schwenk,
17 I'd just like to thank you for your comments. I
18 think the issues you raised are really good
19 issues that we need to consider carefully, and
20 look into. And I appreciate you taking the time
21 to bring them to our attention.

22 MEMBER MARKEY: This is Jim Markey for

1 the record commissioner. Thank you sir for your
2 coming forward, and meeting with the committee.
3 Yes, defense is part of DAC-IPAD, we have had
4 discussions about issues that are faced by
5 defense counsel during a lot of these
6 investigations, as well as convictions.

7 A current project that I am on outside
8 of this is a conviction integrity project. And I
9 think that's something that is -- that you bring
10 forward, I think that's something that the
11 committee has looked at, and should consider to
12 look at when we're looking holistically at this
13 entire process, and including everything within
14 the system, and ensure that everybody's victims
15 are supported, and everybody's rights are also
16 respected.

17 So, I think conviction integrity is a
18 very, very large part of what we need to ensure
19 that the judicial system is functioning in a very
20 optimal way. So, thank you so much.

21 CHAIR SMITH: Yes, thank you sir.

22 MEMBER KRAMER: Can I ask a question?

1 This is A.J. Kramer. Thanks a lot for your
2 comments, and I just have -- and I hope you
3 understand, we did not consider child sexual
4 offenses, as the former chair said, we put that
5 aside. But what we heard was the remarkably low
6 rate of convictions for sexual assault offenses
7 in all the services.

8 And I'm just curious if you think
9 there's some kind of effort to change that, or
10 turn the direction of that, or that some of these
11 changes are made because of that?

12 MR. DOMINGUEZ: My answer to that is
13 twofold. One, when you're trying to translate
14 qualitative change, you need to substantiate that
15 with quantitative change. So, I think in a
16 previous report, it's actually been referenced
17 that there is an unusual propensity to refer
18 cases to court-martial, and in fact there are
19 many cases that are referred to court-martial
20 regardless of Article 32, unfounded evidence.

21 Finding 21 from the 2020 DAC-IPAD
22 report also indicated that the decision makers

1 weren't exactly attuned to actual definitions of
2 probable cause, reasonable, unreasonable,
3 founded, unfounded. And so when you have a mix
4 up in definitions, you have what I call the risk
5 versus gain decision paradigm. Convening
6 authorities are always going to let the system
7 make that decision as opposed to taking on that
8 decision process themselves.

9 Also I think when you indicate low
10 conviction numbers, that is a statistical smoke,
11 and mirror so to speak. Because if you take from
12 a data input, the total number of offenses that
13 someone might face versus the number of punitive
14 outcomes, what you're going to have is a low
15 percentage as far as conviction rates of actual
16 specifications, and charges.

17 So, if you're going to come up with a
18 service member who faces court-martial in a
19 hypothetical situation of let's say, sexual
20 assault against two victims with maybe multiple
21 charges across both victims, and multiple
22 specifications. What ends up happening a lot of

1 times is that that person only gets convicted of
2 the most egregious, or the most serious, or the
3 strongest cases that the prosecution can present.

4 So, from a data perspective, you're
5 looking at an aggregate percentage being low, and
6 that's what gets reported, as opposed to the
7 actual reporting of the overall punitive outcome.
8 And that is that person probably was over
9 sentenced, or over charged, so you have a
10 splitting there of the data that indicates a low
11 percentage of the conviction numbers, but then
12 you still have that person being convicted.

13 MEMBER TOKASH: This is Megan Tokash,
14 thank you for speaking today. I wonder what your
15 thoughts are about the creation of the new Office
16 of the Special Trial Counsel, and what impact, if
17 any, you think that will have on the referral of
18 future cases like your own? Over.

19 MR. DOMINGUEZ: First, I would like to
20 see if the special counsel will adopt the same
21 guidelines as in federal systems. Because this
22 all boils down to probable cause. So, when a

1 convening authority, or a special counsel in this
2 case has anywhere from 48 to 72 hours to
3 determine probable cause, or to have that initial
4 hearing, we have to understand that probable
5 cause is a different standard than beyond a
6 reasonable doubt.

7 Probable cause is prefaced on merely
8 that the offense could have happened, and the
9 offender was most likely the person. That is
10 often premised on merely a statement. Especially
11 when it comes to sex assault cases, where you
12 don't have a corroborating witness, who in their
13 right mind is going to say that probable cause
14 does not exist?

15 So, that's the first question I have
16 to ask, is what standard is going to be used to
17 evaluate that? Second of all, one of the reasons
18 convening authorities were removed from the
19 decision cycle is because of the public
20 perception, or the service's perception of undue
21 pressure politically. You have the McCaskills,
22 and the Gillibrands, and the Speiers who will

1 publicly admonish members in uniform for not
2 taking cases to court.

3 My question is, is the same mechanism
4 for fitness reports, referrals, moving up from a
5 political, and job perspective going to be
6 applied in the same manner when it comes to that
7 special office? Because the other thing is that
8 special office is probably going to be advised by
9 Military JAGs. So, those Military JAGs working
10 with that special office might undergo the same
11 political pressures, or the service pressures
12 that those convening authorities were subject to
13 prior.

14 So, I have a hard time answering that
15 question until I've seen what it looks like, what
16 standards are going to be adopted. I personally
17 don't think if a person had gotten a hold of my
18 case, whether now, or back in 2017 when I was
19 first investigated, based on the original
20 definition of probable cause, that anybody would
21 actually take a look at it.

22 Because when you're looking at merits

1 of evidence, it takes more than 72 hours. And
2 then you're getting into the actual investigative
3 piece, which a convening authority, or a special
4 counsel is not going to make that decision to
5 dismiss, especially when it's a serious
6 allegation.

7 COL BOVARNICK: Any other questions
8 for Lieutenant Commander Dominguez? Looks like
9 there are none, so we'll close the public comment
10 session. Thank you Lieutenant Commander
11 Dominguez for appearing before the committee
12 today. So, as we close out the public comment
13 session, and before I turn it over to Ms.
14 Saunders, just one recommendation.

15 So, the letter that Ms. Tokash was
16 going to send around to all the members, it
17 sounded like there was no objection to that. And
18 so perhaps I'll recommend, and then we can get it
19 official, where Ms. Tokash sends it to me, I can
20 finalize it for Judge Smith's signature, then get
21 it to the general counsel's office. Maybe we
22 just skip a step, because it just didn't appear

1 like anybody objected to that, so I don't know if
2 we need everybody's signature.

3 MEMBER TOKASH: As long as no one
4 objects Colonel Bovarnick, it should be in your
5 inbox already, I sent it to the entire group, and
6 CC'd you, and Mr. Sullivan as well.

7 COL BOVARNICK: Got you, thank you.
8 So, with that, I'll hand it over to Ms. Saunders,
9 she's going to kind of wrap up what we heard
10 today, and any do outs, and then we'll come back
11 to the chair, and then finally to Mr. Sullivan to
12 close us out. So, Ms. Saunders?

13 MS. SAUNDERS: Thank you. I will try
14 to be brief, because I know we're after 5:00
15 already. I'll start back with the administrative
16 session, and just roll up my do outs. If anyone
17 -- if I misstate something, or if anyone has
18 something to add, please jump in, and correct me.
19 We owe you the staff, a reference sheet for
20 common DOD acronyms in the Military justice
21 process.

22 We also owe you some agendas, or

1 overview of topics, and presenters at past DAC-
2 IPAD meetings. I will point out that those can
3 be accessed on our DAC-IPAD website under the
4 meeting tabs. We do have some of the agendas
5 there, but we will still put that together, and
6 send that to you. Also a link to the manual for
7 courts-martial.

8 And an update, we also owe you an
9 update at the next meeting on the status of the
10 database, and how we're going to use data in our
11 projects going forward. So, now moving on to the
12 deliberative session we just finished, one of the
13 big topics that came up was subcommittees, where
14 it seemed to be universal agreement that yes, you
15 should have them.

16 And the four that were mentioned were
17 policy, case review, special projects, and data.
18 And Judge Smith expressed the sentiment that we
19 should get moving on that, because it can take
20 awhile. So, we'll get started on that. Then the
21 topic for the next meeting, it sounds like there
22 was general consensus that you were interested in

1 hearing someone from either the service
2 secretaries, or their designees on this new
3 Office of Special Trial Counsel.

4 What Judge Smith had suggested is that
5 you each provide your top five groups of
6 presenters that you would like to hear from at
7 the next meeting, and we will put that together,
8 as well as additional topics in addition to the
9 four that have already been tasked to the DAC-
10 IPAD, and that would include Ms. Tokash's letter
11 that she has prepared to request that this
12 committee assist DOD in the rules, and
13 regulations that will need to be put together for
14 this new special office for the special trial
15 counsel.

16 So, what we will do next week, and
17 Julie, or Colonel Bovarnick, if you have a
18 different method by which you'd prefer, is we will
19 send you all an email next week wrapping all of
20 this up, providing a summary of all of that, and
21 then we will ask you to each individually email us
22 as the staff with your recommendations

1 for topics, as well as your recommendations for
2 presenters for the next meeting.

3 And I ask that you send that just to
4 the staff, and not hit reply all to the other
5 members. We don't want to see anyone get
6 arrested by the FACA police on our very first
7 meeting. So, in order to not run afoul of the
8 Federal Advisory Committees Act, just send
9 directly to the staff, and then we will compile
10 all of that.

11 And we will send you a subsequent
12 email letting you know what the details of that
13 meeting will be. As always, you are always
14 welcome to call us, or email us if you have any
15 questions. I know we tried to cover a lot of
16 information during this meeting, and obviously
17 just a lot of that will carry over to the next
18 meeting. Other topics that were noted, that will
19 need to be discussed is the scope of review.

20 Should you include child offenses,
21 sexual harassment, some of those types of
22 offenses. As well as -- yeah, I think that about

1 covers it. Did I forget anything important, or
2 did I misstate anything? Okay, thank you all,
3 and I will turn that back over to Colonel
4 Bovarnick. So, look for that email from us next
5 week.

6 CHAIR SMITH: Ms. Saunders, I think we
7 were -- I didn't hear anybody object, and I
8 thought that Ms. Tokash has suggested that we
9 hear from service secretaries, or designees, I
10 think she said Joint Service Committee, and
11 outside agencies. But I don't know if the
12 thought was all in one meeting, or separate?

13 MEMBER TOKASH: Yeah, Chairwoman
14 Smith, this is Megan Tokash speaking. My
15 suggestion was that the three different panels
16 presenting information, so the first panel would
17 be the service secretaries, or their designees to
18 give an overview of their vision of their
19 offices. The second panel would be
20 representatives from the Joint Service Committee.

21 To be able to brief this body on their
22 current efforts to make changes to being ruled

1 for court-martial, to adjust, or correct for the
2 new law, and the change of the role of commander.
3 And then the third panel would be members from
4 other outside agencies for a comparative
5 perspective, whether that would be someone from
6 Department of Justice, who worked on creating the
7 justice manual.

8 Anyone from the National District
9 Attorneys Association, other district attorney's
10 office, or state's attorney's offices. Over.

11 CHAIR SMITH: Okay, so was there
12 consensus that that is who you want to hear from
13 at the next meeting, and that the additional
14 presenters would be for subsequent meetings? I
15 may have misheard that, or misunderstood.

16 MS. SAUNDERS: It could --

17 CHAIR SMITH: So -- go ahead.

18 MS. SAUNDERS: I was just going to
19 say, is everyone in agreement with that for the
20 next meeting? I don't hear any nays, so I'm
21 going with the nays, I don't hear any, so let's
22 stick with that idea.

1 CHAIR SMITH: Okay, well we've got
2 that for action. And we'll again, wrap that up
3 in the email to you that you should have in your
4 inbox next week. So, thank you all, and I'll
5 turn it back over to Colonel Bovarnick.

6 COL BOVARNICK: Thank you Ms.
7 Saunders. And then, so we will definitely wrap
8 that -- we will plan on then knowing just from
9 this who the panels will be for the next meeting
10 in June. So, we'll go with that, start the
11 planning for that in addition to the email that
12 we'll get out next week, and I'll work the letter
13 that Ms. Tokash sent me.

14 So, with that, let me just say any
15 final comments from any members before I hand it
16 off to Judge Smith for her closing remarks?

17 MEMBER SPOHN: Yes, this is Cassia
18 Spohn. You mentioned that we're going to have
19 meetings in September, and December, do you have
20 the dates for those, or could you send us those
21 dates so that we can get those times locked down
22 on our calendars?

1 COL BOVARNICK: Absolutely. We'll
2 send that in that email. We're going to
3 obviously -- yes, the answer is yes, that will be
4 included in that email next week. Looks like
5 nothing else. Judge Smith, any closing comments
6 from you?

7 CHAIR SMITH: No, thank you everyone
8 for your time, and attention today. It sounds
9 like we have our work cut out for us, and it's a
10 good group, so we're going to get it done. Thank
11 you.

12 MR. SULLIVAN: All right, this meeting
13 of the DAC-IPAD is officially closed.

14 (Whereupon, the above-entitled matter
15 went off the record at 5:16 p.m.)

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Before: US Department of Defense

Date: 04-21-22

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