

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

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PUBLIC MEETING

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TUESDAY
JUNE 21, 2022

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The Advisory Committee met in Salon III at The Ritz-Carlton, Pentagon City, located at 1250 S Hayes St, Arlington, Virginia, at 9:25 a.m. EDT, the Honorable Karla Smith, Chair, presiding.

PRESENT

Hon. Karla Smith, Chair
MG(R) Marcia Anderson*
Ms. Martha Bashford*
Mr. William E. Cassara*
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 A. Bovarnick, JAGC, U.S. Army,
Executive Director

Ms. Julie K. Carson, Deputy Director

Mr. Dale L. Trexler, Chief of Staff

Ms. Alice Falk, Technical Writer-Editor

Ms. Audrey B. Critchley, Attorney-Advisor

Ms. Theresa Gallagher, Attorney-Advisor

Ms. Nalini Gupta, Attorney-Advisor

Ms. Amanda Hagy, Senior Paralegal

Mr. Chuck Mason, Attorney-Advisor*

Ms. Marguerite McKinney, Management and Program
Analyst

Ms. Laurel Prucha Moran, Graphic Designer

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*

Dr. William Wells, Criminologist

Mr. Pete Yob, Attorney-Advisor

*Present via video teleconference

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

2 9:28 a.m.

3 MR. SULLIVAN: Good morning. I'm Dwight
4 Sullivan. I am the Designated Federal Officer of
5 the Defense Advisory Committee on Investigation,
6 Prosecution, and Defense of Sexual Assault in the
7 Armed Forces, colloquially known as the DAC-IPAD.

8 This public meeting of the DAC-IPAD is
9 now open.

10 Judge Smith, you have baton.

11 CHAIR SMITH: I want to welcome the
12 members and all attendees to the 23rd Public
13 Meeting of the Defense Advisory Committee on
14 Investigation, Prosecution, and Defense of Sexual
15 Assault in the Armed Forces or DAC-IPAD.

16 Today's meeting is being offered for
17 our members and presenters both in person and by
18 video conference via Zoom.

19 For those members joining us by video,
20 please mute when not speaking. If we have
21 technical difficulties, we will break for 15
22 minutes and move to a teleconference line with

1 instructions to rejoin sent via email.

2 The Secretary of Defense created the
3 DAC-IPAD in accordance with the National Defense
4 Authorization Act for Fiscal Year 2015. The DAC-
5 IPAD's statutory purpose is to advise the
6 Secretary of Defense on the investigation,
7 prosecution, and defense of allegations of sexual
8 assault and other sexual misconduct involving
9 members of the armed forces.

10 I understand that representatives from
11 each of the military services' Criminal Law
12 Division, who serve as the DAC-IPAD's Service
13 specific experts, and liaisons to the respective
14 legal organizations have joined us. Welcome to
15 all of you.

16 This public meeting is scheduled for
17 two days. We will begin today with Colonel
18 Bovarnick providing an overview of our approved
19 terms of reference, subcommittees, and our
20 assigned tasks. That will be followed by
21 professional staff briefings on our appellate
22 case review task data update and our joint

1 explanatory statement task.

2 After lunch, Colonel Bovarnick will
3 provide a brief overview of the Office of the
4 Special Trial Counsel Program followed by a panel
5 of state and federal prosecutors on best
6 practices for establishing an independent
7 prosecutorial office. We will then hear from a
8 few of our fellow members of their best practices
9 for establishing an independent prosecutorial
10 office. Finally, we will end the day
11 with a review and discussion of the Special
12 Victims Counsel to Victims Legal Counsel Report.

13 This meeting is being recorded and
14 transcribed and the complete, written transcript
15 will be posted on the DAC-IPAD website at
16 www.dacipad.whs.mil.

17 If an attendee wants to make a public
18 comment, please submit your name to
19 whs.pentagon.em.mbx.dacipad@mail.mil no later
20 than 2:00 p.m. Eastern tomorrow.

21 Comments will be heard at my
22 discretion at the end of tomorrow's session.

1 We received written public comment
2 with attachments from Lieutenant Commander Manuel
3 Dominguez, who we heard from during the April
4 21st, 2022 meeting. That submission can also be
5 found on the DAC-IPAD website.

6 To assist the court reporter in
7 identifying speakers, committee members should
8 signal if they have a question or wish to speak
9 by stating your name and wait to be acknowledged
10 before proceeding.

11 Thank you to everyone for attending
12 today.

13 Colonel Bovarnick, over to you to
14 start the meeting.

15 COL BOVARNICK: Okay, so excuse me one
16 second. During this session, I'm going to cover
17 the terms of reference, review the committee's
18 tasks, and provide an update on committee
19 feedback regarding presenters' topics, along with
20 the chair, and open the discussion on
21 subcommittees.

22 So the terms of reference are a four-

1 page document included in your read-ahead packet
2 at Tab 3. They were approved by the DoD general
3 counsel on May 23rd of this year. As they go
4 through the terms of reference, you'll see that
5 it specifically covers tasks that have been
6 assigned to the committee including three that
7 the staff will review later this morning, the
8 Joint Explanatory Statement's two tasks, and the
9 appellate case review.

10 So for the next five minutes, I'm just
11 going to flip through the terms of reference for
12 the committee. If you want to follow on, we're
13 at Tab 3 of your package. I'm just going to
14 highlight the key points and not read it to you.
15 It's similar to when we covered at the first
16 session the -- we talked about how the terms of
17 reference, we don't have our bylaws yet and so
18 we'll just go through this.

19 So the objectives and scope you see
20 there in paragraph one, what establishes the DAC-
21 IPAD Section 546 of FY15 NDAA methodology, covers
22 regulatory compliance. So tasking authority --

1 and so the members that were on the committee
2 before, so it may be a little bit different than
3 you were used to, but the tasking authority now
4 is going to come through whether it's statutory -
5 - it's stuff that we're going to cover today,
6 obviously through the joint explanatory
7 statement, but primarily you'll see tasks come
8 through the general counsel of the Department of
9 Defense or tasks requested by the committee will
10 come from the committee through the chair to the
11 general counsel and back to the committee.

12 You've got the paragraph there on
13 access to records, collection of information.
14 The next page there, how you can receive input
15 from agencies. So as we talk about in the
16 strategic session presenters that you want to
17 hear from, whether it's from government or non-
18 government, input from members of the public. We
19 saw that last time, so there will always be a
20 session at these meetings to hear from members of
21 the public.

22 Okay, so this few minutes I'm going to

1 cover, as well as the remainder of this session,
2 just go into the tasks, just so we get it all on
3 the record before the members. So statutory, the
4 annual report, again, you'll hear about that in
5 the strategic session tomorrow afternoon, but
6 that's basically to say that on March 30th of
7 every year, that statutory requirement for annual
8 report. Our Deputy Director, Ms. Julie Carson,
9 will cover that later, kind of the topics that
10 will go into that report that the committee will
11 determine.

12 The biennial collateral misconduct
13 report is another one by statute, every two
14 years, so September of 2023, the next time that
15 that's due. So that's stuff that as the
16 subcommittees get going, these tasks won't
17 necessarily fall under a particular subcommittee.
18 These are ones that are just going to be dictated
19 by the statute.

20 And then studies, and that's going --
21 again, we're going to talk more about that in the
22 strategic session, but that's studies that are

1 either directed to the DAC-IPAD or that the
2 committee wants to take up and again, getting
3 approval from the general counsel.

4 So these two, I'm not going to spend
5 much time. On paragraph 4, there on page 3,
6 because you're going to get briefings on both of
7 these, the assessment of alternate justice
8 programs and victim impact statements. So those
9 are two current tasks assigned to the committee,
10 specifically in these terms of reference now
11 through the general counsel.

12 So you have the joint explanatory
13 statement that put those out there and now
14 because they're in the terms of reference, the
15 committee actually has these tasks and again, the
16 staff is going to brief you on those later this
17 morning.

18 And then the deliverable requested by
19 the general counsel, so you'll see that. And you
20 have the appellate case review, again, another
21 one of your briefings that are going to be
22 covered this morning. But it's specifically laid

1 out in these terms of reference.

2 And so, for example, the Office of
3 Special Trial Counsel task, that's not in the
4 terms of reference, but it's covered because
5 that's the way that another task can come to you
6 and that letter from the general counsel, for
7 example, is at tab 5 of your statement. So even
8 though we have three of them specifically laid
9 out in the terms of reference, the Office of
10 Special Trial Counsel task is another task before
11 the committee based on the general counsel's
12 letter.

13 Does any member have any questions
14 about the terms of reference? Okay, so
15 obviously, you have it there in your packet.

16 The next thing I'd like to cover --

17 MEMBER TOKASH: I think a member
18 virtually has a question.

19 COL BOVARNICK: I'm sorry. Ma'am, I
20 think you may be on mute or we can't hear you.

21 MEMBER BASHFORD: I'm not on mute.

22 Can you hear me?

1 MEMBER TOKASH: I can hear you,
2 Martha.

3 MEMBER BASHFORD: Okay. If I
4 understand you then, that if the DAC-IPAD wants
5 to look at something under its purview, we need
6 permission from DoD in order to do that?

7 COL BOVARNICK: Yes, ma'am. So the
8 request would come through -- so we'll use the
9 Office of Special Trial Counsel as an example.
10 So that was raised by the committee at the last
11 session, as you recall. And then so what did to
12 formalize that -- there's actually another
13 document that kind of dictates this that comes
14 through the different rules of the -- a different
15 office, so the answer is yes. And so what we do
16 with the Office of Special Trial Counsel, the
17 process is actually quick and efficient. You may
18 not think that, but -- so Judge Smith signed a
19 letter -- it's in your packet at tab 5. That led
20 to the general counsel and then the general
21 counsel formally tasked the committee with
22 looking at the issues surrounding the Office of

1 Special Trial Counsel.

2 So the bottom line answer to your
3 question is yes. That's different than before I
4 know when you were the chair and has to be
5 requested and then sent back. Unless it's
6 already in statute. There could be a discussion
7 and debate about it if there's a topic that's
8 clearly under the purview. You actually have to
9 request that and so when that comes up, if it
10 comes up, and I'll discuss that with the DFO and
11 we'll figure out do we actually have to request
12 that in writing. But that is kind of the -- I
13 was going to say short answer, but I've made it
14 long. The answer is yes, you have to request it.

15 MEMBER BASHFORD: So it may be quick
16 and efficient, but it seems to me that it
17 substantially reduces the independence of the
18 DAC-IPAD and in its advisory capacity.

19 Mr. Sullivan, I'm looking over to you.
20 Any help?

21 MR. SULLIVAN: So I would repeat what
22 Colonel Bovarnick said and that is there is no

1 requirement for anything from the Department of
2 Defense where the DAC-IPAD is carrying out one of
3 its statutory responsibilities. And so the
4 statutory authorities are rather broad. The
5 requirement that -- the requirement to go back to
6 the Department of Defense applies to -- and
7 requests to examine items that don't fall within
8 the statutory mandate. Does that make sense?

9 COL BOVARNICK: Thank you, ma'am. And
10 that question was from Member Bashford.

11 MEMBER SCHWENK: I have a comment.

12 COL BOVARNICK: Sorry, please.

13 MEMBER SCHWENK: I want to piggyback
14 on what Martha just said. I think it's a shot
15 across the bow on the system to ensure that when
16 we're -- if we ever get to the point where the
17 committee feels within the ambit of its statutory
18 requirement, it should do X and it asks
19 permission and the answer is don't do X, then
20 we'll have an issue. But until then, it's maybe
21 an administrative problem, but you know, it's
22 doable.

1 COL BOVARNICK: Yes, sir.

2 MR. SULLIVAN: In general, I go a bit
3 beyond that and say if it falls within the
4 statutory ambit, then there's not a requirement
5 to ask for permission.

6 MEMBER SCHWENK: I think most of the
7 things that were appellate case decisions,
8 there's -- you know, why isn't that part of the
9 prosecution, the investigation, prosecution, and
10 defense?

11 MR. SULLIVAN: It certainly would be.
12 That was an example where DoD made its specific
13 request to the DAC-IPAD to examine a certain
14 thing. So that request would not be to suggest
15 that if the DAC-IPAD had, sua sponte, decided to
16 make that investigation that it would have needed
17 to ask for permission. That was something that
18 DoD saw a benefit in having the DAC-IPAD
19 specifically study and therefore asked that the
20 DAC-IPAD apply its expertise to that particular
21 issue.

22 MEMBER SCHWENK: Okay, so the answer

1 then as long as within the discretion of the DAC-
2 IPAD, we think looking at X is within our
3 charter. We don't have to ask for permission.

4 MR. SULLIVAN: I think that's fair.

5 MEMBER SCHWENK: Okay, so the answer
6 is no, Martha.

7 (Laughter.)

8 MEMBER GRIMM: This is Paul Grimm with
9 a question.

10 COL BOVARNICK: Yes, sir.

11 MEMBER GRIMM: Yes, and I think what's
12 implicit in Martha and Jim's comments is that the
13 DAC-IPAD has authority to read the statute and
14 make the first determination as to whether an
15 issue that they want to explore is within their
16 statutory jurisdiction, so long as they read the
17 statute in accordance with accepted statutory
18 interpretation. So we don't have to get someone
19 looking over our shoulder to give us permission
20 as to whether or not we can have properly
21 interpreted the statute, if it's the consensus of
22 the committee that we have.

1 I don't know that there needs to be a
2 comment on that, but that's necessarily implied
3 in the ability of the committee to be able to
4 fulfill its statutory obligations.

5 MR. SULLIVAN: And I certainly agree
6 with that, Your Honor.

7 COL BOVARNICK: Thank you, Judge
8 Grimm.

9 So I guess just to recap then, so we
10 covered the terms of reference, so currently I'll
11 just conclude with this portion here in this
12 session. So certainly by statute we already have
13 those two, the annual report and the biennial
14 misconduct report.

15 And then by request through the joint
16 explanatory statement and those happen to be
17 covered in the TOR, so those are two more.

18 And then through the general counsel
19 that we have which is the appellate case review,
20 talked about the Office of Special Trial Counsel.

21 And then one that we hope to conclude
22 today that will be subject of a briefing at the

1 end of the day today is a special victim counsel,
2 victim legal counsel report. That had been
3 assigned and then to the DLSA staff, the Defense
4 Legal Service Agency staff, all the members got a
5 copy of that and so we're going to ask today a
6 recommendation and after the committee discusses
7 it and deliberate, whether the committee wants to
8 adopt that report with modifications or not.

9 So those are all the tasks. The other
10 studies that we'll discuss in the strategic
11 session tomorrow afternoon and I'll lay those
12 out, will determine, the committee will determine
13 do we actually have to ask for permission to do
14 these studies that many which were recommended by
15 the committee members. And so then we'll take
16 that particular issue up tomorrow. So in other
17 words, if the committee wants to study X, then
18 we'll figure out okay, do we actually have to
19 request that or no. And certainly the committee
20 will discuss that tomorrow.

21 But that basically covers the current
22 status of all the tasks. Any questions on that

1 particular topic? And again, we'll have more
2 discussion on that tomorrow. So as I close out
3 that discussion on behalf of the chair is
4 finalize the proposal for subcommittees that were
5 raised at the first session and then work to
6 finalize our nominations for submission to the
7 general counsel for appointment. And then the
8 assignment of tasks to a particular subcommittee,
9 we'll hold that until tomorrow afternoon.

10 And so I propose that we do this in
11 three steps: agree on the subcommittees
12 themselves, go through the nomination process;
13 and then again, tomorrow, during the strategic
14 planning session determine which projects would
15 go under a particular subcommittee.

16 So although four subcommittees were
17 discussed on April 21st, we sent out -- the staff
18 sent out a subcommittee preference sheet,
19 approved by the chair, and we recommended three
20 subcommittees. The fourth subcommittee that was
21 recommended or mentioned at the April 21st
22 meeting was the Data Subcommittee. After

1 discussions with the chair, we determined that
2 three subcommittees will come up for proposal and
3 the staff's data team of which you'll hear a
4 brief from today will support all of those
5 subcommittees, so there not necessarily be a
6 separate subcommittee.

7 And so Chair Smith, over to you.

8 CHAIR SMITH: Well, let me just say so
9 the three subcommittees that we're proposing are
10 Special Projects, Case Review, and Policy. Is
11 there a motion for the committee to approve the
12 three proposed subcommittees?

13 MEMBER TOKASH: So moved.

14 CHAIR SMITH: Is there a second?

15 MEMBER SCHWENK: I second.

16 CHAIR SMITH: All right, very good.

17 All in favor say aye.

18 (Chorus of aye.)

19 CHAIR SMITH: All opposed, please say
20 opposed.

21 Hearing none, the motion is approved.

22 The staff will prepare a memorandum for the

1 general counsel requesting the establishment of
2 these three subcommittees.

3 COL BOVARNICK: Okay, ma'am, so with
4 those three subcommittees, we solicited
5 volunteers for each subcommittee. No one
6 subcommittee can have a quorum of more than eight
7 members. So as a best practice, it's recommended
8 that four to five members is an ideal number for
9 a subcommittee.

10 And based on the voluntary preferences
11 submitted, we want to confirm the following
12 nominations for the three subcommittees that the
13 chair will submit to the DoD general counsel for
14 appointment. So for the Special Projects
15 Subcommittee, the proposed nominees are Dr.
16 Markowitz, Dr. Spohn, Mr. Kramer, Ms. Tokash, and
17 Judge Walton with Ms. Tokash nominated as a
18 Special Projects Subcommittee chair.

19 Do the members present concur with the
20 nomination to the Special Projects Subcommittee?
21 And Ms. Tokash, do you concur with your
22 nomination to be the subcommittee's chair?

1 MEMBER TOKASH: Yes.

2 COL BOVARNICK: Thank you all. For
3 the Case Review Subcommittee, the proposed
4 nominations are Ms. Bashford, Ms. Garvin, Ms.
5 Long, and Mr. Markey with Ms. Bashford nomination
6 as the Case Review Subcommittee chair.

7 Do the members present concur with
8 their nominations of the Case Review
9 Subcommittee? And Ms. Bashford, do you concur
10 with your nomination to be the subcommittee's
11 chair?

12 MEMBER BASHFORD: Yes.

13 COL BOVARNICK: Thank you. And
14 finally --

15 MEMBER SCHWENK: Colonel Bovarnick?

16 COL BOVARNICK: Yes, sir.

17 MEMBER SCHWENK: Is it possible to add
18 a name to the Case Review Subcommittee?

19 COL BOVARNICK: Yes, sir.

20 MEMBER SCHWENK: Could you add my
21 name, please?

22 COL BOVARNICK: So done. Yes, sir.

1 Okay. Now for the Policy Subcommittee, we have
2 Chair Smith, General Anderson, Ms. Goldberg, Ms.
3 O'Connor, and General Schwenk. And General
4 Schwenk, you've been nominated as the Policy
5 Subcommittee chair.

6 Do the members present concur with
7 their nomination to the Policy Subcommittee. And
8 General Schwenk, do you concur with your
9 nomination to be subcommittee's chair?

10 MEMBER SCHWENK: Yes.

11 COL BOVARNICK: Thank you. And so as
12 noted, during the strategic planning session
13 tomorrow, the committee will discuss and
14 designate projects to each subcommittee as
15 previously assigned tasks and new proposed
16 projects as discussed. The recommendation would
17 be to assign no more than two projects to each
18 subcommittee at a time. Again, that will be open
19 for discussion for the committee if they want to
20 take on more. And so we'll hold that discussion
21 until tomorrow.

22 And ma'am, at this time, I have

1 nothing further. Are there any other questions
2 about the subcommittees?

3 MEMBER GRIMM: Colonel, this is Judge
4 Grimm.

5 COL BOVARNICK: Yes, sir.

6 MEMBER GRIMM: Again, if we don't
7 already have the expected numbers or the maximum
8 numbers on the first subcommittee, I'd like to
9 throw my hat in the ring if there's still room on
10 that committee.

11 COL BOVARNICK: Yes, sir. For the
12 Special Projects Subcommittee?

13 MEMBER GRIMM: The very first one, Ms.
14 Tokash's one.

15 COL BOVARNICK: Yes, sir, got you.

16 MEMBER GRIMM: Thank you.

17 COL BOVARNICK: Yes, sir. So to
18 recap, so for Special Projects, the chair, Ms.
19 Tokash, Dr. Markowitz, Dr. Spohn, Ms. Kramer,
20 Judge Walton, and Judge Grimm. For Case Review,
21 Ms. Bashford, Ms. Garvin, Ms. Long, Mr. Markey,
22 and General Schwenk with Ms. Bashford as the

1 chair. And the Policy, with General Schwenk as
2 the chair. Chair Smith as a member, General
3 Anderson, Ms. Goldberg, and Ms. O'Connor.

4 So ma'am, that includes that. So at
5 this time, we can take a break unless there are
6 any other comments until 10:30 a.m. and we'll
7 return and you'll be briefed by the staff on the
8 appellate decision task and then a series of
9 three briefings total leading up to lunch.

10 With no other questions, we will take
11 a break until 10:30.

12 (Whereupon, the above-entitled matter
13 went off the record at 9:50 a.m. and resumed at
14 10:30 a.m.)

15 COL BOVARNICK: Welcome back,
16 everyone. For the next 90 minutes leading up to
17 lunch, you're going to receive three briefings,
18 two covering tasks that we discussed this morning
19 and a data update.

20 First, you'll hear from Ms. Audrey
21 Critchley and Ms. Kate Tagert on the appellate
22 decision tasking, then from Mr. Chuck Mason on

1 data, and finally, from Ms. Terri Saunders and
2 Ms. Meghan Peters on the two tasks requested from
3 the joint explanatory statement and contained in
4 the terms of reference.

5 Now I'll hand it off to Ms. Critchley
6 for the appellate review briefing.

7 MS. CRITCHLEY: Thank you, Colonel
8 Bovarnick. Good morning. I'm Audrey Critchley.
9 On behalf of the team, which includes Meghan
10 Peters, Terri Saunders, and Stacy Bogges, my
11 colleague, Kate Tagert, and I are going to talk
12 with you about the appellate review study.

13 The purpose of this briefing is
14 threefold, first, to inform you about the task,
15 the Department of Defense Office of General
16 Counsel or OGC asked the DAC-IPAD to undertake,
17 second, to inform you of the work the committee
18 staff has done so far to execute the task, and
19 third, to guide the committee in a discussion of
20 the decisions that must be made in order to move
21 forward with this study.

22 I will provide an overview of the task

1 as assigned to the DAC-IPAD, steps the staff has
2 taken to frame the project for your
3 consideration, and staff recommendations for next
4 steps. Then, I'll turn it over to Kate to guide
5 discussion on decision points for the committee.

6 On January 28, 2022, OGC requested
7 that the DAC-IPAD conduct a comprehensive study
8 of appellate decisions in military sexual assault
9 cases. The tasking memo is in your read ahead
10 materials at tab five.

11 According to the tasking memo, the
12 study should analyze recurring appellate issues
13 in military sexual assault cases and recommend
14 reforms, analyze the efficacy of the military
15 appellate system's handling of these cases, and
16 recommend training and education improvements for
17 practitioners.

18 The study should also consider recent
19 legislative changes to the standard of appellate
20 review of factual sufficiency and sentence
21 appropriateness, which you heard about briefly
22 from Colonel Bovarnick earlier.

1 The design of the appellate review
2 study and its suspense date were left to the
3 judgment of the DAC-IPAD. The staff has
4 conducted a preliminary review of one year's
5 worth of appellate decisions in order to assess
6 the size and scope of the study.

7 At the end of this presentation, the
8 staff will submit several issues for your
9 consideration. First, how should military sexual
10 assault cases be defined? Second, and I believe
11 we may have already answered this, would the
12 committee like to form a subcommittee to work
13 with the staff on this study? And that has been
14 accomplished. And finally, what experts or
15 stakeholders would the committee like to hear
16 from at a future meeting?

17 The staff recommends that the study
18 begin with appellate decisions in fiscal year 21
19 in order to capture the substantial changes
20 brought by the Military Justice Act of 2016.

21 Most of those changes took effect on
22 January 1, 2019, and are not reflected in

1 appellate decisions until fiscal year 21, making
2 fiscal year 21 the most recent complete year
3 under current law.

4 The study will necessarily encompass
5 subsequent fiscal years as it must consider the
6 modified factual sufficiency and sentence
7 appropriateness standards of review that I
8 mentioned a moment ago.

9 Because these new standards are not in
10 play in the fiscal year 21 appellate decisions
11 and are not critical to the decisions that must
12 be made today, the staff will brief the committee
13 on these standards of review at a later date.

14 For now, please note only that the new
15 factual sufficiency standard applies to guilty
16 findings entered on or after January 1, 2021,
17 which will begin to make their way to the
18 appellate courts in fiscal year 22.

19 And the new sentence appropriateness
20 standard applies to cases in which all findings
21 of guilty are for offenses that occur on or after
22 December 27, 2023. These cases are unlikely to

1 reach the appellate courts before fiscal year 25.

2 The first step in developing the study
3 is to define military sexual assault. The staff
4 recommends that the study focus on appellate
5 decisions in cases where there was a guilty
6 finding on a nonconsensual penetrative or sexual
7 contact offense under any article and any theory
8 of non-consent.

9 This could include the rape statute,
10 Article 120, parallel offenses against children
11 under Article 120b, Articles 92, 93 and 133 to
12 the extent they involve inappropriate sexual
13 acts, contacts, or relationships with junior
14 service members, Article 134 offenses such as
15 indecent contact without consent under older
16 versions of the UCMJ and assimilated offenses
17 such as sex trafficking in violation of the U.S.
18 Code, and finally, Articles 80, 81, and 82
19 covering attempts, conspiracies, and solicitation
20 to commit any of the aforementioned offenses.

21 The committee may choose to define
22 military sexual assault differently and Kate will

1 facilitate a discussion of this foundational
2 issue in just a few minutes, but the staff has,
3 for the time being, adopted the recommended
4 definition in order to take the next step of
5 identifying appellate decisions in military
6 sexual assault cases.

7 The staff has created a list of every
8 fiscal year 21 appellate decision that is posted
9 on the websites of the service courts and the
10 Court of Appeals for the Armed Forces. There
11 were 789 appellate decisions in fiscal year 21,
12 including rulings on writs and substantive
13 motions.

14 Next, the staff reviewed the 789
15 appellate decisions and is currently in the
16 process of obtaining and reviewing trial results
17 for each case reflected in these decisions to
18 determine whether there was a guilty finding on a
19 military sexual assault offense.

20 Out of 789 appellate decisions, 235,
21 or nearly 30 percent, have already been
22 identified as involving military sexual assault

1 cases.

2 The next step will be to review in-
3 depth the 235 decisions in the military sexual
4 assault cases to identify recurring appellate
5 issues and to analyze those issues.

6 Identification and analysis of issues
7 may include consideration of input from the
8 government and appellate defense divisions of
9 each of the services as well as other
10 stakeholders, and Kate will open the floor for
11 discussion of who else you might like to hear
12 from in just a minute.

13 The final step will be to report on
14 the analysis and recommendations resulting from
15 the study, to include multiple years of case
16 review.

17 The staff recommends that the
18 committee approach the task in phases, beginning
19 with analysis and reporting on recurring
20 appellate issues.

21 Subsequent phases could include
22 standalone reports analyzing the impact of the

1 modified factual sufficiency and sentence
2 appropriateness standards of review.

3 This completes my overview of the
4 appellate review study and I will now turn it
5 over to Kate to discuss where we go from here.

6 MS. TAGERT: Good morning. Now for
7 the fun part, deliberations, right? Okay, so as
8 you know, the Office of General Counsel assigned
9 the DAC-IPAD this study. However, the study
10 itself is described as comprehensive, and
11 therefore, we believe that the DAC-IPAD has a lot
12 of discretion to make this study whatever they'd
13 like it to be.

14 So, part of the study is that there
15 needs to be an identification of reoccurring
16 appellate issues that are coming up, and as the
17 committee awaits the formation of the
18 subcommittees, before the subcommittees really
19 start to work, there are several initial
20 decisions that the DAC-IPAD as a whole could
21 discuss today.

22 So, as Audrey described, we've taken

1 the preliminary steps in identifying what sexual
2 assault offenses are, and we have included child
3 sexual assault offenses.

4 However, as you deliberate today as to
5 whether or not you want to include child sex
6 offenses or not, or what type of sexual assault
7 cases you want to review, obviously those
8 decisions are for the committee and not for the
9 staff, so you may want to define sexual assault
10 more broadly or more narrowly.

11 So, there are two decisions to make
12 under the scope of the OGC tasking, and the
13 tasking itself did not define what sexual assault
14 is. As Audrey noted, we reviewed 789 cases, and
15 using our definition, that includes child sex
16 assault offenses and some additional cases that
17 don't fall under Article 120.

18 There were 235 cases in the fiscal
19 year 21 batch. For some of the committee members
20 that worked on the case review investigative
21 project, this is -- you know, there's just not as
22 many cases to review for committee members.

1 The staff recommends that the
2 appellate project take on the child sexual
3 assault offenses where there is a conviction. We
4 believe that the use of the word comprehensive by
5 OGC means that potentially this is a broader
6 project than the DAC-IPAD has done before.

7 However, if you do choose to review
8 convictions where there was an appellate case for
9 child sexual assault, we don't believe that binds
10 you in future studies to include those types of
11 cases. It's just for this particular project.

12 And so, then the second deliberation
13 point for the Chair and the committee will be how
14 you want to define sexual assault, and I'm going
15 to go back to slide five of Audrey's
16 presentation.

17 These are the articles that we have
18 used when reviewing the appellate cases, and
19 again, as Audrey described, this is cases where
20 there was a nonconsensual contact or penetration.

21 However, we have excluded other cases
22 which the committee may be interested in looking

1 at, which include Article 134, child pornography
2 or indecent exposure, forcible pandering. Those
3 were cases that we did not select as part of the
4 235.

5 So, having addressed those two initial
6 scoping issues, I'm going to turn it over to
7 Madam Chair for deliberation and a potential vote
8 on those two issues for the appellate project.

9 CHAIR SMITH: So, can I ask a
10 question? When you say that there were certain
11 types of cases that didn't fall under Article 120
12 that you included in that 235, what types of
13 cases were those?

14 MS. TAGERT: Those cases involved
15 offenses like failure to obey a lawful general
16 regulation, maltreatment of a subordinate, or
17 conduct unbecoming an officer, where a supervisor
18 or officer engaged in sexual activity with a
19 junior servicemember. They also included Article
20 134 assimilated offenses such as sex trafficking
21 in violation of the US Code.

22 CHAIR SMITH: Okay, and of the 235

1 cases, how many of those were child sex assault
2 convictions?

3 MS. TAGERT: So, unfortunately, we
4 have not -- we haven't been able to -- we read
5 the cases, but we didn't, like, capture all of
6 the data yet. We just were kind of like trying
7 to give you a ballpark.

8 I would say anecdotally from the Navy
9 cases that we've reviewed, there are substantial
10 child sexual assault offense convictions in the
11 appellate world. I don't know if Audrey can
12 speak for the other services.

13 MS. CRITCHLEY: No, I mean, just based
14 on where we are on the process, we can't give you
15 a number, but it's substantial. I don't want to
16 guess, but 30 percent maybe. I'm not sure. It's
17 a substantial number.

18 CHAIR SMITH: Okay, so anyone have
19 comments with respect to, first, the inclusion of
20 child sex assault cases? I mean, even based on
21 Audrey's statement that it's substantial, it
22 would be my opinion that we would include those

1 in the report. Anyone?

2 MEMBER GOLDBERG: Thank you very much
3 for the presentation. I guess I have two
4 questions. One is, were there any other
5 categories, I know you talked a little bit about
6 this, that you thought hard about and then
7 decided shouldn't be here?

8 And then the second is -- so if
9 there's anything more you want to say about that,
10 and then the second is whether or to what extent
11 the sexual assault cases also have issues related
12 to stalking, or domestic violence, other kinds of
13 offenses that are sometimes broadly considered in
14 the sexual assault realm in other areas?

15 MS. CRITCHLEY: So, for purposes of
16 our review, if there was not one of our defined
17 military sexual assault offenses, we did not
18 include, for example, stalking cases. Again, I
19 can't give you numbers. There is overlap in the
20 cases.

21 There will be a case that's a domestic
22 violence case that has a sexual assault offense

1 in it, but if it did not have one of those
2 offenses, we did not include it, and that's one
3 of our questions for you today. Would you like
4 to include those? We're open to that. The
5 numbers aren't going to be as substantial as for
6 something like child sex offenses.

7 MEMBER GOLDBERG: May I ask a follow-
8 up, which is do you have a gauge on the numbers
9 in the domestic violence area which might be
10 higher than stalking?

11 MS. CRITCHLEY: We can't -- at this
12 point of the preliminary review just for coming
13 up with the universe of cases, we're just not
14 there yet.

15 MEMBER GOLDBERG: Got it, thank you.

16 MS. TAGERT: And one other point for
17 the committee members to think about is I know
18 that you're looking at the Office of Special
19 Child Counsel which will focus on domestic
20 violence cases. However, as far as the DAC-IPAD,
21 the OGC memo specifically discusses military
22 sexual assault.

1 However, it would be within your
2 discretion of whether or not you'd like to open
3 up this particular study to potentially bleed
4 into the OSTC conversation that potentially is
5 going to be taking place with the committee.

6 MS. CRITCHLEY: If I could also add
7 one more thing, if you're interested in knowing
8 what would including certain types of cases due
9 the numbers, then that would be useful direction
10 going forward that we can start tracking that.

11 MEMBER WALTON: So, as I understand,
12 child sexual assault would not be included, I
13 mean, pornography, I mean?

14 MS. TAGERT: That's correct, sir.

15 MEMBER WALTON: Did you consider the
16 distinction between only viewing the genitalia of
17 a child as compared to actually viewing the
18 sexual assault of a child, which I consider to be
19 very different types of conduct?

20 MS. CRITCHLEY: No, we excluded all
21 child pornography unless it involved a charge
22 where, say, the person producing it is there, you

1 know, committing one of the acts. So, we
2 excluded that, and again, it's -- the floor is
3 open to include that.

4 CHAIR SMITH: So, if -- I'm trying to
5 think of a scenario, but with respect to the
6 child pornography piece, if a child of a military
7 person was used in the creation of the
8 pornography, but let's say that it wasn't, that
9 the person convicted isn't the actor, that would
10 be excluded from --

11 MS. TAGERT: Correct.

12 CHAIR SMITH: Okay, and so the
13 rationale for excluding -- I want to understand.
14 The rationale for excluding indecent exposure, or
15 the pandering, or that form of child pornography
16 is what? What was the rationale?

17 MS. CRITCHLEY: There was no contact
18 by the accused.

19 CHAIR SMITH: Okay, all right, anyone
20 have any --

21 MEMBER WALTON: So, that would even
22 include a situation where the parent permitted

1 their child to be subjected to pornography, but
2 the parent was not present when the actual act
3 occurred?

4 MS. TAGERT: That's correct, sir.

5 MS. CRITCHLEY: Yes.

6 MEMBER TOKASH: Meghan Tokash. This
7 is really just a comment on food for thought with
8 respect to child sex offenses and child
9 pornography.

10 There was a really good United States
11 Sentencing Commission report that was issued in
12 October of 2021. It was the federal offenders
13 who served in the armed forces report that found
14 that veteran offenders committed child
15 pornography offenses more than four times as
16 often as citizen offenders overall.

17 While I don't think for the purposes
18 of this study that including child pornography
19 offenses would be particularly germane, I do want
20 to note this troubling statistic and consider it
21 for maybe future study. Thank you.

22 MEMBER SCHWENK: This is Jim Schwenk

1 and I want to look at it from the standpoint of
2 don't bite more than you can chew.

3 So, 250, you know, decisions, a five-
4 person subcommittee, I guess we would go to Dr.
5 Wells and ask for what a statistically
6 significant number is that the members would have
7 to get through in order to reach that, and then
8 the staff would go through those plus others,
9 plus the remaining ones.

10 Do you guys have an idea of -- you
11 know, we don't want to make a one-year study or,
12 you know, a three-year study, or whatever we did
13 last time by having too many cases, so do you
14 have any thoughts on that numbers-wise? Is the
15 250 manageable that you've come up with? It does
16 seem like that's the floor of what we sort of
17 have to do based on the tasking.

18 MS. TAGERT: Sir, we found the review
19 of the appellate documents -- again, we are not
20 reviewing the investigation, just the appellate
21 documents and the statement of trial results to
22 determine what they were actually convicted of.

1 We did not find that very
2 overwhelming, and we believe that because these
3 are public documents, that any committee member
4 would be able to view these cases on their own
5 laptops, so it would not be as time consuming, I
6 would say.

7 And although COVID probably did have
8 an impact on the number of cases that the
9 appellate world saw, we don't believe there's
10 going to be -- you know, if we're averaging 230 a
11 fiscal year, I think it's manageable.

12 CHAIR SMITH: All right, any more
13 comments on the first issue of whether or not to
14 include the child sex assault?

15 MEMBER GARVIN: Madam Chair, this is
16 Meg Garvin. I'm remote.

17 CHAIR SMITH: Yes?

18 MEMBER GARVIN: There's a handful of
19 us that have our hands raised. I don't think any
20 of us knew the proper protocol, so I apologize
21 for interrupting, but I do have a methodology
22 question that will impact both parts one and

1 parts two.

2 So, just with regard to methodology,
3 I want to understand how you defined appellate
4 review, and I apologize. You explained it. My
5 notes are less than clear.

6 Was it post-conviction appellate
7 review, so no interlocutory, which, of course,
8 some of the victim issues could go up on an
9 interlocutory writ of mandamus on a sexual
10 assault case.

11 I was just trying to understand is it
12 all post-conviction, but I think you said habeas
13 too? If you could just unpack how you defined
14 appellate review, because I'm trying to figure
15 out if declinations of issues might also be filed
16 within the direction to us to look at recurrent
17 issues?

18 MS. CRITCHLEY: Thank you for that
19 question. That's actually something we're
20 interested in talking about. I didn't know if we
21 would reach that today.

22 But to answer the first part, we

1 looked at all of the appellate decisions that
2 were put on the websites in fiscal year 21, and
3 that included a few interlocutory appeals, and to
4 the extent the underlying case dealt, although
5 there was no conviction, if there were charges of
6 one of our military sexual assault offenses as
7 we've defined them, we intend to include them
8 because that's an appellate decision in a
9 military sexual assault case.

10 So, that's a little bit of a side road
11 there, but, yes, we intend to include those, and
12 then the question -- I'm sorry, the second part
13 of your question was, oh, about the non-issues or
14 what the appellate courts are not taking.

15 One of our issues that we're working
16 through and looking at is apart from the
17 appellate decisions, we're possibly interested in
18 looking at the appellate briefs as well because a
19 lot of issues are raised and not granted and/or
20 not discussed at all.

21 And so, we're interested in looking at
22 appellate briefs so that we can track those

1 issues as well, but we thought we'd start with
2 the decisions in the initial trial documents so
3 we can get a clear universe of cases.

4 And then the question will be do we
5 want appellate briefs on all of those decisions
6 or do we want them only on some of the decisions,
7 and we just haven't reached that point yet, but
8 your input is -- the question is one of ours as
9 well.

10 MEMBER GARVIN: Thank you.

11 CHAIR SMITH: So, members of DAC-IPAD
12 who are appearing virtually, we cannot see that
13 you have your hands up, so I'm going to ask that
14 you just chime in if you have a comment or a
15 question. Just remember to identify yourself
16 first.

17 (Simultaneous speaking.)

18 MEMBER CASSARA: This is Bill Cassara.
19 I'm calling in remotely from the great southwest,
20 Santa Fe, New Mexico.

21 So, I'm coming at this from the
22 perspective of a defense appellate practitioner,

1 which is what I've done for most of my career,
2 and I have two questions that I wanted to see how
3 they fit into what we are doing as a committee.

4 The first one is, to sort of piggyback
5 onto what was just mentioned about the appellate
6 briefs, is it within the purview of the committee
7 to look into -- one of the pet peeves that those
8 of us in the field have is that appellate briefs
9 are generally not available on the appellate
10 court websites.

11 I don't know if it's within the
12 purview of this committee to look into whether we
13 want to encourage, require, whatever the term
14 might be, that appellate courts sort of come up
15 to the 21st century, or I guess 22nd century now,
16 and do like the federal courts do and have
17 appellate briefs, a PACER system where appellate
18 briefs are more readily available, so that's
19 question number one.

20 And question number two is within the
21 scope of what we, as a committee, are looking at,
22 one of the areas that I deal with the most in my

1 practice are what we call TCAP cases, which is,
2 you know, like everything else in the military,
3 we use acronyms.

4 It's called To Catch a Predator, and
5 there are cases in which an OSI or CID has set up
6 a profile of an underage child, and a military
7 member has responded to that and engaged in
8 sexual talk and been convicted, and I don't know
9 whether and where that falls into the inclusion
10 of a sexual offense because there's not a real
11 child involved. It's a fictitious person, but it
12 is a real sexual offense, so I don't know how
13 that sort of fits into what the staff looked at.

14 MS. CRITCHLEY: We looked and we saw
15 quite a few of those cases and we included them
16 if there was a conviction on an attempted sexual
17 assault, for example.

18 MEMBER CASSARA: Okay, so those were
19 included?

20 MS. CRITCHLEY: Yes, they were.

21 MEMBER CASSARA: Okay, thank you.

22 MS. TAGERT: And, sir, we did see

1 quite a few of those cases, and to your initial
2 point, we have recognized as staff the inability
3 to access the briefs. It's somewhat hit or miss.
4 We've noticed that the Navy sometimes uploads
5 them, but potentially the committee could, as
6 part of this project, make recommendations to the
7 services on that.

8 MEMBER CASSARA: Okay, thank you very
9 much.

10 MEMBER MARKEY: Madam Chair, this is
11 Jim Markey. Thank you for allowing the question.
12 And maybe I should know this, but I don't. What
13 is the age where the military considers it a
14 child sexual assault?

15 CHAIR SMITH: He asked the age that
16 the military considers a child sexual assault, I
17 believe, is what the question was.

18 MS. CRITCHLEY: Sixteen is the age of
19 consent and there's another break for certain
20 factors at age 12.

21 MEMBER MARKEY: These cases that were
22 included so far, do you know what the age cutoff

1 -- and the only reason I'm asking is 30 percent,
2 I mean, that's what you're estimating, seems like
3 a pretty significant number.

4 And just from personal experience, the
5 dynamics of a child sexual assault or molestation
6 can be different even though there is crossover
7 kind of in between --

8 CHAIR SMITH: We are unable to hear
9 you. Could you, if you wouldn't mind, I don't
10 know if you need to get maybe closer to your
11 microphone and start your question or comment
12 again, please?

13 MEMBER MARKEY: How does this sound?
14 Can you hear me at all?

15 CHAIR SMITH: We can hear you, but
16 it's pretty soft.

17 MEMBER MARKEY: Yeah, I don't know
18 what's going on.

19 PARTICIPANT: I can hear you on the
20 video, Jim.

21 MEMBER GARVIN: Yeah, this is Meg
22 Garvin. I think those of us on the meeting can

1 hear it just fine, Jim, so there might be a
2 volume issue in room.

3 MEMBER MARKEY: Okay.

4 CHAIR SMITH: Well, we could hear you
5 clearly. He's just a little bit soft --

6 MEMBER MARKEY: I will try --

7 CHAIR SMITH: -- so maybe you can yell
8 where you are.

9 (Laughter.)

10 MEMBER MARKEY: Please, do not be
11 offended if I sound like I'm yelling. I will
12 speak up though. Hopefully that will help out.

13 So, you estimated that 30 percent of
14 the cases so far would involve child sexual
15 assault. I believe that's a significant number.
16 I also look at, through my experience, the
17 dynamics of what a child sexual assault or
18 molestation case involves versus the dynamics of
19 working with adult sexual assault victims can be
20 different.

21 There is some crossover offending.
22 I'm wondering -- I want to make sure that, you

1 know, we all agree that we're not going into some
2 of the original scope creep of where we're
3 starting to look at some of these other offenses.

4 And although I believe that child
5 sexual assault/molestation clearly can be looked
6 at, should be looked at, I just don't want to
7 lose focus that the committee is looking at adult
8 cases and all of the challenges, and gaps, and
9 issues that we're addressing with that, that we
10 don't start losing that focus as well.

11 And so, that was my one comment, and
12 I was curious about what the cutoff age was for
13 that designation of whether it's a child offense
14 or an adult offense. Thank you.

15 CHAIR SMITH: Are you referring just
16 with respect to this particular report or are you
17 referring to in general with the committee
18 focusing just on adults and to the exclusion of
19 children or just for the appellate review report?

20 MEMBER MARKEY: All of the above. So,
21 yeah, I think it's just a consideration that I
22 was looking at, and I think if we go down the

1 road for this particular study, you know, that
2 will clearly open up, could be additional
3 opportunities for the committee to step into the
4 child crimes area more and more or not, and if
5 that's a direction as a whole that the committee
6 would consider, or want to go, or has been asked
7 to go.

8 MEMBER LONG: Madam Chair, this is
9 Jennifer Long and I have a comment similar to
10 Jim's, although a little different. I do want to
11 look at child sexual assault offenses, but I feel
12 like they should be deferred to.

13 And maybe I'm looking at this
14 incorrectly, but I see this appellate review as
15 almost the next step of the case reviews that we
16 did which were primarily focused on adult sexual
17 assault cases, and I feel like brought up certain
18 questions around sufficiency and certain
19 questions around the law that are somewhat
20 unique.

21 And I think any review of appellate
22 decisions involving children, and actually Bill

1 brought up a really good area of undercovers and
2 different, I think even around child pornography,
3 they may be so unique that perhaps we want to
4 segment them and do the case review first and
5 then the appellate review.

6 I feel like that's similar to the
7 domestic violence and the other co-occurring
8 crimes, stalking. I think -- I'm a big believer
9 of case review and I feel like that preceding the
10 appellate review would be a good way of starting
11 to handle those cases.

12 I'm a little wary of mixing in the
13 child sexual abuse reviews to the appellate
14 procedure now just because of where we started,
15 but that also could be the way I'm viewing how
16 this fits in the other earlier case reviews from
17 the last DAC-IPAD iteration.

18 MS. TAGERT: So, Ms. Long, I think the
19 question of whether or not another case review
20 type review will take place should be discussed
21 in your second day deliberations where
22 potentially those decisions will be made, just

1 because Audrey and I, on the appellate team,
2 we're kind of -- we're just micro focused on the
3 appellate review, so I'm not sure what the case
4 review subcommittee will ultimately take up.

5 MEMBER LONG: Can I just ask you,
6 Kate, do you see them related at all? Did you
7 see the appellate review as a follow on to the
8 case reviews that were done or do you both see
9 this as very separate for a separate purpose?
10 Because that would also impact how I looked at
11 this.

12 MS. TAGERT: So, holistically, I
13 believe that obviously the appellate review may
14 reach back to the case review, but based on the
15 OGC tasking, they're asking the committee to look
16 at recurring appellate issues, but the DAC-IPAD
17 will ultimately need to assess whether or not
18 those recurring appellate issues are really, you
19 know, harken back to an investigation or the
20 trial level.

21 I mean, obviously, again,
22 holistically, they would, but I do, as a staff

1 member, I view the appellate project as somewhat
2 separate from the initial case review.

3 MEMBER LONG: Okay, and thank you.
4 That's very helpful. I would just then make sure
5 we, if we're going to do both, we do segment them
6 a little bit to ensure we're --

7 MS. TAGERT: Absolutely.

8 MEMBER LONG: -- make sure we're,
9 yeah, we're just capturing the distinctions
10 between them. Okay, thank you.

11 MEMBER BASHFORD: This is Martha
12 Bashford.

13 CHAIR SMITH: Any other comments with
14 respect to the inclusion of child sexual assault
15 cases in the appellate review?

16 MEMBER BASHFORD: This is Martha
17 Bashford. Can you hear me?

18 MS. TAGERT: Yes.

19 MEMBER BASHFORD: It seems to me that
20 it would be a good methodology to see if there
21 are recurring problems that crossover between
22 adult and child sexual offenses on appeal.

1 If the issues on appeal for the
2 children's cases are very different than those
3 for the adult cases, that might warrant deferring
4 that to a different study. If there are common
5 issues, then we could make recommendations that
6 presumably could help downstream from the
7 appellate process.

8 CHAIR SMITH: Thank you. Anyone else
9 want to be heard on that?

10 MEMBER GOLDBERG: Thank you. It's
11 Suzanne Goldberg again. It's not exactly on
12 this, but it's on my adjacent question because I
13 also meant to ask before about sort of other
14 forms of sexual exploitation and your sense of
15 the value, if I can ask that question, of the
16 value of including that additional material in
17 this review?

18 And again, coming from the perspective
19 less about -- I don't have the depth in military
20 case law, but certainly outside of this context,
21 there is often overlap between one form of sexual
22 abuse and another, and it would --

1 It seems to me that it would be sort
2 of a shame to do a major study that would aim at
3 shedding light on important trends, but miss the
4 surrounding ways in which other kinds of offenses
5 may intersect.

6 MS. CRITCHLEY: So, we ultimately
7 selected the cases that we were recommending
8 reviewing based on a fact pattern, which is why
9 we started with the appellate decisions within a
10 time period and then we've looked at, and we
11 still have a few more to get, but we're looking
12 at the trial documents to look for where there
13 were convictions with a fact pattern, which is
14 why we had multiple articles, not just 120, but
15 all of these others, 92, 93, 133, and that
16 included some --

17 I'm not sure if you want to refer to
18 something specific, but there were some
19 trafficking cases under U.S. Code that were
20 brought into the study as a result of that based
21 on this fact pattern of there was a contact, or
22 sexual contact, or sexual assault in there, or an

1 attempt, or solicitation, or conspiracy.

2 So, it was not a matter of, you know,
3 scanning for a particular article, for example.
4 It was the underlying fact on which there was a
5 conviction. So, to the extent that that branches
6 into any other types of offenses, we've got it,
7 but again, if there was no contact or assault,
8 then we did not include it.

9 MS. TAGERT: So, and for the
10 methodology, the starting point is whether or not
11 there is this contact or penetration, but, for
12 example, if there is indecent exposure, there is
13 sexual harassment in that case and it is
14 addressed in the appellate decision, it's still
15 part of the review.

16 So, we're not looking at the appellate
17 decisions and saying, oh, this doesn't include
18 any, like the rape, but they discussed all of
19 these other issues. We are still using that as
20 part of the study. However, if there was a
21 conviction, let's say, you know, now a conviction
22 on sexual harassment, we would not -- that

1 wouldn't be in the review if there was no other
2 conviction.

3 However, again, if the DAC-IPAD wants
4 to more broadly define the cases that we look at,
5 it will be easy enough to identify those cases
6 going forward and going back into the 789 that we
7 did review, so.

8 MEMBER GRIMM: Paul Grimm with a
9 question whenever it's appropriate. Yeah, Madam
10 Chair, this is Paul Grimm. If you can hear me, I
11 do have a quick question.

12 CHAIR SMITH: Oh, sure, Judge, go
13 ahead.

14 MEMBER GRIMM: Thank you so much.
15 We're talking about convictions. Are you able,
16 from your review, to give me a sense of the
17 breakdown between convictions resulting from
18 trial and convictions resulting from plea?

19 I know in the federal system, there
20 are often waivers of the right to appeal, and so
21 sometimes an issue precludes the appellate review
22 of an offense because there was a waiver of the

1 right to appeal.

2 I'm not familiar with the way in which
3 guilty pleas are actually conducted in the
4 military courts, whether there's a written
5 statement of facts that would be the factual
6 basis for the plea to the charge that resulted in
7 the conviction and whether or not the appellate
8 reviews were trial reviews as opposed to a guilty
9 plea.

10 A guilty plea where the record is
11 restricted to an agreed upon statement of facts
12 is going to be a much more narrow factual record
13 to look at for getting information than if
14 there's a trial and you're looking at all of the
15 potential evidence and the evidentiary ruling
16 that the judge made that may or may not be the
17 subject of the appeal. So, if you have any sense
18 of that, that would be -- I'd be grateful for
19 your insight on that.

20 MS. CRITCHLEY: We can't give you the
21 number, but we are tracking that. So, as we're
22 reviewing the cases, we are tracking whether

1 there was a guilty plea or whether it was
2 contested on these offenses as we're tracking
3 whether there was a child victim or an adult
4 victim or both.

5 So, we can't tell you the number yet
6 because we haven't finished reviewing them all,
7 but we will be able to tell you that and then to
8 be able correlate that with, you know, what types
9 of issues arise or does it determine that we need
10 to look at different documents. That will make
11 it easy for us to pull those cases and separate
12 them and analyze them.

13 MEMBER GRIMM: Thank you.

14 MEMBER TOKASH: Meghan Tokash. My
15 question is are you able to give us a sense out
16 of the over 700 cases, how many of those involved
17 stalking, domestic violence, and sexual
18 harassment?

19 MS. TAGERT: No, we would have to go
20 back and review those documents.

21 MEMBER TOKASH: And follow-up question
22 to that, once you parsed out the 200 or so cases

1 that fell under the staff's definition of sexual
2 assault, did any of those cases include some
3 aspect of stalking, or domestic violence, or
4 sexual harassment?

5 MS. TAGERT: I did not review a case
6 that involved stalking. However, there were
7 domestic violence cases.

8 MS. CRITCHLEY: And sexual harassment.
9 Yeah, again, I can't talk to the number either,
10 but again, if those included one of these
11 offenses, they were included, and then would be
12 included for all of the appellate issues, but we
13 don't have the numbers yet.

14 MEMBER TOKASH: No problem. Thank
15 you.

16 MEMBER WALTON: Reggie Walton. In
17 regards to the question asked by Judge Grimm, you
18 were able to identify appeals that were taken
19 following guilty pleas?

20 MS. TAGERT: Yes, sir.

21 MEMBER LONG: This is Jennifer Long.
22 I'm so sorry. I have one other question. I'm

1 very sorry. It's hard to read the room when
2 you're remote. Madam Chair, just one more
3 question for Kate.

4 How many of these cases involved image
5 exploitation of adults, if you know, alone,
6 otherwise known like involved an image
7 exploitation of an adult, maybe an assault sent
8 over -- I'm not sure what, and I apologize, what
9 article that would be, maybe an assault captured
10 on film of an adult or --

11 MR. SULLIVAN: 117a.

12 MEMBER LONG: Thank you.

13 MS. TAGERT: Yes, so we did not --
14 again, those were not cases that we pulled out of
15 the 789, so I could not give you a number on
16 that.

17 MEMBER LONG: That's a category that
18 I would include, for sure.

19 MR. SULLIVAN: And, hey, this is
20 Dwight Sullivan, if I could just provide just a
21 little bit of information for the committee's
22 purpose? So, there was an express prohibition in

1 military law in a plea bargain, bargaining away
2 the right to appeal.

3 So, any guilty plea that falls within
4 the framework of a sentence will either go up on
5 appeal automatically or the individual will have
6 the right to appeal.

7 There's also another interesting,
8 unusual context in the military in that a number
9 of cases are submitted to appellate courts
10 without assignment of error, so the appellate
11 defense counsel won't identify an issue.

12 We don't have Anders briefs, so
13 they're not writing an Anders brief. They submit
14 the case to the appellate court and then the
15 appellate court will then exercise its
16 responsibility to review the record to look for
17 whether the evidence supports the conviction and
18 to look at the appropriateness of the sentence.

19 So, there's some unique aspects to the
20 military system that will drive certain aspects
21 of looking at it. Again, you know, the no issue
22 case would be very unusual in the civilian

1 context. That happens quite a lot in the
2 military context.

3 CHAIR SMITH: Any other comments
4 regarding the inclusion of child sexual assault
5 or anything else? No? All right, well, why
6 don't we consider the other issue and then we'll
7 come back and, I guess, take a vote?

8 MS. TAGERT: Thank you, ma'am. So,
9 the second issue will be how narrowly or broadly
10 you would like to define either 120 or adding
11 child pornography or any other offense that you
12 believe would be relevant to study as part of the
13 appellate project.

14 Again, Audrey and I, we just wanted to
15 give you a starting point as to what the numbers
16 would look like just to wrap your brain around
17 it, and we knew that contact and penetrative
18 cases would absolutely be part of the study, so
19 that was our, you know, why we did that.

20 However, we open it up to the DAC-IPAD
21 committee to determine whether or not they want
22 to expand the number of offenses that we select

1 out of the appellate draws.

2 It could also be a matter that those
3 decisions are left to the chair of the
4 subcommittee to really discuss the details of the
5 study or the DAC-IPAD makes that broad decision.
6 In the case review study, the DAC-IPAD committee
7 made the decision to study only penetrative
8 sexual assault offenses.

9 That was not left to the working
10 group, but again, I would open it up to
11 discussion to the members of what types of cases
12 they would want included so that, until the
13 committees are up and running, Audrey and I could
14 start reviewing the cases.

15 CHAIR SMITH: Anyone have any
16 thoughts, comments?

17 MEMBER SCHWENK: Yeah, this is Jim
18 Schwenk. I think that the definition that the
19 two of you have come up with is a good definition
20 for our purposes in responding to the General
21 Counsel's tasking.

22 But since we have a broader charter,

1 we then have the discretion to do something
2 further, but remembering, if I get this right for
3 a change, crawl, walk, run. The last time, our
4 crawling took years, so I'm reluctant to say we
5 should jump initially to more than the tasking.

6 Collect all of the information that
7 people have mentioned for follow on work, and in
8 my opinion, this can sort of work, I said this
9 last time, case reviews, and build on what we
10 learn from this case review of the offenses
11 you've defined to other areas.

12 So, I'm happy to say yes on the child
13 side, and then your definition on the second
14 question, and then see where it leads us in the
15 subsequent years.

16 CHAIR SMITH: Yes, Ms. Carson?

17 MS. CARSON: Just one option that came
18 to mind is it sounds like there's a lot of
19 interest among the panel to know how many
20 offenses are involved on each in the appellate
21 cases.

22 So, potentially, we could work on the

1 data for you and then you can look at the data.
2 I mean, that might slow things down or it could
3 be a project we do simultaneously. You could go
4 with the cases that we've pulled out for now and
5 also request the data on the number of cases for
6 each offense in the appellate realm.

7 And then I think you need to decide
8 what you want to know. Do you want to know what
9 offenses were convicted, they were convicted of,
10 or do you want to know what offenses were the
11 issue in the appeal?

12 CHAIR SMITH: I like that idea because
13 I do hear folks having inquiries about child porn
14 and some of the other offenses, so perhaps we
15 follow what General Schwenk said.

16 Keep the child sex abuse in the
17 appellate review, so that 235 cases, and if folks
18 have other offenses that they're interested in
19 knowing numbers, we could get the numbers and
20 then figure out if that's something we want to
21 include in the appellate review.

22 I also had a question actually for

1 General Schwenk. You talk about the previous
2 time. How many cases were involved in that case
3 review if you remember?

4 MEMBER SCHWENK: Close to 2,000.

5 CHAIR SMITH: Okay, so that's
6 significantly more.

7 PARTICIPANT: Yeah, just to raise one
8 other point since we're kind of running out of
9 time for this session, we can take this up a
10 little bit more in the strategic planning on the
11 last day, so I don't think you need to feel
12 compelled to make a decision right now.

13 CHAIR SMITH: Perfect, so should we
14 move on then?

15 MS. TAGERT: Sure, so, you know, when
16 we're talking about recurring issues, the staff
17 recommendation would be to talk to people that
18 deal with reoccurring issues in the appellate
19 world, so that although we'll be doing our own
20 review and check of the system through the
21 documents themselves, the committee members may
22 want to hear from practitioners in the field.

1 Mr. Cassara may have some good ideas
2 for the committee as to who may be relevant to
3 talk to these issues, whether or not that would
4 be trial practitioners or appellate
5 practitioners, so that may be something that
6 you'll want to deliberate on tomorrow because we
7 could start putting that in motion for the next
8 meeting.

9 And then finally, the staff
10 recommends, based on the standards that changed
11 in the NDAA, but we won't see them until years
12 down the road, the committee may want to think
13 about issuing multiple reports on these appellate
14 project.

15 So, like General Schwenk said, we'll
16 kind of crawl first, figure out what the issues
17 are, and then move onto recommendations, as well
18 as looking at the specific standards of review
19 that have been requested by OGC, and the
20 committee could either vote on that
21 administrative matter now or wait until tomorrow
22 for deliberations.

1 CHAIR SMITH: Anyone have comments
2 they want to make briefly on that one issue, the
3 series of reports? Is that what you're referring
4 to, yeah? Do we want to hold it until tomorrow?
5 All right, we'll hold it for tomorrow.

6 MS. TAGERT: Okay, pending any
7 questions, that concludes our appellate project
8 overview. Thank you.

9 CHAIR SMITH: Thank you.

10 (Pause.)

11 COL BOVARNICK: We're going to go
12 right into the data briefing by Mr. Mason if you
13 want to -- I think we're getting ready to pull
14 that up.

15 MR. MASON: Okay, Madam Chair and
16 Committee, this is Chuck Mason. Apologize for
17 not being able to present to you in person, but I
18 am coming out of a covid battle, so I didn't
19 think you'd all want me in the room with you.

20 How I would like to start up the
21 presentation is just to frame it with the idea of
22 a memo that the Deputy Secretary of Defense sent

1 last May, 5 May 2021. And the first words in the
2 memo are, Data is a strategic asset. And I think
3 the DAC-IPAD had learned long ago in our
4 operations that data is important and that
5 without the data, we can't make informed
6 decisions and we can't make observations and we
7 can't make recommendations.

8 So the idea of how data interacts with
9 your committee and within the organizations as a
10 whole is what I'm going to try to touch on this
11 morning. Next slide, please.

12 So what exactly does the Data Team
13 support mean and how does that interact with the
14 professional staff? First, if you look on the
15 lefthand side, you'll see professional staff
16 includes the leadership team, the staff
17 attorneys, paralegals, as well as our ad hoc
18 employees, Dr. Bill Wells, the graphic design,
19 the editing with Dr. Falk.

20 That whole team together is your
21 Professional Team. And where the Data Team comes
22 into this is that we are just a subset of the

1 professional staff, but our primary focus is on
2 data, how to get the data, how to do an analysis
3 of it, and then get that information back to you
4 as decision-makers on how to utilize it in your
5 projects.

6 So the Data Team at this point
7 consists of myself as the team lead, Ms. Stacy
8 Powell and Ms. Stayce Rozell, who you're seeing
9 this morning, as the staff paralegals. And when
10 it gets down to it, they do the grunt work.
11 They're the ones that get this data in and get it
12 into a format that we can use.

13 And then finally Dr. Wells is our
14 criminologist, and I know he's probably sitting
15 along the back wall unless they brought him up to
16 the table. But we could not accomplish what we
17 do without him. He is the expert and gives us
18 the guidance that we need in order to provide the
19 answers that you're looking for.

20 So that takes us to the communication
21 and collaboration component. And who are we
22 communicating with and who are we collaborating

1 with. Well, obviously you. The Committee as a
2 whole, as well as the subcommittees that we're
3 talking about this morning.

4 And then that ties into our project
5 teams, and the project teams being on the right-
6 hand side of your slide is a little bit of a
7 misnomer because it's actually a quasi-
8 organization that includes you as Committee
9 members, as well as our professional staff. And
10 when you have a project, something that's
11 identified, a team is going to be identified of
12 staff.

13 And what is important to remember is
14 as a complete part of every team, you're going to
15 have somebody from the Data Team that is going to
16 be intimately involved. So we're not going to
17 come in at the back end and try to figure out
18 what you were looking for. We're going to be
19 involved in the very beginning and talk about the
20 information you're looking for, and then start
21 thinking about the best ways to get that
22 information so that you can have it.

1 And I can't stress it enough, the
2 communication and collaboration is the big part.
3 We don't expect all of you to be experts on how
4 to get data or what data you necessarily need.
5 What we're looking for are your insights into the
6 type of information that is useful in your
7 professional capacity to make these types of
8 determinations. And then we'll start pulling the
9 strings on our end to figure out how we get that
10 information. Next slide, please.

11 So it's kind of unique. You know we
12 are professional staff and that we help three
13 organizations, the DAC-IPAD at the top because
14 that's what we're here talking about today. And
15 you have the Data Team that's in the central
16 spoke or central location. And then we also work
17 with the Military Justice Review Panel, which I'm
18 sure you've heard of, known as the MJRP.

19 This is a permanent organization that
20 was created inside the Uniform Code, and they are
21 doing reviews on a four- and eight-year plan of
22 the overall health of the Uniform Code. So their

1 mandate is larger than yours in the sense that
2 they're covering every offense, not just limited
3 to the sexual assault offenses as in the statute
4 that created the DAC-IPAD.

5 And then the third -- the third part
6 of this wheel or the third spoke is the Defense
7 Legal Services Agency, or DLSA. This one might
8 be a little less familiar to you, but it is the
9 parent organization that all of the staff belongs
10 under with respect to the Office of the General
11 Counsel.

12 And the General Counsel for DoD is
13 dual-hatted, and one hat is DLSA. And we've
14 become as a staff more familiar with the DLSA
15 concept because we've been tasked over the past
16 few months with projects related to DLSA. And
17 they were able to do that because you're familiar
18 with the zero-base review, where everything
19 pretty much came to a screeching halt for a
20 while. Well, the staff remained gainfully
21 employed and working on these other projects.

22 And they tie into what you're doing,

1 and the knowledge that we're gaining is going to
2 be of a benefit to you as well. Next slide,
3 please.

4 So, what do we work on, what kind of
5 products and how does data fit into it? And if
6 you look at the first column, the DAC-IPAD,
7 here's just a few things that we've done. One
8 was an annual report, you're well aware the
9 Committee needs to do that on an annual basis.

10 In the past, case adjudication data
11 was included in those reports, and it gave you a
12 snapshot of what was happening in military
13 justice over the past year. So we were looking
14 at what types of -- how many cases were coming
15 down. How many individuals might be an E-3 or an
16 E-4 on the enlisted side. Or maybe there were
17 officers that were being charged.

18 We could track that down. The basic
19 demographics like male, female. How the system
20 was actually working.

21 Now, on the first level, when you talk
22 about this demographic, it's just giving you a

1 snapshot. It's telling you who are the players.
2 It doesn't explain why those players are
3 involved. But you may be able to see a trend
4 over time where there are less officers being
5 charged or there are more enlisted males being
6 charged.

7 We were able to start digging at -- we
8 had some years of this data. And just as a side
9 note, we've had over 4,000 cases that we've added
10 into a database that span 2012 to 2018. So we
11 have many years that we could look at and get an
12 idea of how things were happening.

13 And one thing we started to notice was
14 a slight climb in male victims. And you know,
15 that -- generally speaking, when we think sexual
16 assault, just societally we think male on female
17 crime. And we've started to see a trend in the
18 military with male on male. Very limited
19 incidences of female on male. But non-existent.

20 So when you start doing the
21 demographics, you start seeing these other ideas.
22 In 2018, the last time that we published an

1 actual case adjudication data report, we did it
2 as a standalone report. And the intent behind
3 that was to try to get the information that we
4 were observing out to the public and out to the
5 Committee sooner rather than later.

6 When you're -- when you're locked into
7 an annual report that's due at a certain time of
8 the year, end of March, the data can become
9 outdated really quickly. So we were trying to
10 increase our methodology, our internal operations
11 so that we were doing it faster.

12 Another report, you just heard about
13 it briefly, there were over 2000 cases that they
14 were looking at, was the case review, the
15 investigation report. And it was a deep dive
16 into investigations and looking at one fiscal
17 year investigations, but it took three years of
18 work to get that figured. And that's because how
19 in-depth it was.

20 We used a lot of lessons learned from
21 case adjudication in order to kickstart case
22 review and investigations, and we actually had to

1 create some separate spreadsheets. And we did
2 different analysis for that in order to try to
3 identify some trends, as well as see in general
4 what's happening with respect to investigations.
5 Extremely complicated, but I think a very
6 extremely rewarding process.

7 Additionally, there are ad hoc reports
8 analysis that the Committee worked on. The one
9 that I worked, and it's just, I bring it up often
10 because it's easy to relate to, was a study on
11 race and ethnicity in the services and how are
12 they handled in military justice. And one of the
13 things that we learned up front is that the
14 services don't track race and ethnicity the same
15 way.

16 So it is nearly impossible to look at
17 the Army and compare it to the Navy and compare
18 it to the Marine Corps, because how they define a
19 race and ethnicity is not identical. And if you
20 look at ethnicity is the best example, when you
21 do the census, it is Hispanic/Not Hispanic.
22 Those are generally the two categories. And we

1 were seeing upwards of 20 categories reported by
2 a service for ethnicity.

3 And when one service has reported two
4 and another is reporting 20-plus, you can't
5 compare them, and it makes it difficult. So one
6 of the observations on there is you need to
7 standardize.

8 Now, all that being said, there is
9 this process that's happening on the backside
10 where the services are trying to get to a common
11 definition and a common way to report. So there
12 is hope at the end of -- light at the end of the
13 tunnel on that project.

14 So the next column is MJRP, and what
15 is the MJRP doing? Well, yes, it's a separate
16 committee. They were also impacted by the zero-
17 base review. They're just now getting up to
18 speed, the first meeting coming later this year
19 we hope. So they're behind you during this
20 reconstitution process.

21 But as a part of that process, they
22 had two statutorily required reports. So the

1 general counsel stepped in and said MJRP, we know
2 you don't exist, the staff is going to work on
3 this. You need to answer these two deliverables
4 by the statutorily required date. So the
5 Committee worked on that.

6 And then now DLSA, this is the -- this
7 other umbrella. And they've worked on Article
8 32, 34 and looked on the SVC/VLC project, which
9 you're going to hear about a little bit later.

10 But this last bullet, and I don't want
11 to go into too much detail on it, but it's fairly
12 interesting. It is a requirement, it's under
13 Section 547 of the FY '22 NDAA, and the
14 requirement is to create plans that need to be
15 published by the end of this year by the
16 Secretary of Defense.

17 And one is to create a plan for a
18 uniform document management system. One is to
19 create a plan for tracking pretrial information.
20 And the third is a plan for assessing the effects
21 of the changes in law.

22 So there were some specific changes

1 related to the OSTC, which we heard earlier, the
2 Office of the Special Trial Counsel, how the law
3 is changing in that area. They want to know is
4 it working or not, what are the impacts of it.
5 So plan 3 of the Section 547 is to figure it out.

6 Now, Mr. Cassara, you brought up the
7 question about briefs and the inability in the
8 military system generally to find briefs. Part
9 of the plan that we are looking at, and I should
10 say that the project team of that plan consists
11 of myself, two other -- or three other staff
12 attorneys and one staff paralegal, and we've been
13 working on this since January, so we're deep into
14 it.

15 But one of the plans and one of the
16 things that we're looking at is how do we get
17 that PACER-like system instituted into the
18 military courts so that that issue you're looking
19 for, what are these briefs that are out there,
20 how can the individuals that are practicing in
21 that system have access to those, rather than,
22 you know, having an internal email database or,

1 you know, where they share back and forth. But an
2 actual go in, access it, and see what's
3 happening.

4 So while that all - all that
5 information isn't due till the end of the year,
6 it's not to be published until 27 December, some
7 of the issues that you're talking about
8 specifically tying it to the sex assault
9 offences, are being addressed on a much larger
10 scale. And the reason that I bring that up is
11 that this committee is going to benefit from the
12 work that's happening under that DLSA umbrella.

13 So the access to information,
14 depending on how these plans come together, could
15 be immensely powerful and useful, it's just not
16 going to happen tomorrow. But it's coming. So
17 from the data standpoint, we're excited because
18 there's going to be information at your
19 fingertips in the future. Next slide, please.

20 So, what exactly do we do to help you?
21 And I'm going to start out by saying
22 authoritative and neutral. Keep that in mind as

1 we're talking here because whatever we're doing,
2 it's to give your information that is
3 authoritative and neutral so that when you make a
4 recommendation and you make a finding, there is
5 data and facts behind it to support that
6 information.

7 You're not going to be out on a limb
8 making -- telling DoD that they -- or Congress
9 that they should do something without having a
10 basis for it.

11 So when you look at this wheel of
12 operation, you're going to see identify the
13 question -- identify questions and issues. As a
14 committee, you're going to look at that and say
15 we want to study X. And as I said, Data's going
16 to be involved because we're going to help with
17 defining the request for information and we're
18 going to draft that request.

19 And that RFI, as they're called, will
20 go out to the necessary parties that have that
21 information. Now, generally speaking, that
22 involves the military justice systems, or the

1 Judge Advocates General -- easy for me to say, I
2 apologize. The Judge Advocates General of the
3 services.

4 We're going to go to them and say we
5 need x, y, and z. Best example, you just heard
6 about the appellate review project. We just did
7 an RFI for them, and we talked about here are the
8 documents that we're looking for. Here are the
9 cases that they identified. We formatted it into
10 one document, and sent individual RFIs to each
11 service, telling them we need x, y, and z by a
12 particular date.

13 All that information's going to come
14 in, and then we're going to take all those
15 documents and provide them in a way that's useful
16 to the Committee and useful to the Project Team
17 to start looking at those cases. And if we need
18 to redact information, we'll look into that. But
19 our job is to get it in and to get it in a format
20 that is useful.

21 Now, as part of that process is
22 document-based review. So in the past we have

1 done this two-pronged approach where we usually
2 say give us your information as a data dump.
3 Give it to us in an Excel spreadsheet, something
4 that we can just look at quickly. Then give us
5 the actual documents we're looking for.

6 And we start marrying those documents
7 up with the results to make sure the answers that
8 we're getting really do match. So we had a hard
9 copy, or in this case an electronic copy of a
10 document that we can verify what is on the
11 document is what was entered into their systems,
12 and therefore will be entered into our systems.

13 Once we get that, we start doing the
14 quantitative and qualitative analysis. We want
15 to tell you what are the basic demographics, what
16 is the information you're getting. What
17 relationships can we draw between these different
18 types of information.

19 And again, I refer back to what we
20 have done previous with the DAC-IPAD. We started
21 doing a bivariate analysis where you'll look at
22 maybe the individual's pay grade, how many

1 individuals by pay grade are involved. But then
2 how many of them are found guilty. How many of
3 them are acquitted. And you start seeing that
4 relationship between different variables. And
5 then we provide that information to the Project
6 Team.

7 Once the Project Team gets it, they
8 are going to start putting it into that overall
9 project, that overall report that the Committee
10 is looking for. And in this case, it's going to
11 be a subcommittee most likely, and then on to the
12 Committee. But there's going to be multiple
13 levels of review.

14 Once you as the DAC-IPAD are
15 comfortable with the information you received,
16 you're able to publish it. Publish it with those
17 findings, publish it with the recommendations.
18 And again, I go back to that center point. What
19 you publish and what you say is authoritative,
20 it's neutral, it doesn't have a bias to it, and
21 it can be defended.

22 So you're not going to be out on a

1 limb saying you should do X and there is
2 absolutely no data to defend that position. And
3 our job is to make sure that you have that in the
4 most efficient manner possible. Next slide
5 please.

6 So the Data Team, what is our
7 commitment to you. And I know from if I were a
8 Committee member and I had seen how we previously
9 worked with the DAC-IPAD and we were, you know,
10 primarily focused on your mission, and now you're
11 saying there's two avenues that we're working,
12 how does that impact you. It doesn't impact you
13 at all.

14 There is absolutely no concern with
15 how we're going to be available to help you and
16 what we're going to be able to provide for you.
17 We are vertically integrated throughout the
18 process. We're at the beginning, middle, and the
19 end, and if we need to redo something in the
20 process, it's going to happen.

21 Our team is able -- is agile, and
22 we're able to respond to your needs as it

1 happens. We're going to give you tailored
2 requests for data. Everything that we do is
3 based on lessons learned from previous requests
4 for information. And it doesn't just regurgitate
5 a question, it looks at what you're looking at
6 and we tailor the questions for that specific
7 request.

8 Now, we're going to do analysis
9 utilizing Excel and various analytic software.
10 And the one part I left off of there because it
11 has to be bigger than what could be in writing,
12 is that Dr. Wells is involved in all of that. It
13 probably is not lost on you that you have an
14 attorney telling you about data, something that
15 attorneys are probably not known for liking,
16 doing numbers. I unfortunately love it for some
17 reason, so I've really embraced this concept.

18 But Dr. Wells is the expert, he is the
19 criminologist. He knows the analysis side and he
20 is doing the deep dive, multivariate analysis
21 that we have gotten to him in the past, and then
22 providing that information to the Project Team.

1 So be assured you're not getting
2 someone that's playing with crayons. You have an
3 individual that knows his business.

4 And then we're -- we're committed to
5 you for consistent and continual support. And
6 what does that mean? Behind the scenes, we're
7 working on the data, providing support to you.
8 But if you want us in a meeting to brief what
9 does this process look like, how does it directly
10 the Subcommittee, how does it impact the
11 Committee, we're available.

12 We will be there to explain the
13 process, show you where we're going, show you
14 preliminary results. The bottom line is that
15 we're committed to you. If you identify
16 information that you need support for your
17 mission, we're going to find a way to get it for
18 you. It may take us a little extra time if it's
19 outside of our normal avenues of information
20 gathering, but it can be done.

21 So I want -- I hope I've put any
22 concerns about our availability to rest. And

1 that you know you're going to get the support
2 that you need. And with that next slide, it's
3 questions. And I will attempt my best to answer
4 any questions you have about this process and
5 what we're going to be doing.

6 CHAIR SMITH: Any questions for Mr.
7 Mason?

8 COL BOVARNICK: Okay, hearing, none,
9 thank you, Chuck, great brief, appreciate it.
10 Ma'am, we'll have our last presentation leading
11 up to lunch, we'll kind of go right into it while
12 they're pulling up the slides.

13 You have Ms. Terri Saunders and Ms.
14 Meghan Peters will come up. And they'll cover
15 the two JES taskings that we briefly mentioned
16 this morning.

17 MS. SAUNDERS: Good morning. I hope
18 everyone can hear me okay out there in the
19 internet who's logging in. But please jump in
20 and let me know if you can't.

21 So this morning we're going to talk to
22 you about a couple of issues that were raised in

1 the Fiscal Year 2020 National Defense
2 Authorization Act Joint Explanatory Statement.

3 So Meghan Peters are I going to talk
4 about -- talk about these issues.

5 If anyone is wondering what is a joint
6 explanatory statement, I admit I had to look that
7 up. And what it is, it's basically a report that
8 accompanies the conference committee report and
9 explains the elements the conference committee's
10 -- or excuse me, agreement between the House and
11 Senate versions of the bill.

12 So in this case, the conference
13 committee members used the joint explanatory
14 statement to request that DAC-IPAD study two
15 issues that are not contained within the
16 statutory language of the bill.

17 And the first is whether military
18 judges are too strictly limiting what victims may
19 say in their victim impact statements at
20 sentencing proceedings. And the second is
21 whether alternative justice programs could be
22 used in the military.

1 So I'll discuss victim impact
2 statements, and then I'll turn it over to Meghan
3 to discuss alternative justice programs.

4 So this is the statutory -- or excuse
5 me, this is the language from the joint
6 explanatory statement. And if you want to see
7 that in your materials, it's under Tab 3, the
8 terms of reference, and then it's on page 4 of
9 the terms of reference. You'll see Section 4,
10 deliverables requested by the joint explanatory
11 statement, and that gives the actual language for
12 both of those issues if you want to see that.

13 But for victim impact statements, you
14 see here that it says, The conferences are
15 concerned by reports that some military judges
16 have interpreted Rule for Court Martial 1001C too
17 narrowly, limiting what survivors are permitted
18 to say during sentencing hearings in ways that do
19 not fully inform the court of the impact of the
20 crime on the survivor.

21 So Congress requested that the DAC-
22 IPAD assess two aspects of this issue. The first

1 is whether military judges are giving appropriate
2 deference to crime victims who provide victim
3 impact statements. And the second is whether
4 military judges are allowing other witnesses to
5 testify about the impact of the crime.

6 So those of you who were with us prior
7 to the zero-base review may recall that at the
8 February 2020 DAC-IPAD public meeting you heard
9 from -- you heard from an individual who was a
10 representative from a group called Survivors
11 United.

12 And she relayed the experiences of
13 some victims who had provided victim impact
14 statements at courts martial sentencing that the
15 military judges had severely limited what they
16 were able to say during their delivery.

17 She mentioned that some, specifically
18 that some military judges stop victims from
19 completing their statements, some redline their
20 statements prior to delivery, and some would not
21 allow the victims to make specific sentencing
22 recommendations.

1 So a little bit of background on where
2 this right comes from. The right of a victim to
3 provide a victim impact statement stems from
4 Article 6B of the Uniform Code of Military
5 Justice, which is the military's victim rights
6 statute. And one -- one part of that, one aspect
7 of Article 6B provides the right of victims to be
8 reasonably heard at sentencing proceedings. And
9 Rule for Court Martial 1001C actually implements
10 that provision of Article 6B.

11 So in a minute I'm going to talk to
12 you about some recent statutory -- a recent
13 statutory change affecting courts martial
14 sentencing that's important I think to this
15 issue. But first I'd like to give you some
16 context about why military judges may limit what
17 victims can say in their victim impact
18 statements.

19 Rule for Court Martial 1001C provides
20 avenues for victims to be heard, and that can
21 orally, it can be in writing, or it could be
22 both. But it also provides some limitations.

1 For example, the rule does not allow a victim to
2 provide a specific sentencing recommendation.

3 And the reasons for these limitations
4 and a potential reason why a military judge may
5 limit what a victim may say at sentencing is a
6 concern that the panel members or jury will hear
7 information that's irrelevant, that the military
8 judge had previously ruled was inadmissible, or
9 that's not permitted by the rules and which may
10 inappropriately influence the panel members in
11 their sentencing decision.

12 This concern is presumably less when
13 the military judge is the sentencing authority,
14 as the judge may more easily set aside
15 inappropriate matters in considering the
16 sentence.

17 So that brings me to the recent change
18 in sentencing procedures that's important to this
19 issue. Right now the state of sentencing in the
20 military is that military judge sentencing is the
21 default.

22 So whether the member is convicted by

1 a military judge or by a panel, the military
2 judge is the default for sentencing. Although
3 the member may request that the panel sentence
4 him or her.

5 In the Fiscal Year 2022 National
6 Defense Authorization Act, however, Congress went
7 a step further, and they have now made judge-
8 alone sentencing mandatory in all cases except
9 for death penalty cases. And that will take
10 effect for cases in which the offense occurred on
11 or after December 27, 2023.

12 So to implement this change as well as
13 all of the other changes that you've heard about
14 in this particular National Defense Authorization
15 Act, such as the special trial counsel
16 provisions, the members of the military's Joint
17 Service Committee on Military Justice are
18 currently making some pretty large scale changes
19 to the rules for courts martial.

20 And tomorrow morning you're going --
21 you're going to hear from the Chair of the Joint
22 Service Committee about this process and the

1 proposed timeline for these changes.

2 So the path forward, because of time
3 constraints and because we want you to look at
4 these issues in the broader contexts of the
5 subcommittees and the issues that the
6 subcommittees will be taking up, what we plan to
7 do here today is to raise some of the question
8 that you will probably want to discuss and
9 resolve on these issues, and then actually have
10 you discuss and, you know, decide how you want to
11 proceed on these issues tomorrow afternoon in
12 your deliberation session.

13 But for victim impact statements, the
14 recent -- because of the recent changes making
15 the military judge the sentencing authority, the
16 -- one question you may want to discuss is
17 whether this study is still necessary. So
18 tomorrow afternoon you'll have the opportunity to
19 discuss that.

20 And some of the questions you may want
21 to raise are whether the Committee should
22 undertake this study in light of the fact that

1 military judges rather than juries will be the
2 sentencing authority going forward.

3 If you do determine that the study is
4 still necessary, would it be -- would it be
5 appropriate to defer the study until after the
6 changes to the Rules for Courts Martial have been
7 made and after the judge-alone sentencing has
8 taken effect, or do you wish to proceed with the
9 study now.

10 So before I turn it over to Meghan to
11 discuss the next issue, are there any questions
12 or comments on this issue?

13 MEMBER SCHWENK: Yeah, this is Jim
14 Schwenk. Do you know whether the Department
15 directly or the DAC-IPAD or the Department of
16 Defense indirectly or the DAC-IPAD directly has
17 heard from Congress on this issue at all since
18 the explanatory statement came out several years
19 ago?

20 MS. SAUNDERS: No, we have not heard.
21 I'm looking over to Julie to make sure that --
22 yeah, we have not heard anything. So that is the

1 question. Obviously there's been a lot of
2 intervening events --

3 MEMBER SCHWENK: Right.

4 MS. SAUNDERS: Since in the two and a
5 half years since this --

6 MEMBER SCHWENK: And they're aware of
7 the changes to the law, obviously.

8 MS. SAUNDERS: One would hope.

9 MEMBER SCHWENK: And that may be an
10 explanation for why they haven't been bugging up
11 about this report.

12 MS. SAUNDERS: Right.

13 MEMBER SCHWENK: Thank you.

14 MS. SAUNDERS: Sure.

15 CHAIR SMITH: I have one quick
16 question. Is there a way to parse out the judge-
17 alone sentences now the Committee said okay,
18 well, we still want to look at it? Is there a
19 way for us to only look at the judge-alone
20 sentencing as opposed to ones with a panel?

21 MS. SAUNDERS: Absolutely. In fact,
22 one study that some of our staff members

1 undertook during the time, during the zero-base
2 review, was to look at sentencing for Fiscal Year
3 2020 cases. And what they were seeing was that
4 far and away judge-alone sentencing is almost, is
5 really here in effect. The vast majority of
6 cases were judge-alone sentencing.

7 So if the Committee did decide that
8 you wanted to look at this, we could take for
9 example, you know, Fiscal Year 2021 cases and you
10 know, send a request for information to the
11 services and begin looking at the -- those case
12 that have victim impact statements and how those
13 were resolved.

14 MEMBER WALTON: This is Reggie Walton.
15 Has the military, as the federal courts have
16 done, adopted advisory sentencing guidelines?

17 MS. SAUNDERS: They -- there are no
18 sentencing guidelines right now. Dwight, do you
19 know what the situation is with that?

20 MR. SULLIVAN: Sure, so in last year's
21 National Defense Authorization Act, Congress
22 enacted wide-scale military justice reform. So

1 one part that you're already familiar with is
2 prosecutorial discretion will move from
3 commanders to lawyers for those 11 covered
4 offenses.

5 One other huge swath of that reform
6 was sentencing reform. And so Congress -- right
7 now there are no guidelines or equivalents.
8 Congress enacted those in last year's NDAA. They
9 will apply to cases in which sentencing occurs
10 for an offense after December 27, 2023.

11 And so what Congress did was they said
12 hey, Mr. President, set up what they call
13 parameters, so guidelines -- parameters just
14 means guidelines, they just use a different word
15 I think. I think the word guidelines has become
16 freighted in some way, so they use a different
17 word. Set up parameters. Those parameters will
18 have anywhere between five and twelve sentencing
19 categories.

20 And then we recognize that there may
21 be some military offenses for which parameters
22 are not appropriate, for which guidelines aren't

1 appropriate. And for those, give judges criteria
2 that they should apply in adjudicating the
3 sentence.

4 So let me give you an example of
5 something that may not be appropriate for a
6 sentencing guideline: the offense of -- the
7 Article 133 offense of conduct unbecoming an
8 officer. That could be anything, you know, that
9 could be not showing up for work on time. That
10 could be having uniform discrepancies, to
11 premeditated murder.

12 So that would be one where it would be
13 really hard to have a -- to have a guideline. So
14 Congress recognizes that particularly some of
15 these military offenses may not be conducive to
16 guidelines. So then they said -- so they said,
17 Mr. President, give us criteria that judges
18 should apply in those cases.

19 And they set up in excruciating detail
20 procedures that will be used to create these
21 proposed guidelines for the President's
22 consideration. And so the process of drafting

1 those is underway right now.

2 So again, we're moving from a system
3 where, take an offense like kidnaping. The
4 sentencing authority in the kidnaping case is
5 told, and this is exactly what they're told, you
6 may sentence this accused to any -- to any
7 sentence from no punishment to confinement for
8 life without eligibility for parole.

9 And there's very guidance in the
10 current system about how to pick one or the
11 other. Or where in between. But again, we're
12 evolving into a guideline-like system.

13 MS. SAUNDERS: Well, if there are no
14 other questions, again, we will discuss -- there
15 will be time tomorrow afternoon for you to
16 discuss this further. And you know, we can
17 answer any questions you may have at that point
18 and then you can discuss how you want to resolve
19 this issue.

20 And with that, I will turn it over to
21 Meghan Peters.

22 MS. PETERS: Good morning. I'm going

1 to highlight the second review requested by
2 Congress in the Joint Explanatory Statements for
3 the FY '20 NDAA. And it's on the topic of
4 alternative justice programs and their
5 applicability to the military.

6 In this very brief overview, I
7 realize, I think, I'm the last thing between you
8 and lunch, is the task itself, some related
9 developments, and potential paths forward for
10 DAC-IPAD that you may consider in your strategic
11 planning discussions tomorrow.

12 So before you, you have the wording of
13 the task, and it is to review as appropriate
14 whether other justice programs, such as
15 restorative justice or mediation, could be
16 employed or modified to assist the victim of an
17 alleged sexual assault or the alleged offender,
18 particularly in cases in which the evidence has
19 been determined not to be sufficient to take
20 judicial, non-judicial, or administrative action
21 against the perpetrator of the alleged offense.

22 So the first step in reviewing this

1 task is to identify what are some potential
2 examples of alternative justice programs. And in
3 the civilian world adjunct to the criminal
4 justice system, there are many.

5 So, one for example is restorative
6 justice, which in brief involves a conference
7 between the victim and the person responsible for
8 causing the sexual harm. And in this context,
9 they're not referred to as the offender or
10 defendant. This conference is designed to repair
11 the harm to the victim, give voice to his or her
12 concerns, and it can also be used to rehabilitate
13 the responsible party.

14 Restorative engagement would by
15 contrast entail a conference between a victim and
16 an organizational official, an agency official
17 such as someone from DoD, who would hear the
18 victim's concerns and hear about the victim's
19 experience and engage in a trauma-informed
20 dialogue with that victim in order to understand
21 what their needs are, to acknowledge the harm
22 experienced. And possibly, in some of these

1 programs, one component involves financial
2 compensation as an acknowledgment of the harm
3 experienced by the victim.

4 Mediation is up here as an example
5 just to refer to the forum generally in which the
6 harm experienced by the victim can be heard by
7 another party, whoever that is, and that a
8 resolution can be reached.

9 Recompense can take on various forms.
10 It can be in the form of restitution, as part of
11 a court martial sentence or usually arranged
12 through a plea agreement.

13 Reparations is payment to a group of
14 people to make amends for past harm. And a
15 compensation fund would address expenses that
16 were incurred as the result of a harm experience
17 and are generally already -- or not otherwise
18 compensated for.

19 Lastly, pre-charging diversion
20 programs are often adjunct to the criminal
21 justice system and they aim to provide some level
22 of accountability and rehabilitation for people

1 accused of low-level or nonviolent offenses.

2 And the diversion programs, while they
3 can occur at a variety of stages in the criminal
4 justice process, I've just highlighted the pre-
5 charging diversion option because the nature of
6 the request seemed to draw attention to cases
7 that were not selected for prosecution, and thus
8 not charged.

9 Now, the themes common to all of these
10 options, and again, this is not an exclusive
11 list, but in general -- in general they want to
12 provide a means of restoration to the victim,
13 rehabilitation to the responsible party, and
14 identify a need or area of potential change in a
15 community or in an organization. Next slide.

16 Now, those of you who were a part of
17 the DAC-IPAD previously, you may recall that
18 prior to the DAC-IPAD suspension for the zero-
19 base review at a public meeting in November of
20 2020, the Committee received some information on
21 the topic of restorative justice and its use in
22 civilian jurisdictions. And we heard about some

1 examples there.

2 At the time, the Committee voiced some
3 concerns regarding the applicability of the
4 restorative justice model to adult victim sexual
5 assault crimes, particularly where there is an
6 ongoing relationship or intimate partner
7 violence. But the Committee expressed a desire
8 to examine the topic further. Next slide.

9 Now, since the Committee's initial
10 discussion back in 2020 on alternative justice
11 programs, the Independent Review Commission
12 issued two related recommendations in 2021 in its
13 report. And DoD has since issued its response.

14 So the first relevant recommendation
15 is that the DAC-IPAD study methods our allies
16 have used to make amends to survivors, including
17 restorative engagement programs and financial
18 compensation. And our allied military forces
19 referred to there include Canada, Australia, New
20 Zealand, the UK, and Israel.

21 Now, DoD approved this recommendation
22 and directed a study of other militaries'

1 restorative engagement programs.

2 The second recommendation is that the
3 IRC supported significant reforms to courts
4 martial sentencing procedures, and the
5 recommended reforms from the IRC included a
6 mandatory restitution provision for sexual
7 assault victims.

8 Now, DoD's response broadly approved
9 of sentencing reforms in the forms of sentencing
10 parameters and judge-alone sentencing. But it
11 did not address specifically mandatory
12 restitution as part of a court martial sentence.
13 Currently it cannot be ordered by a military
14 judge, but it can be arranged-for as part of a
15 plea agreement. Next slide.

16 Now, just a few more details on the
17 IRC's discussion of the issue. The IRC felt that
18 specifically the Canadian and Australian defense
19 forces models for restorative engagement could
20 provide a guide for the U.S. to develop its own
21 program and have victims have an opportunity to
22 be heard by a senior DoD official through a

1 trauma-informed dialog.

2 The IRC also highlighted the fact that
3 both of those allied forces programs included the
4 provision of financial compensation to either
5 make amends to survivors or to make up for
6 financial losses incurred as the result of the
7 sexual harm that they experienced. Next slide.

8 Finally, I just want to make you aware
9 that the DAC-IPAD's predecessor committee, the
10 Judicial Proceedings Panel, in 2016, it issued
11 the report on restitution specifically. And that
12 a JPP recommended that DoD address the financial
13 needs of sexual assault victims by establishing a
14 uniform compensation fund, not necessarily by
15 making restitution mandatory, but a uniform
16 compensation fund was recommended back then.
17 Next slide.

18 So with that information, I invite you
19 to consider as you deliberate tomorrow in your
20 strategic planning session figuring out what
21 tasks to place earlier in the queue or later and
22 prioritize your efforts moving forward, I urge

1 you to consider that one option for the DAC-IPAD
2 is to acknowledge that DoD has directed a study
3 and is studying the issue of restorative
4 engagement and its applicability to the military.

5 And the DAC-IPAD could just
6 acknowledge that DoD has owned this issue and has
7 studied it and not take up its own separate
8 study.

9 The other is that the DAC-IPAD of
10 course could take up its own study and make
11 recommendations to DoD and Congress on which
12 forms, if any, of alternative justice may be
13 applicable and useful for the military.

14 So with that, I invite any questions
15 or comments and in the time that remains.

16 MEMBER SCHWENK: Yeah, this is Jim
17 Schwenk. Do you have any idea what the timeline
18 is for the DoD study?

19 MS. PETERS: The DoD study was given
20 to this staff as part of the Defense Legal
21 Services Agency. That study is complete, it's
22 been turned in to DoD. And that's the

1 information that we have. We worked with and
2 researched the programs in the allied militaries
3 countries and provided a report to DoD on that
4 topic.

5 MEMBER SCHWENK: So I guess that means
6 we're too late if we were hoping to influence
7 their report, since it's done.

8 MS. PETERS: The staff's report is
9 complete. There is no timeline on this
10 particular task or anything in the Joint
11 Explanatory Statement, it just says as
12 appropriate. And it can go in a variety of
13 directions, because restorative engagement is one
14 form of alternative justice. And it does involve
15 financial compensation, which is a, I think an
16 important component of the IRC's recommendations.

17 So the field is wide open. There's
18 really no limits on what the DAC-IPAD can do. I
19 just wanted to make you aware that DoD is
20 undertaking a study. So it's being looked at,
21 and I think that's important for the Committee to
22 consider. But the study itself is done.

1 MEMBER GOLDBERG: Thank you. I just
2 want to be sure I understood. So DoD is
3 undertaking a study now, or a study has been
4 completed and yet to be determined what will
5 happen with the study?

6 MS. PETERS: Right, I think I've said
7 it both ways. The study is complete, it's been
8 submitted to DoD. What happens from there, we
9 don't have that information. I don't believe
10 that that is public. That is a, sort of in the
11 policymaking, pre-decisional realm.

12 MEMBER GOLDBERG: Got it. And maybe
13 this follows on Jim's question a little bit,
14 which is, it sounds like the answer is we don't
15 know. But that timeframe in which DoD is likely
16 to act on the study in any respect. Just sort of
17 gauging whether it's useful for DAC-IPAD to weigh
18 in further.

19 MS. PETERS: So we -- we don't have
20 that information today. I think we can have that
21 conversation and reach back for that information
22 and provide it to the Committee, if that's known

1 and knowable and what the timetable is. We'd be
2 happy to ask that question and provide that to
3 you guys.

4 MEMBER GOLDBERG: Sounds like it would
5 be useful to know.

6 MS. PETERS: Right.

7 MEMBER GOLDBERG: Thank you.

8 MEMBER GARVIN: This is Meg Garvin.

9 Just a -- I want to make sure I'm understanding.
10 The study that DoD has asked you to do, that it's
11 done and that is now under consideration, that
12 was on restorative engagement.

13 MS. PETERS: Yes.

14 MEMBER GARVIN: And including
15 compensation, but not restorative justice in the
16 broader sense of where the victim and the person
17 who did the harm have direct restorative aspects.

18 MS. PETERS: Correct. The study makes
19 a distinction between those two types of programs
20 and then focused on restorative engagement models
21 with agency officials who conference with the
22 victim in those other allied militaries.

1 MEMBER GARVIN: Do you happen to know
2 if those other allied militaries also have
3 restorative justice?

4 MS. PETERS: I don't have that answer
5 for you, I'm not sure at this time.

6 MEMBER GARVIN: Thank you.

7 MEMBER WALTON: Point of information.
8 In the military justice system, is there anything
9 like probation when an individual is not
10 sentenced to a period of incarceration?

11 And if they are sentenced to a period
12 of incarceration, is there anything like
13 supervised release whereby that individual is
14 under supervision once they finish their
15 incarceration period, regardless of whether
16 they're removed from the military or not?

17 MS. PETERS: The military doesn't have
18 that directly. And I think once they fall under
19 the Bureau of Prisons, I think the options may
20 expand, but generally no.

21 MR. SULLIVAN: If I could hop in for
22 one quick second. So there's no probation as a

1 sentence. But once -- if someone is sentenced to
2 a lengthy term of confinement, it is normal that
3 they are released substantially before their
4 mandatory release date. And when they are
5 released before their mandatory release date,
6 they are put on mandatory supervised release.

7 And that actually gives rise to a
8 substantial amount of post-trial litigation in
9 the system. But that is an aspect where it is a
10 lengthy sentence.

11 MEMBER WALTON: So that period, this
12 is Reggie Walton again, that period of post-
13 incarceration supervision ends at the time when
14 their otherwise sentence is -- would be
15 completed?

16 MR. SULLIVAN: Correct. So once
17 they've reached their mandatory supervised -- I'm
18 sorry, once they've reached the actual end of
19 their sentence, it ends. So the mandatory
20 supervised release is in the period between when
21 they are released at some point, essentially
22 paroled, you know, until they reach the end of

1 their sentence.

2 MEMBER GRIMM: Paul Grimm with a
3 followup question.

4 CHAIR SMITH: Go ahead.

5 MEMBER GRIMM: So Dwight, unlike
6 supervised release conditions that Judge Walton
7 was referring to where the sentencing judge
8 imposes the conditions of supervision during the
9 sentence with the knowledge that they won't kick
10 in until later when an incarcerative sentence is
11 over, those that you are referring to after a
12 lengthy incarcerative sentence has been imposed
13 and the release has occurred and there's still a
14 period of time where that supervision comes in,
15 it's going to be much more like parole, where the
16 conditions are being set -- set by whom?

17 By BOP, by -- I mean, who sets those
18 conditions and who supervises? Because the
19 sentencing judge would have absolutely no
20 involvement in that, right?

21 MR. SULLIVAN: That's an excellent
22 question. The -- and my understanding is that the

1 answer to that question is currently in flux
2 because the, traditionally the federal -- the
3 federal parole authorities have played a role in
4 that.

5 And my understanding is that federal
6 parole authorities are being sunsetted. And so
7 that DoD is going to take over some functions
8 that right now are being performed in a federal
9 Article 3 judiciary context.

10 I'll do some questioning, perhaps some
11 of the subject matter experts in our audience
12 today have some additional details. So I'll see
13 if I can find out any additional information
14 about that over the break.

15 MEMBER GRIMM: So just if I may follow
16 up on that, Dwight. The reason why I asked that
17 is, and -- and certainly people familiar with
18 federal sentencing law, which is not for the
19 fainthearted too, are aware there are sort of
20 like statutory, mandatory conditions that you
21 have to impose, but those are enacted by statute.
22 So there's no discretion on the judge.

1 There's a whole series of sort of
2 standard ones that just say, you know, report, be
3 honest to your supervisory, don't, you know,
4 don't -- you got to have drug testing, you got to
5 have this, that, and the other thing. And then
6 the ones that tend to be most important for
7 rehabilitation and also are the -- are the
8 specific ones that the judge imposes at the end.

9 And those are the ones that tie
10 directly to what is the nature of the offense and
11 what kind of conditions are likely to succeed in
12 -- in either providing some sort of relief to a
13 victim, like restitution or something of that
14 nature. Or what are likely to rehabilitate,
15 anger management, mental health treatment, drug
16 treatment.

17 Those are tied in to the underlying
18 facts of the case, and that's what the sentencing
19 judge typically has the greatest amount of input
20 to tailor to try and get the most effective
21 outcome you can get. So it might be that, you
22 know, could have certain statutory in the first

1 two categories, but not a whole lot of knowledge
2 as to how to come up with those final things that
3 may actually be the most important conditions
4 that are out there.

5 So I'm just curious as to what the
6 thinking might be going forward, if that's to
7 have -- to judge, well, it's a question if that's
8 to have any kind of beneficial impact.

9 MEMBER WALTON: This is Reggie Walton
10 again. If a restitution obligation is imposed
11 and that restitution obligation is not paid
12 before the person completes their sentence, is
13 there a means by which that restitution can be
14 recovered subsequent to that?

15 MR. SULLIVAN: So right now
16 restitution is not an authorized form of court
17 martial punishment. So there is one work-around
18 that was mentioned, and that is there could be a
19 plea agreement in which the accused agrees to
20 provide restitution and then in exchange for that
21 receipt, some -- some benefit.

22 In my experience, you know, that

1 restitution would tend to be provided before that
2 PTA -- before the plea agreement kicks in.

3 There is in military law the concept
4 that where there is a fine imposed as a sentence,
5 and a fine is an authorized court martial
6 punishment, that there can be contingent
7 confinement as a method to provide a sword of
8 Damocles hanging over the person's head in case
9 the fine isn't paid.

10 But again, that's a fine that would go
11 to the -- to the federal government and not to
12 the victim.

13 MEMBER TOKASH: This is Megan Tokash.
14 So if I understand correctly, in December of
15 2019, Congress requested that this body review
16 alternative justice programs, is that right?

17 MS. PETERS: Yes.

18 MEMBER TOKASH: Then during the zero-
19 base review, the DLSA staff looked into the
20 matter and completed the report.

21 MS. PETERS: Yes.

22 MEMBER TOKASH: And then turned it

1 into OGC.

2 MS. PETERS: Yes, that's what
3 happened.

4 MEMBER TOKASH: Okay. So how are we as
5 a body to complete our tasking, or are we
6 relieved of that tasking if we can't see and
7 consider the report?

8 MS. PETERS: I think the -- that
9 information is -- we've provided that to you just
10 to see where the Committee's appetite is for this
11 topic. It is a request. It's in your terms of
12 reference. But the engagement with that topic
13 and your level of engagement with it is at your
14 discretion.

15 And if you were worried about or
16 wondered whether DoD had looked into this or ever
17 considered it, the answer is yes, and it was in
18 response to the IRC report. The staff's research
19 is available to the Committee, certainly. So and
20 everything else, again, policy recommendations
21 that fall to the Department, is not in your --
22 the staff's lane. But all of the information we

1 gathered absolutely is.

2 MEMBER TOKASH: Okay, I think that
3 that would be helpful to try to decide a way
4 forward with respect to this topic. I think if
5 the staff had done a lot of work on this
6 particular area, as a member, I think it would be
7 helpful to be able to consider that before going
8 forward, so.

9 MR. SULLIVAN: And Ms. Tokash, if I
10 could offer one little tweak, and I'll ask the
11 staff if I -- if I understand this correctly. So
12 my understanding, and please correct me if I'm
13 wrong, is that what the staff reviewed was not
14 the tasker that was included in the JES.

15 What the staff reviewed was the IRC
16 accountability effort, of which of course you
17 were one of the leads and General Schwenk was one
18 of the leads. That it was their recommendation
19 to study our allies -- actually, I think it was a
20 4.3 recommendation, but -- yeah. To study our
21 allies' recompense system.

22 So my understanding, and let me know

1 if I'm right, my understanding is that the -- the
2 -- what was studied was not the whole scope of
3 alternative justice programs, but rather it was
4 what does Canada, New Zealand, Australia, etc.,
5 do in this context. Am I right or wrong about
6 it?

7 MS. PETERS: Yeah, absolutely. So the
8 JES request was issued well before the IRC
9 convened and made its own study and issued its
10 own report. It is an entirely separate tasking.
11 It so happens that the IRC's report becomes
12 relevant to the conversation because it brought
13 the issue of restorative engagement as a form of
14 alternative justice programs to the DoD.

15 It recommended a study, and DoD has --
16 has undertaken that. So to the extent that
17 restorative engagement is now in the -- is in
18 DoD's consideration, that information is relevant
19 I think to whether and what the DAC-IPAD wants to
20 do.

21 That said, the JES asked you to
22 consider a variety of forms of alternative

1 justice programs. You're not limited to that.
2 The DoD study, again, does not -- it has an
3 overlap, but it doesn't take the DAC-IPAD's place
4 and it doesn't squarely address all aspects of
5 the JES.

6 Certainly the JES request invites you
7 to consider what form of program is appropriate,
8 when in the system or at what point in the system
9 DoD may want to consider or implement these
10 programs. And then what form, of course, they
11 should take.

12 So there's a lot left on the table,
13 but I wanted to put all of the information out
14 there that was relevant, the recent reports.

15 MEMBER TOKASH: That's super helpful.
16 This is Megan Tokash again, to Mr. Sullivan and
17 Ms. Peters. I was trying to see if we still had
18 some outstanding tasker to complete, which it
19 sounds like we do. So I wanted to make sure that
20 we were -- we were answering Congress's call.
21 Thank you.

22 CHAIR SMITH: It sounds like the task

1 that we were charged with is much broader than
2 what they -- they study that they undertook.
3 Okay.

4 MS. PETERS: Judge Smith, I don't have
5 anything further for the Committee, but subject
6 to your questions, that concludes the staff's
7 briefing.

8 CHAIR SMITH: Okay. Anyone have any
9 questions or comments? All right, thank you.

10 COL BOVARNICK: So for the Committee,
11 ma'am, that ends the three briefings. And again,
12 three of the tasks will be discussed tomorrow in
13 deliberations and then the potential assignment
14 under a subcommittee as appropriate.

15 So now we're on a lunch break until
16 1:15 p.m., and then after lunch there will be a
17 couple of panels that the Committee will hear
18 from. And then the Special Victim Counsel report
19 that we'll cover after that.

20 So we're on break until 1:15 and we'll
21 reconvene in here. Thank you.

22 (Whereupon, the above-entitled matter

1 went off the record at 12:10 p.m. and resumed at
2 1:16 p.m.)

3 COL BOVARNICK: Okay. Welcome back,
4 everyone. I'm just going to take the next few
5 minutes and just provide a quick summary of the
6 Offices of Special Trial Counsel. We're going to
7 hear from a panel this afternoon -- a couple
8 panels, one, civilian prosecutors, both state and
9 federal, and then we have our own committee
10 members are going to talk a little bit about
11 prosecution offices. And then, of course,
12 tomorrow we have the general counsel, the
13 military department --

14 PARTICIPANT: We can't hear you.

15 COL BOVARNICK: Oh, you can't hear me?
16 Is it something down there maybe? So the folks
17 on the screen can't hear. I'm not sure what we
18 have to do to fix that. Okay.

19 How about now? Can you hear me?

20 Anyone online? Ms. Bashford, can you hear me?

21 Anybody? Test, can anyone hear me on this
22 screen?

1 (Pause.)

2 COL BOVARNICK: Mr. Cassara, can you
3 hear me?

4 (Pause.)

5 MEMBER GRIMM: Are we back in session?

6 MEMBER LONG: They're trying to fix
7 the sound, I think, Judge. I could hear Martha.
8 We couldn't hear them.

9 PARTICIPANT: Anybody hear us? Jim?
10 Martha? Bill? No?

11 COL BOVARNICK: Testing, can anyone
12 hear us? Judge Grimm, can you hear us? That may
13 have done it. I think they just unmuted.
14 Testing, Mr. Cassara, can you hear us?

15 MEMBER CASSARA: Yes, I can.

16 COL BOVARNICK: Okay, great. Thank
17 you very much. I'll whip through this part
18 quickly. Okay. I'm going to welcome back.
19 Sorry for those technical difficulties. We've
20 got everyone online here.

21 I'm going to just give a quick summary
22 of the Offices of Special Trial Counsel, and then

1 we'll get into our guests that have come in to
2 speak with the panel today. So Sections 531
3 through 539(c) of the FY '22 NDAA requires
4 establishment of a new independent Offices of
5 Special Trial Counsel for each military service
6 except for the Coast Guard. And for the members,
7 the statutes -- the complete statute is at Tab 7
8 of your handout packet there.

9 MEMBER GRIMM: Colonel, this is Judge
10 Grimm. My apologies. Could we get the camera to
11 zoom back onto the committee, please. The camera
12 is focused on, I think, our technical advisor, so
13 --

14 COL BOVARNICK: Oh, got you. Who is
15 controlling the camera? Roger. We'll get that
16 fixed. Or someone can fix the camera for the
17 panel members? Thanks.

18 So at the April meeting, Mr. Sullivan
19 provided a summary. And it's just a quick review
20 to set the stage for member presenters at this
21 meeting, including right after me here a panel of
22 five civilian prosecutors to discuss the

1 structure and processes of their offices. And
2 then four of our own committee members will
3 discuss their experiences.

4 And then tomorrow, the general counsel
5 of the military departments as well as their
6 judge advocates, general, and the SJA to the
7 Commandant of the Marine Corps will come in to
8 address the panel as well. The statute requires
9 11 of approximately 140 UCMJ offenses removed
10 from the control of commanders to the control of
11 judge advocates. And the 11 covered offenses
12 over which the Offices of Special Trial Counsel
13 have authority, Article 117(a), wrongful
14 broadcast or distribution of intimate visual
15 images, Article 118, murder, Article 119,
16 manslaughter, Article 120, rape and sexual
17 assault, Article 120B, rape and sexual assault of
18 a child, Article 120(c), other sexual misconduct,
19 Article 125, kidnaping, Article 128(b), domestic
20 violence, Article 130, stalking, Article 132,
21 retaliation, and Article 134, child pornography.

22 The judge advocates called Special

1 Trial Counsel in this capacity will be assigned
2 to Offices of Special Trial Counsel. Each of the
3 lead Special Trial Counsel which by statute will
4 be a general or flag officer and report directly
5 to the Secretary of the applicable military
6 department with no intervening authority. The
7 command control and judge advocate control
8 systems will interact as parallel systems.

9 In addition, the 11 covered offenses
10 I just mentioned, the Offices of Special Trial
11 Counsel will also have discretionary authority
12 over related offenses as well as known offenses
13 allegedly committed by someone over whom they are
14 exercising authority. When an Offices of Special
15 Trial Counsel defers action on a case, it would
16 go to the commander to exercise certain action as
17 deemed appropriate, though the commander will not
18 have the authority to refer a covered offense and
19 trial by special court martial or general court
20 martial. The effective date of the changes will
21 apply to offenses that occur on or after December
22 27th, 2023, two years after enactment.

1 And we provided some sample questions
2 for the Offices of Special Trial Counsel Panel
3 tomorrow. Those are at Tab 9 regarding
4 structure, function, and charging status. So
5 with that, we'll ask our members that are present
6 our guests get to come in. If you want to come
7 up to the table in here, get you settled in.

8 And so for the group, we have -- yeah,
9 please. I think we have the name tags up there.
10 And we also have one that will joining us
11 virtually. We have Ms. Sherry Boston. Oh,
12 sorry. So the panel that's taking their seats
13 now, Ms. Sherry Boston -- again the members will
14 introduce themselves -- Ms. Parisa Dehghani-
15 Tafti, Ms. Fara Gold, Ms. Sharon Marcus-Kurn, and
16 Mr. Eric Rosenbaum. And I'll turn it over to the
17 chair now.

18 CHAIR SMITH: Welcome, and thank you
19 for appearing before the committee today. We
20 appreciate your time and willingness to share
21 your experiences with us. We have your bios, but
22 if you could briefly introduce yourselves and

1 tell us a little bit about your offices. Then we
2 can open it up for discussion. We'll start with
3 you, Ms. Boston, when you're ready.

4 MS. BOSTON: Good afternoon. Can you
5 hear me?

6 CHAIR SMITH: Yeah.

7 MS. BOSTON: Okay. Thank you so much
8 for having me today. I am Sherry Boston. I am
9 the District Attorney for DeKalb County in
10 Atlanta, Georgia. A little bit about our office,
11 I've been DA since January 1st of 2017.

12 Our District Attorney's office is a
13 felony only office. Prior to that, I served as
14 the elected Solicitor General which is the
15 prosecutor that oversees misdemeanor prosecution.
16 I did that for six years prior to that.

17 So I have over the last 12/13 years
18 been the lead prosecutor in DeKalb in two
19 capacities. And both those offices do handle
20 sex-related crimes, one being the misdemeanor
21 offenses and the office I run now is felony
22 offenses. Our office is made up of about 277

1 employees. About 85 of those are lawyers and 50
2 are investigators.

3 MS. DEHGhani-TAFTI: Good afternoon.
4 Microphones are always awkward. Good afternoon,
5 everyone. My name is Parisa Dehghani-Tafti. I
6 am the Commonwealth's attorney in Arlington
7 County and the City of Falls Church which means
8 I'm the elected prosecutor.

9 I came into office on January 1st,
10 2020. And I think that some of my background is
11 actually -- I would like to interweave it with
12 explaining what my office is. But at the outset,
13 I'll say we handle misdemeanors. We handle
14 juvenile cases where juveniles are both victims
15 and the accused. And we also handle all of the
16 felony cases in those two jurisdictions.

17 I have about 21 attorneys. I have no
18 investigators, and about 21 support staff as well
19 that consist of paralegals and front desk. A
20 significant piece of my support staff is victim
21 witness advocates.

22 And I'll be saying more about the

1 benefits of having those folks in the office.
2 But I came here today and it's sort of funny to
3 be here for me because I came at this work in a
4 very odd way. And I campaigned on reform, but I
5 campaigned also on taking serious crimes like
6 sexual assault very seriously.

7 And I am extremely victim centered in
8 the work that we do because I, myself, am a
9 survivor of sexual assault that happened as a
10 child and I did not report. So I have been
11 endeavoring to make reporting as easy as possible
12 and to make sure that we have a system where the
13 victim's voices and the victim's wishes are
14 honored. And that's it.

15 CHAIR SMITH: Thank you.

16 MS. GOLD: Good afternoon, everyone.
17 Thank you for having me. My name is Fara Gold.
18 I'm a career prosecutor at the Department of
19 Justice. I've been DOJ, it'll be 13 years in
20 September.

21 Prior to that, I was a state
22 prosecutor in Fort Lauderdale, Florida for six

1 years. So prosecuting for nearly 19,
2 specializing in sexual assault. I specialize in
3 prosecuting sex crimes and child abuse when I was
4 a state prosecutor.

5 In DOJ, I'm specifically in the civil
6 rights division criminal section. So we
7 prosecute law enforcement misconduct and hate
8 crimes throughout the country. Everyone thinks
9 mostly of law enforcement misconduct and
10 excessive force, but we use the same statutes to
11 prosecute sexual assault.

12 So I specialize actually nationally in
13 prosecuting sexual assault by government actors
14 all over the country, government actors being
15 police officers, patrol officers, probation
16 officers, school employees, and have brought
17 these cases from all over. They don't have to be
18 federal. And I also serve kind of in this dual
19 capacity as senior sex crimes counsel in the
20 prosecution side.

21 I'm also partially detailed to our
22 front office right now as senior counsel on

1 sexual misconduct because the Violence Against
2 Women Act just gave us about four new criminal
3 federal statutes. They're specifically going to
4 strengthen our ability to prosecute civil rights
5 crimes involving sexual misconduct. So I kind of
6 have two jobs now.

7 So I'm involved in implementing the
8 statutes and kind of developing best practices
9 nationwide and I have a caseload all over the
10 place. So thank you for being here. I'm happy
11 to help as much as I can.

12 CHAIR SMITH: Thank you.

13 MS. MARCUS-KURN: Good afternoon. My
14 name is Sharon Marcus-Kurn, and I'm the chief of
15 the sex offense and domestic violence section at
16 the U.S. Attorney's Office in D.C. As many of
17 you know very well, our office in D.C. is the
18 only U.S. Attorney's Office that also has a local
19 practice.

20 We prosecute on the Superior Court
21 side, and I'm the chief of that section. And we
22 also have a criminal division side. Sometimes

1 the child exploitation offenses are also kind of
2 co-mingled in my office. Right now, they're
3 separately.

4 So I'm basically kind of the chief of
5 a small DA's office without a DA. We don't have
6 an elected official of the U.S. attorney as you
7 all know is appointed. And so my section is
8 about 35 prosecutors.

9 We handle all the domestic violence
10 and all the sexual assault involving adult
11 perpetrators, very few juveniles. And we
12 prosecute only those that are involved in forced
13 sexual acts or forced rape. We have advocates.

14 I think all of us on the panel are
15 going to be thrilled to talk to you about the
16 importance of having advocates. And we do have
17 in-house investigators. My section has the new
18 attorneys that handle misdemeanor domestic
19 violence and misdemeanor sexual assaults all the
20 way up to felony domestic violence and felony
21 sexual assault.

22 Everybody that handles the felony

1 cases wants to be there, has interviewed, and
2 wants to do this kind of work which I think
3 you're going to also hear over and over again is
4 essential. So I'm thrilled to be here. Thank
5 you.

6 CHAIR SMITH: Thank you. So we're
7 going to open it up for -- oh, we have someone
8 online. Sorry about that. I think it's Mr.
9 Rosenbaum.

10 MR. ROSENBAUM: Can you hear me okay?

11 CHAIR SMITH: Yes, we can hear you.

12 MR. ROSENBAUM: Great. It's easy to
13 virtually miss one of us. I really appreciate
14 the opportunity to speak with you today. I thank
15 you for the invitation.

16 I'm the chief of the Special Victims
17 Bureau at the Queens County, New York City DA's
18 office. It's one of the ten largest District
19 Attorney's offices in the United States. And at
20 this point in my career, I think I'm a senior
21 state sex crimes prosecutor amongst the 62
22 counties in New York State.

1 I've been a DA since the mid-'90s.
2 I've exclusively focused on special victims
3 oriented crime since the late '90s. Here, the
4 Special Victims Bureau is a felony bureau like
5 some of my colleagues have said theirs is.

6 We focus on felony level sexual
7 assaults against both adults and children,
8 violence against the elderly. So not the
9 housekeeper stole your checkbook, physical
10 violence against the elderly and physical child
11 abuse at the felony level including some infant
12 fatalities. And because we're in the major
13 crimes division, various homicides come to our
14 bureau as well.

15 So these are the crimes that the
16 public understands. They get reported in the
17 press. It's very forward facing. Bureau of the
18 District Attorney's Office, very outward facing.
19 And it calls for special handling of the cases.

20 I've been working on best practices
21 statewide through the District Attorney's
22 Association for a couple decades. I teach

1 statewide and nationwide on best practices. And
2 specifically, I've sort of spearheaded as a
3 member of a team of us across the state who have
4 identified the importance of trainings for every
5 single sex crimes prosecutor in victim centered
6 interviewing techniques, forensic interviewing
7 techniques. And those are very different than
8 the regular interviewing techniques you might use
9 in a burglary or a financial crime.

10 So victim-centric interviewing,
11 forensic skills, as well as an understanding of
12 the neurobiological responses to trauma and its
13 impact on perception, memory, recall, and
14 behavior. Every one of my Assistant District
15 Attorneys, we have about 15 of them here in the
16 bureau, is trained in those areas. And we have
17 periodic training to make sure that those
18 responding to these special victims' matters are
19 fully aware and versed in the application of
20 victim-centric, survivor-centric, and trauma
21 informed interviewing techniques.

22 CHAIR SMITH: Okay. Thank you. So

1 we're going to open it up for any questions at
2 this time for our panel.

3 MEMBER GRIMM: This is Judge Grimm.
4 If I could have -- if no one else has got their
5 hand up first.

6 CHAIR SMITH: Absolutely. Go ahead.

7 MEMBER GRIMM: Thank you. Thank you
8 all for being here with us today and for sharing
9 your expertise in this very important area. I
10 would like to raise a question and hear from each
11 of you if you have some thoughts on this.

12 One of the challenges for prosecution
13 and defense of sexual assault, the charges in the
14 military, is that the assignment system for JAGs
15 in the military is one which oftentimes results
16 in an officer being assigned to a particular
17 position which may be a prosecutor position or a
18 defense position for a period of time, two years,
19 three years, maybe more, maybe less. And then
20 they're rotated out. And the career advancement
21 progression that would be in front of someone who
22 wants to make the military a career would be such

1 that the personnel folks would be saying, well,
2 we need to move you to another position where you
3 can get experience in legal assistance and then
4 maybe administrative law and then you want to be
5 a deputy advocate.

6 And then you want to do a staff job.
7 And so what you get is you get a lot of very new
8 junior officers very qualified, very
9 enthusiastic, gets some experience and then very
10 soon transferred out. I think your thoughts
11 about the importance if there is importance in
12 your views of having people who are more in this
13 type of work as a career or a substantial period
14 of time to be able to deal with the particular
15 types of issues that come up in these cases.

16 Thank you.

17 CHAIR SMITH: Who wants to take Judge
18 Grimm's question?

19 MR. ROSENBAUM: I'll jump in having
20 gone last on the intros. I'll go first here.
21 It's said that expertise comes after a minimum of
22 about 10,000 hours of work in a particular area.

1 For a hardworking attorney, that would be about
2 five years' worth of work.

3 In sex crimes, it is perhaps more
4 important than any other area to have a global
5 perspective based on experience of the variety of
6 cases that come in, the patterns that come in
7 that survivors may show the course of a
8 prosecution how it flows. We only take seasoned
9 prosecutors into the bureau. And as one of my
10 colleagues suggested, it has to be a handshake.
11 They have to want to be here, and we have to want
12 them.

13 They need a basic familiarity with
14 forensics, medical records, maybe working with
15 victims of trauma in a different context. But
16 this is a major crime's track. And you really
17 build the muscle only at about three years. You
18 can take on anything.

19 So having a major crime's track at our
20 office where you don't need to graduate out of
21 sex crimes and work on as was suggested
22 administrative tasks and get to know other

1 aspects of the office. There's an early on
2 rotation. But this is sort of the explanation
3 point. And as a sex crimes prosecutor, you can
4 take on some other major cases as well so long as
5 the focus remains sex crimes.

6 That's homicides, the child
7 fatalities, and serious physical child abuse.
8 But the seniority is critical in developing a
9 skill set. Three years in, three years out,
10 you're never going to get the quality of
11 prosecutions you're looking for in the sex crimes
12 arena in my opinion.

13 MS. GOLD: I could go, yes. I agree
14 with everything that he said. When I started as
15 a baby prosecutor and I was 25 years old, you
16 start out where you think everything is huge
17 which is a good way to be a prosecutor. But it
18 wasn't. It was low level crimes.

19 And so then graduated up to sex crimes
20 after I had done low level misdemeanors, low
21 level felonies, intermediate felonies, and all
22 the way up. And then I was there for three years

1 when I left to come to DOJ. And at that point, I
2 had tried I think it was something like 35 to 40
3 cases in three years.

4 And then coming to DOJ, as I said, I'm
5 in the civil rights division. So I was
6 prosecuting excessive force cases and hate crimes
7 but drew upon my experience in sex crimes to get
8 our office to start doing more and more. And now
9 13 years later just in DOJ and having prosecuted
10 all these cases, I know what's coming.

11 I mean, you always have to deal with
12 the unpredictability of trial. But I have a
13 sense of expertise that certainly the younger
14 people in my office who come in straight from law
15 school and the honors program don't have that
16 expertise. And you can see a difference.

17 So I do think there is value in having
18 people who have that low level experience who've
19 been able to -- I mean, the expression is cut
20 their teeth and then graduate up to sex crimes.
21 In my old office after sex crimes, you're able to
22 go to homicide but they didn't have to, right?

1 And I think giving people the opportunity to
2 specialize in sex crimes I think is the way to go
3 while once in a while saying, hey, if you want to
4 take a homicide case here or there, an arson
5 case, so whatever it may be.

6 Just quite frankly it is a wearing job
7 just to give them an opportunity to do something
8 else at the same time I think is good. But that
9 kind of getting to know how to deal with victims,
10 getting to know how the cases get put together.
11 You need expertise.

12 I mean, I can see it right now. I
13 work with the FBI. I have FBI agents right out
14 of the academy. They don't know the first things
15 about sex crimes, and I've been doing it for 19
16 years.

17 And there's a huge difference.
18 Somebody has to be able to know what we're doing.
19 And if you had someone who's straight out of law
20 school doing this stuff, an FBI agent straight
21 out of Quantico. It's not a recipe for effective
22 prosecution.

1 MS. BOSTON: I agree with my
2 colleagues. In our office, we have two units
3 that deal with sex crimes. We have our domestic
4 violence sexual assault unit which deals with
5 adult victims.

6 We have our SECAC unit which is sexual
7 exploitation and crimes against children. So
8 that's where we see our sex cases against
9 children. And so the specialization in sex cases
10 is very important.

11 None of our general crimes division
12 deal with these cases. Again, it is -- these are
13 units that prosecutors select and train and work
14 to become a part of and agree to be a part of
15 that unit because it does require specialized
16 training. Our victim advocates and our
17 investigators are also specialized in how to deal
18 with victims of sex crimes.

19 It is a team effort. And so training
20 across all aspects of the case and having
21 prosecutors, investigators, and victim advocates
22 that know how to interface with these level of

1 victims is really important to the successful
2 prosecution of these cases. So I would concur
3 that -- I will note that my Chief Assistant
4 District Attorney started his career in the
5 military and JAG.

6 So I am intimately familiar, and he
7 spent his time in JAG working both sides as both
8 prosecution and defense. And I think that that
9 could work in a lot of cases. But when you're
10 talking about sex crimes, I think this is an area
11 where it's important to examine the importance of
12 having that specialized training.

13 MS. DEGHANI-TAFTI: I don't have
14 anything to add in terms of that, this sort of
15 skill level specialized training. But one of the
16 things that I think is important is having
17 prosecutors that can compartmentalize because
18 this is extraordinarily high trauma, not just for
19 victims but also for the prosecutor. So there
20 are things that they see that they can't unsee.

21 And it takes a toll. So I support all
22 of the things everybody said. But also sort of

1 active rotation out into other things and some
2 serious attention to teaching people how to -- or
3 getting people who can compartmentalize.

4 MS. MARCUS-KURN: I guess the piece
5 that I would add is that it does take tremendous
6 experience to be able to evaluate the evidence.
7 The consequences of filing a charge that alleges
8 sexual assault, just the filing, is very serious.
9 The consequences of not filing a charge for a
10 victim who has a strong feeling of bringing
11 charges is very serious.

12 So it takes people that are
13 specialized and are dedicated to know, to really
14 listen with an open ear, to evaluate the evidence
15 or the lack of evidence, whether it's lack of
16 corroboration, whether it's inconsistent
17 statements, whether it's lack of physical
18 evidence, DNA, whether it's lack of genital
19 injury, whether it's delayed disclosure and to
20 evaluate that in terms of is that something that
21 is normal or is that something that actually
22 suggests that the victim is not telling the truth

1 or not telling the whole truth. Does that mean
2 that I can't win at trial? Or can I overcome it
3 by putting on experts?

4 Similarly, to evaluate, like, did this
5 happen and is it a crime even if it did happen?
6 I'm sure all of us on the panel have had cases
7 that involve intoxication. We do a lot of them
8 in my office because we have a number of colleges
9 here. And I know the military deals with that.

10 We have people that are detailed to my
11 office who have misdemeanor cases from the
12 military. Those are very tough cases. Consent
13 is a defense. Permission is a defense. But what
14 does that mean? So I think that's the piece that
15 I would add that it's very important for the
16 victim to be heard, and it's very important for
17 the person who's being accused to know that the
18 prosecutor is taking all of the evidence and
19 their experience very seriously.

20 MS. GOLD: Could I just piggyback on
21 something? I do this training around the country
22 for agents and prosecutors. And one of the

1 things that I talk about at the very beginning
2 are the sex crimes fallacies that kind of creep
3 into our unconscious.

4 Like, he said, she said, and it can't
5 be proven. Like, people lie about rape. Like,
6 there's no evidence even if they have the
7 victim's account. And I go through all of that
8 and try as I can to kind of give everyone
9 permission to recognize that you may
10 unconsciously have that and to kind of confront
11 it.

12 Because when you talk about having
13 someone come to a specialized unit and there's a
14 handshake that we all want to do this work, you
15 have to figure out a way not to buy into those
16 fallacies. Because they all are fallacies and
17 they are kind of misperceptions of the law, on
18 data, on facts, on science. And so we have to
19 make sure that people working in these cases
20 don't come in there with this automatic
21 assumption that people lie about rape or we can't
22 prove something based upon a victim's account.

1 Obviously, a victim's account is evidence.

2 I hear all the time, we can't
3 investigate without evidence. You can't get
4 evidence until you investigate and you can rely
5 on a victim's account. So I think that goes into
6 everything that Sharon said about evaluating
7 evidence but also recognizing that there are
8 people who want to do this work and don't, pardon
9 the pun, fall victim to those fallacies.

10 MEMBER LONG: Madam Chairman, it's
11 Jennifer Long. May I ask a question?

12 CHAIR SMITH: Sure.

13 MEMBER LONG: I wanted to ask the
14 panel how you identified attorneys in your office
15 to recruit to your unit. We talked a little bit
16 about their experience. But what other qualities
17 or competencies are you looking for?

18 MS. BOSTON: Well, in our office, most
19 of our attorneys start in our general crimes
20 division and our pre-charging unit where they
21 have a vast array of cases. But all the lawyers
22 in our general crimes division because they're

1 assigned to specific judges have an opportunity
2 to second chair cases in all of our units. So
3 generally speaking, our general crimes lawyers
4 get an opportunity to say, hey, I'm really
5 interested in gangs and homicide or I'm really
6 interested in domestic violence and sexual
7 assault and will often volunteer to sit second
8 chair with those special unit lawyers.

9 And getting that type of trial
10 experience and then additionally going to
11 training or asking to attend specialized training
12 is generally where we start to see where
13 people's, I guess, jam is. And we're also in
14 office -- a lot of office -- I mean, some offices
15 just assign people or when an opening comes.
16 We're the type of office that when folks come
17 into our office, we specifically ask them what
18 types of cases are of interest to you. Where do
19 you see yourself in five years if you were to
20 remain in prosecution? So it's a combination of
21 self identifying and then people showing and
22 engaging in the work in that second or third

1 chain level that allows us to then consider them
2 for openings when they do come.

3 MS. DEGHANI-TAFTI: Primarily a
4 desire to do it for the same reasons that I
5 talked about earlier, the ability to handle that
6 trauma. But like Sherry, we have people doing
7 other kinds of cases. Nobody jumps in and gets
8 assigned these cases straight out of law school
9 or even straight into our office if they're a
10 lateral.

11 What we do is watch, and this is the
12 advantage of having victim witness liaisons in
13 our office because we're very, very coordinated.
14 And the victim witness will watch and tell the
15 management team how a person deals with victims
16 and what they're good at and what they're not.
17 So once we're confident that they have the
18 litigation skills from the other cases, from
19 second chairing, and from specialized training,
20 we spend time with victim witness to make sure
21 that the way that they are interacting with
22 victims is trauma informed and sensitive.

1 MR. ROSENBAUM: So each organization
2 can sort of figure out how to network and find
3 its best candidates. One of the things we look
4 for in that process, though, is a very high EQ or
5 emotional quotient. I can teach trial skills to
6 most people who have the basic aptitudes for it.

7 If you're not giving the summation
8 that you're capable of, I can get you to,
9 especially working with you over a period of
10 time. But I can't teach you emotional
11 intelligence. I can't teach you how to connect
12 emotionally with other human beings.

13 There has to be that general aptitude
14 upon which you can build the victim-centric
15 interviewing skills and teach them about the
16 effects of trauma so you know that what you're
17 seeing may not be an indication of a lack of
18 credibility but rather something that's very
19 consistent with someone who's been through what
20 the victim is telling you. I can teach those
21 thing. But you really need to be a people
22 person.

1 You need to love people. You need to
2 feel their pain while compartmentalizing because,
3 yes, we do, as my colleague said, need to have a
4 very solid mental health base of people going
5 into sex crimes prosecutions who can put it in a
6 box and then go home and have a nice evening.
7 Maybe it means we're all a little dysfunction. I
8 don't know.

9 But after doing this for over 25
10 years, I don't know if dancing with the devil has
11 necessarily changed me as the old adage goes in a
12 negative way. But that emotional connection with
13 humans is necessary, and you cannot teach it.
14 And without it, you're not going to get survivors
15 feeling good about the process they went through
16 with the prosecutor's office. They need to feel
17 a connection.

18 CHAIR SMITH: Is there a minimum
19 amount of trial experience that you would want
20 prior to allowing someone to move on to your sex
21 offense unit or child abuse unit?

22 MS. MARCUS-KURN: We in our office are

1 just coming out of COVID. So we are getting
2 attorneys that are doing these cases that have
3 had very limited trial experience. So I agree
4 that emotional intelligence is very important.
5 Of course, you would want somebody who has had
6 prior experience. But I don't think any rules
7 about it is necessary.

8 MS. BOSTON: I might have had a
9 different answer pre-COVID. I think we all would
10 have. We've all experienced what it's like for
11 lawyers to essentially be out of trial for a few
12 years and for new lawyers to come on board. And
13 this is year three, and they have not yet had a
14 trial or maybe just one trial because of the
15 backlog. So I have a different take now.

16 I think what's more important to us
17 less than trial experience, obviously ideal to
18 have more rather than less, is whether that
19 person is capable of working in victim centered
20 prosecution an evidence-based way. Is that
21 person going to be able to relate to victims,
22 work with their victim advocate, and understand

1 the sensitivities of the matter? I think to me
2 right now given what we are facing with more
3 inexperienced lawyers, those are the types of
4 qualities that we have to look for and have to
5 see that those lawyers are able to show that
6 because they may not have as much trial
7 experience by not fault of their own.

8 MS. GOLD: I will just say that I
9 think it is an ideal. I mean, you're going to go
10 for the ideal. Go for knowing your way around
11 the courtroom.

12 I mean, I had a lot of trial
13 experience before I went to sex crimes as a state
14 prosecutor. And then I came to DOJ with a lot of
15 state trial experience which was significant for
16 me to then transition to the federal system.
17 There is a difference because I work with new
18 lawyers all the time.

19 There is clearly a different between
20 knowing your way around a courtroom and not. And
21 just quickly anecdotally had a trial in October
22 of 2019 where my colleague was in AUSA in Arizona

1 and both had a lot of trial experience and
2 specifically sex crimes experience. And this was
3 a police officer who sexually assaulted someone
4 and went to jail.

5 And it was all sorts of shenanigans
6 that we typically see in these kinds of trials.
7 And I remember thinking because the two of us had
8 so much trial experience, we were able to hold it
9 altogether as it was coming at is in all
10 different directions. And I don't know that I
11 would've been able to do that years and years
12 before or a lot of the lawyers in my office who
13 don't have that kind of experience.

14 So I totally agree with COVID and all
15 of that. We do the best we can. But if you're
16 looking for the ideal, the ideal is trial
17 experience.

18 MEMBER WALTON: I assume that all of
19 you appreciate as experienced prosecutors that
20 sometimes the status of an individual, whether it
21 be the person who's accused or someone who is
22 accusing, can come into play in the assessment as

1 to whether someone should be charged with a
2 crime. Do you have any ideas about -- and that
3 can apply in the military obviously as it relates
4 to the command status. Do you have any ideas
5 about internally what type of structure can be in
6 place to ensure that those type of extraneous
7 factors don't come into play and impacting on a
8 prosecutorial decision?

9 MS. GOLD: I could just answer for the
10 justice manual which governs how a DOJ prosecutes
11 that we are not to consider. It flat out says
12 popularity or any sort of outside pressure. Now
13 that's how I certainly function.

14 I can't say that that happens in
15 practice all the time, although it certainly
16 should because that is in our justice manual.
17 That is the way we're supposed to prosecute.
18 That's how all prosecutors should be.

19 Certainly, when you prosecute civil
20 rights crimes, your victims are marginalized and
21 seen as -- they have credibility issues baked in
22 simply because of who they are in society whereas

1 my defendants are sometimes they're government
2 officials. Sometimes they're law enforcement
3 officers. And I think there is that --
4 automatically, it comes into play.

5 A jury is going to believe my victim
6 less because of who, most of the time, she is.
7 But it's an evaluation of the evidence. And just
8 because we think a jury might have a difficult
9 time with it because of who these people are
10 shouldn't stop us. And it hasn't stopped me in
11 my own prosecution. So I think just the idea
12 where it is written out that popularity does not
13 play a factor. That counts for something.

14 MEMBER WALTON: Let me -- God forbid,
15 for example, that a judicial colleague was
16 accused of some type of sexual act. I mean,
17 obviously, consideration of how you proceed is
18 going to be in some way potentially impacted by
19 that status. Internally, what type of process
20 can ensure that that status is not going to be a
21 determining factor as to whether someone is
22 charged?

1 MS. MARCUS-KURN: I can say in my
2 office I guess there's three things that we do.
3 The first thing that we do is we have one of the
4 most senior prosecutors who reviews all the
5 warrants and all the grand jury originals. And
6 she probably is the most experienced.

7 And when she reviews it, she makes a
8 charging decision to charge. She writes up a
9 summary and it is sent to all the supervisors,
10 the chiefs and the three deputies. And we all
11 read it to ensure that it's appropriate.

12 Similarly if she chooses to decline
13 charges, we have a Felony 1 prosecutor review
14 that declination decision for every single one of
15 those. And the third thing we do which I think
16 is really important, we keep charts for things
17 that are kind of more susceptible to biases or
18 political influences or influences of somebody
19 has a louder voice or somebody has a softer voice
20 or somebody is more high profile, et cetera. And
21 that is that we keep charts of kind of cases that
22 are similar of similar facts.

1 And for example, we have a number of
2 cases that involve what we call kind of statutory
3 rape cases. We have to have four years apart for
4 child sexual abuse and the defendant has to be 18
5 or over. But we oftentimes get what appears to
6 be a consensual sexual assault involving let's
7 say 19 year old and a 14 year old maybe that has
8 resulted in a child.

9 But we definitely keep track of those
10 for decisions of do we charge a nonsexual crime.
11 Or do we decline to make sure that if we have a
12 19 year old who happens to be a very well known
13 football player, for example, or the son of a
14 well known politician that person isn't being
15 treated differently. So we keep charts of that
16 and we all confer.

17 And I guess the last thing we do is
18 when we have kind of a situation where we think
19 that there's something, whether it's a gender
20 bias which we have to be very sensitive of also
21 in this, we get together with groups of people
22 that are senior prosecutors in our section and

1 discuss it. So those are the four things we do.
2 And I think you're appropriate to bring it up
3 because it's very easy to happen.

4 MS. GOLD: Could I just add to what I
5 saying? I don't want to jump in too much. Most
6 of the cases that we wind up doing in the civil
7 rights division because they're all over the
8 country, inevitably when we come in, it makes
9 news, whether it's local news or national news.
10 And at least from the perspective of prosecuting
11 those types of cases where we know we're going to
12 make the news, all of our decisions are very
13 deliberate.

14 We have a similar process where we all
15 write up lengthy indictment memos that talk about
16 the state of evidence, the defenses. And
17 similarly, we'll make declinations. It is very
18 detailed, interviewed by a lot of people. So
19 these are not, like, unilateral decisions that I
20 make on my own and it's nothing that is ever made
21 lightly.

22 MS. BOSTON: So similarly, you have to

1 have checks and balances. I think that's the
2 most important thing in order to avoid that level
3 of influence. And in our office, we have a
4 deputy chief over our domestic violence and
5 sexual assault unit that would be responsible for
6 making decisions.

7 But above that person, we also have a
8 director of special victims unit and then up
9 through the chief assistant and to me. So what I
10 can say is for our seven deadlies in Georgia
11 which would include rape or aggravated sodomy,
12 those cases can't be dismissed or reduced without
13 your deputy chief's approval. If you're talking
14 about cases that we flag as high profile or media
15 cases generally involving a victim or a person
16 charged that has some level of influence, whether
17 it's who they are or what they do in the
18 community, those cases are flagged.

19 And I can tell you as the elected
20 District Attorney that those cases would never be
21 dismissed or reduced without going through me
22 with myself being the final decision maker. So

1 that, I guess, presents the question, right?
2 When you are dealing with a military tribunal,
3 there is perhaps -- and I don't know because I've
4 never served -- one person that can be held
5 accountable like myself and Parisa who are
6 accountable to the people and our decisions stand
7 as our decisions. And then we bear the good and
8 the bad that comes with either proceeding or
9 declining.

10 But ultimately in our office there is
11 a checks and balance system. And if you are
12 going to create a system, you have to consider is
13 there a person or persons that would be
14 responsible for signing off on major decisions,
15 especially around prominent people that are
16 charged or prominent people that are affected.
17 It happens on both the victim side and the
18 accuser side. And it's important to make all
19 those considerations and to have a system in
20 place.

21 MS. DEGHANI-TAFTI: I'm not sure how
22 big you anticipate these tribunals to be. But

1 the benefit of having a small office is that we
2 are talking about -- we would be talking about
3 this from the very beginning. And it would be
4 the assistant who's working with the detective.

5 It would be my chief deputy, and it
6 would be me. And if it was somebody that I had a
7 close personal relationship with, I would
8 actually ask for a special prosecutor from
9 another jurisdiction immediately. And we have
10 actually done that.

11 MR. ROSENBAUM: I was going to say the
12 collaborative nature of this is one of those
13 checks that you do get in place when you all sit
14 down and put your heads together. But it's not
15 just for who can be clever and what's everyone's
16 take on it. We deal with the core of the
17 messiness of the interactions that people have
18 with one another.

19 Nine out of ten of our cases are going
20 to be cases where people know each other in some
21 capacity before the incident in question. That
22 makes for a complicated nest to sort of unravel.

1 And your own personal experiences can color
2 whether something sounds credible and reasonable
3 to you or not.

4 And given that this is sort of the
5 most intimate aspects of our lives, we have
6 limited perspectives based on our own
7 experiences. So by sitting down in a
8 collaborative setting and everyone discussing it
9 at different points, you get that variety of
10 perspectives that can help you really assess the
11 credibility and legitimacy of what you're being
12 told. The other thing, though, that I think
13 guards against the nature of the individual in
14 these cases is the public will respect a fair
15 process or respect the outcome if the process in
16 getting there appears fair.

17 There will be some outliers who do
18 not. But the process has to be a fair one. So
19 in order to make these decisions, you need as
20 much evidence and the most comprehensive
21 investigation possible so that you can make a
22 sound decision.

1 Investigators think often in terms of
2 identifying who committed a crime or what crime
3 was committed. Prosecutors think in terms of
4 proving it, similar but not completely the same.
5 They overlap.

6 So the earlier prosecutor gets
7 involved in a case, the better from our
8 perspective which is why first degree crimes and
9 high and MR. HUTT: publicity crimes, crimes
10 occurring in schools and day cares, churches,
11 subways. We get very involved with the police.
12 And what does that mean?

13 It means from the onset we're
14 establishing relationships of trust with the
15 survivors. We're ensuring their continued
16 cooperation, their feeling of safety so they can
17 accurately convey the information as they're able
18 to access it. We're identifying additional
19 witnesses who may not have been interviewed yet.

20 We're securing electronic data,
21 financial transfers, bar receipts, videos from
22 people's door ring bells that the incident took

1 place walking by. There's so many things in the
2 modern world that putting our heads together, we
3 can enhance the prosecution early on and the case
4 assessment. So it's that collaboration and the
5 early involvement that ensure a better process.

6 And therefore, whatever the outcome
7 is, you can better justify if called upon to do
8 so. But if you haven't interviewed all the
9 outcry witnesses, if you haven't obtained
10 everything that's able to get obtained because
11 the investigator didn't do it, the outcome is
12 going to be circumspect no matter how good your
13 judgment was. So we really place a premium on
14 that early case enhancement on all -- the highest
15 level of crimes and those that are going to
16 garner an extra level of scrutiny potentially.

17 MEMBER BASHFORD: Martha Bashford. I
18 just want to follow up a little bit on what Eric
19 Rosenbaum just said. Ms. Dehghani-Tafti, I
20 believe you said your office doesn't have its own
21 investigators. For all of you, how important is
22 it do you think when we're standing up new

1 offices for the offices to have their own
2 investigators as opposed to solely relying on the
3 military police?

4 MS. BOSTON: It's invaluable in our
5 office. So as I stated, we have about 50-plus
6 investigators assigned to our office. I can tell
7 you that in the domestic violence and sexual
8 assault unit as well as the sexual exploitation
9 and crimes against children's unit -- and let me
10 also -- I failed to mention that we also have a
11 SAKI unit which stands for sexual assault kit
12 initiatives.

13 So they are doing pulled case sexual
14 assault cases. In all three of those units, they
15 have dedicated investigators that work in trial
16 team pairs. So every pair or shall I say quad
17 actually has a lawyer, a victim advocate, an
18 investigator, and a paralegal assigned.

19 So that investigator picks up a case
20 where the criminal investigator that made the
21 case left off. And I can tell you in a lot of
22 cases but in particular in sexual assault cases,

1 there are a lot of things that detectives that do
2 on the probable cause arrest level are not doing
3 where we have to pick it up and get it to the
4 reasonable doubt standard. And for anyone that's
5 ever done this work knows there is a huge
6 difference which requires a lot of work. So
7 investigators assisting prosecutors becomes very
8 important. Specifically, I'll say especially in
9 our cold case sexual assault unit, our
10 investigator is doing work on cases that are 15
11 and 20 years old.

12 So they are going out tracking down
13 long lost victims, getting old receipts,
14 information that sometimes has been lost in the
15 shuffle over decades. And we have to reinvent
16 the wheel and reinvent the file to prosecute
17 especially cold case sexual assault cases where
18 we are just perhaps learning a potential identity
19 of a sexual predator based on evidence from CODIS
20 Hits. So I would say, again, if you're creating
21 an ideal prosecution agency, absolutely you must
22 have investigators assigned to work the cases to

1 get it from charging to beyond a reasonable doubt
2 in front of a jury.

3 MS. DEGHANI-TAFTI: So speaking as
4 somebody who used to have an investigator when I
5 was at the Mid-Atlantic Innocence Project and was
6 working innocence cases but doesn't have an
7 investigator, as a prosecutor, it's astounding to
8 me how important they are. And I think it's
9 essential to have an investigator who is
10 independent of whatever entity that may be
11 prosecuted and I think particularly important
12 with the military. And for me, it would have to
13 be an investigator who is independent of our
14 sheriff's office and independent of the police
15 department because having somebody who reports to
16 me but is really an employee of the police
17 department would not provide that sort of
18 independence. But I am planning on advocating to
19 get an investigator in the next budget cycle.
20 And it's essential.

21 MR. ROSENBAUM: I was going to say
22 it's not a coincidence that five of the largest

1 District Attorney's offices in the country and
2 New York City all have very robust staffs of
3 independent prosecutors. That's not an accident.
4 They're generally retired first grade detectives
5 from the NYPD who work with special victims
6 units. Those are really high caliber
7 investigators.

8 And I need to be able to have my
9 assistants open their door, run down the hall,
10 and ask an investigator, can you get this done?
11 I just found out there's another eyewitness at
12 this location. Can you go talk to them, maybe
13 bring them in? I need a subpoena served
14 immediately for X, Y, Z.

15 If you're depending on the case
16 officer to get all this done, it's not going to
17 get done. That case officer is going to be on
18 assignment somewhere else. They're going to be
19 on vacation. They're going to have just made an
20 arrest about something else.

21 And meanwhile, you've got something
22 exigent. Maybe a complaining witness has come in

1 and they're recanting. You're not going to sit
2 in that room alone with a recanting witness.

3 Who's going to be in there with you?
4 Not one of your other lawyers. You don't want
5 them called as a witness in a case. You bring in
6 an investigator, and you don't have time to go
7 find the case person, detective who's assigned.

8 There's a myriad reasons that they
9 assist, and it's not always because the NYPD
10 would be worse at it or would compromise the
11 task. It's just they're not available and it's
12 not realistic. So I have a small squad, it's
13 like a strike force, for special victims that can
14 go out and act on every case very quickly. I
15 think it's absolutely essentially, Martha.

16 MS. GOLD: I could just add my
17 perspective come from we do more historical cases
18 because they're not emergencies because that's
19 when people call 911 and local police show up.
20 So I get them historically, and I work with the
21 FBI as I said before. I'm a little bit jealous
22 that you all get to stand up this new office and

1 think about what the ideal is because I fully
2 relate to everything that Eric just said.

3 I don't have investigators in my
4 office. I have to rely on the FBI. They have a
5 million other things to do, and they're not
6 particularly trained in sex crimes. But they get
7 assigned to it.

8 And they're not going to necessarily
9 know why I want every little thing that I want
10 because they haven't necessarily been to trial.
11 So the ideal, again, going back to that, I think
12 would be necessary to have the most effective
13 office you can is to have investigators who work
14 closely with the prosecutors. And they can all
15 work hand in hand to make the best case.

16 MS. MARCUS-KURN: I think if you're
17 trying to send the message that you're taking the
18 investigation and the prosecution of these cases
19 seriously, it's well worth the allocation of
20 resources to this and to have advocates. There's
21 no downside. And I think for all those reasons,
22 it's definitely beneficial.

1 CHAIR SMITH: How involved are your
2 attorneys in the investigation itself? So in
3 other words, the call is made. There's been a
4 rape at this location. The detective goes out.
5 At what point does your attorney get involved in
6 the case?

7 MS. MARCUS-KURN: Well, I mean, I
8 think we're all aware that our attorneys get
9 involved because they need to get involved
10 because they don't have the investigative
11 resources. And it's the attorneys that want to
12 develop the relationship with the victims because
13 ultimately going to trial is absolutely grueling
14 for the victim. And we have a huge burden beyond
15 a reasonable doubt, so we better know.

16 So we have very talented prosecutors
17 who are fantastic of thinking of how do we get
18 corroboration. What social media can we get?
19 Who are corroborating witnesses? But on the
20 other hand, you don't want your prosecutor to
21 become a witness because then they'll have to be
22 kicked off and they can be subpoenaed. So I

1 would say the people that decide to go into this
2 work are very enthusiastic and they're very
3 involved.

4 MS. GOLD: And I am one of those
5 people on the line. So I have this senior role,
6 but I'm also a prosecutor every day. So as I
7 said, my cases are all over the country, but I go
8 there all the time.

9 I mean, I was in Sacramento last week
10 and you meet the victims. You go where they are
11 most comfortable. I say to my colleagues, don't
12 wear a suit. Dress like a human. Dress like a
13 person, right, to be a human. Go where it makes
14 them feel comfortable, if it's a park bench, if
15 it's their house, if it's a library, if it's the
16 FBI office, whatever it is.

17 So sometimes the agents that I work
18 with bristle because they think that we're
19 separate. But as Sharon said, I need to know my
20 victim. If I'm going to get -- if I'm going
21 advocate for bringing charges to my bosses, if
22 I'm going to bring it to trial, then I'm going to

1 need to be able to judge his or her credibility
2 and have that relationship because it goes on for
3 years. And they have to be able to trust us.

4 So I say the earlier we can get
5 involved, and I know I was talking about that
6 earlier, the better. And I know that isn't
7 always the case in state offices. But to the
8 extent that you can be on the ground and be with
9 everyone involved and lay eyes on people and ask
10 the questions you would ask, that's the best way
11 to do it.

12 MS. BOSTON: So I interpreted your
13 question perhaps at what stage do we get
14 involved.

15 CHAIR SMITH: Correct. So I was
16 thinking that way back when I was a prosecutor I
17 would see what the detective had and then say, go
18 rip the carpet out, go do this, go do that. So
19 that's what my question --

20 MS. BOSTON: And so, to that, that's
21 exactly how we're still handling cases. The vast
22 majority of our sexual assault cases come in

1 after there's been an arrest and a file's been
2 turned over, and generally speaking I would say,
3 every investigator in our unit says they've got
4 to go back to square one.

5 Now we do and have developed great
6 relationships with the police department's
7 specialized units that handle these cases, and
8 the biggest of our jurisdictions, both, DeKalb
9 County Police Department and Atlanta Police
10 Department, have specialized police investigative
11 units that are dedicated to these types of cases.

12 So they're going to be the people that
13 we work with all the time, so we engage with
14 them. And it's not uncommon if they have a
15 question as they're actually putting together a
16 file, that they will also collaborate with the
17 attorneys and investigators in our office. And
18 sometimes even want to get our permission
19 perhaps, for the decisions that they make or
20 don't make.

21 But the vast majority of our cases
22 will come through with just a -- as a warrant,

1 and if it's some of our smaller police agencies,
2 there's no real investigative file and we have to
3 work it up, you know, from start to finish. I
4 will say that I have seen rape cases that come
5 through with a warrant that says rape, and a
6 police report, a one-pager. Obviously, we know
7 that's not enough to substantiate a rape charge
8 in felony court, and so our investigators would
9 have to build that file.

10 MS. DEGHANI-TAFTI: So, for us,
11 victim witness would be involved pretty
12 immediately, to reach out to the victim to offer
13 services. And they wouldn't talk about the case
14 at all, they would just be there as someone -- as
15 a point person for the victim, and to provide
16 them.

17 We have a SART in our jurisdiction,
18 and so at every stage there's a warm handoff, so
19 the victim will have already received a lot of
20 services by the time our victim witness gets to
21 them. We get involved pretty close to the
22 beginning, I get -- after every shift I get a

1 watch commander report where I can see, you know,
2 what happened and what was reported. And so,
3 when we see that I'll forward the information to
4 the folks that do these kinds of cases, and
5 they'll start talking to the detectives right
6 away.

7 MR. ROSENBAUM: For us, you can't walk
8 a case into court without it going through the
9 District Attorney's Office, so we know what's
10 going to court, how do the police know to contact
11 us for that riding program that I described? You
12 know, high profile and first degree crimes.
13 Because there are procedures in place that, when
14 you have a crime on this list, you must notify
15 the district attorney's hotline which reaches out
16 to one of my people who's on duty 24/7, every day
17 of the year.

18 So there's always someone to answer
19 the call on that list, and that's at arrest. But
20 we've also developed a category of cases for
21 which they engage in pre-arrest conferrals,
22 necessarily. They can -- with discretion -- call

1 us about anything if they want our input, but
2 they must call us, in Queens at least, on cases
3 where their theory is that the victim was
4 physically helpless. That is, they were asleep
5 or, more often, voluntarily intoxicated.

6 And cases with significant delayed
7 reporting, so not necessarily a day or two, or a
8 week, but two years later. The last thing you
9 want is for the police to run out, make an arrest
10 on an incident that occurred allegedly two or
11 three years ago and it arrives in court. You're
12 not going to know what to do in the time limits
13 that you then have for grand jury presentations
14 and speedy trial, and the rest of it.

15 The police will confer with us and
16 what we will often do in those cases is do joint
17 interviews, the police are present with us so
18 we're not witnesses, we're cumulative. But we
19 will get a handle on what's going on because,
20 man, like -- and I know that this is a lot of the
21 cases in the military -- they're these voluntary
22 intoxication cases, and a lot of them are also

1 coupled with delayed and outcry.

2 You want to be involved at the
3 earliest stages of the investigation that you
4 have the resources to devote to, I think it's
5 really essential in getting it right.

6 MEMBER CASSARA: I'd like to add a
7 question, sort of a factor to that question, one
8 of the other unique things that we have in the
9 military, besides what Judge Grimm said about
10 people rotating every couple of years out of a
11 job, is they're also rotating locations. So they
12 may be going from Fort Hood Texas to Fort Bragg,
13 North Carolina, to wherever, Germany, Korea,
14 whatever.

15 And I would just like your --
16 especially the young lady who travels the country
17 with DOJ, doing this, her perspective on the
18 particular complications of, you know, of sort of
19 jumping into a case and not working with the same
20 investigators every day. You know, you might be
21 there six months and then a new investigator
22 comes on. Or, you know, a new victim's counsel,

1 or a new, you know, whatever person within the
2 process may be changing, you know, two or three
3 times during your two years there as a
4 prosecutor.

5 MS. GOLD: The only thing I could add
6 is, it's a weird existence to keep having to go
7 into new jurisdictions, and sometimes I work with
8 people that I worked with before and sometimes
9 not. And just, like, you know, I don't think
10 it's actually uncommon how you have your
11 prosecutors or your lawyers moving around,
12 because that's typically how state prosecutors
13 work. But, you know, in the FBI the agents move
14 very often, so sometime over the length of a case
15 sometimes they have different agents.

16 I come in as the specialist so it's a
17 different kind of a world where usually the
18 AUSAs, those are the federal prosecutors around
19 the country that I work with, they may be the
20 civil rights point of contact or they may just be
21 somebody interested in working in this case with
22 me. It is rare, though, that I'm working with

1 somebody who has the specific expertise of civil
2 rights experience, right? So that's one of the
3 reasons why I go.

4 I have -- right -- I go early because
5 then I can have the continuity with the victim,
6 so at least she or he can trust me along the way,
7 and we do what we can to develop continuity
8 throughout the entire case. But, such as, you
9 know, the way life is, people move on. But to
10 the extent -- this is one of the reasons why we
11 talked before, is that, you know, do you want
12 people to move on to another unit or do you want
13 them to stay?

14 It's important for the case overall
15 because you have the institutional knowledge of a
16 case, but that relationship with the victim, it
17 sounds touchy-feely but it actually -- I mean,
18 there's such a level of trust that has to go
19 between me and my victim from the beginning
20 until, you know, sentencing, throughout trial in
21 order for her to tell a room full of strangers
22 the worst thing about her life.

1 So, you know, I don't have a good
2 answer other than, you know, it's part of this
3 whole kind of -- finding prosecutors who could be
4 human and be able to interact with people well,
5 is that, you know, that's why I go all over the
6 country, so I could, you know -- and I have
7 developed the skills of being able to, you know,
8 interact with people who are not necessarily like
9 me, but having this common goal of getting this
10 case to the finish line.

11 I don't know that I was able to answer
12 anything too helpful other than, it goes back to
13 finding people who are adaptable and able to get
14 along with other people.

15 MS. BOSTON: So I think if you have a
16 situation as you do in the military, where it's
17 not uncommon for people to move to various bases,
18 within the system you're going to have to
19 contemplate what is going to be my continuity for
20 the victim. Is that going to be a victim
21 advocate that is consistent? Because, you know,
22 we obviously have situations where lawyers leave

1 our offices and join other prosecution offices,
2 or other government agencies, all the time.
3 Sometimes before a case resolves itself in the
4 criminal justice system.

5 So, in an ideal world, it's the same
6 people from start to finish, but in practical
7 terms it's not likely. But we do try to have a
8 level of continuity, and a victim advocate could
9 be a way that you can do that because victim
10 advocates aren't going to likely move around as
11 much as say, a lawyer would.

12 And you just need to be victim-
13 centered on that decision, because remember that
14 every time you have a new lawyer come onto a
15 case, that victim is going to be required to be
16 re-traumatized by telling that story again and
17 again, because the lawyer coming on the case
18 needs to hear it and needs to understand exactly
19 what happened. And so, just know that every time
20 there is a party that's moved, we are engaging in
21 re-victimizing a survivor, and so that just needs
22 to be a part of the calculus even if it is

1 unavoidable.

2 MEMBER GOLDBERG: Can I jump in?
3 Because I've got a question that -- first of all,
4 thank you very much, and I'm sorry I jumped in in
5 the middle. But I have a question that follows
6 up on what you were just saying, and also on an
7 earlier thread in the conversation where several
8 of you talked about EQ and sort of the things you
9 can't teach somebody about relating to others.

10 And so, the two questions are, if you
11 haven't already addressed them, do you have
12 something that you can share with us about how
13 you screen for that? That may be useful for our
14 work here, I know it's, you know, it's one of
15 those things that could easily be described as,
16 you know it when you see it. But when we think
17 about systematizing, the question of, well, you
18 know, how can you make that assessment, and also
19 make that assessment in a fair way that
20 recognizes that people are different. If you
21 have thoughts that you can share on that, I think
22 that would be very helpful.

1 And then on the second point, you
2 know, it's of course a significant issue that
3 there is turnover in victim advocates under
4 various titles, and it would be helpful -- and
5 maybe you've already shared this -- to know more
6 about your best practices for managing and sort
7 of supporting a victim through the turnover, but
8 and also ensuring that the handoff that happens
9 between one and another person is as good as
10 possibly can be. And if there are researches you
11 can point us to, outside of even what you do in
12 your offices, as I imagine there are, that would
13 also be helpful to know.

14 And I should've introduced myself for
15 people who can't see the visual, I'm Suzanne
16 Goldberg from the DAC-IPAD.

17 (Simultaneous speaking.)

18 MS. BOSTON: I'll speak to the second
19 part of your question around victim advocacy.
20 And so, I will say that, when I took over this
21 office the previous administration only had nine
22 victim advocates serving the office, we now have

1 over 23. So first and foremost, you need to make
2 sure that you have a robust enough program
3 because essentially, when I came on board, there
4 was a small number of advocates which meant they
5 only touched -- they triaged.

6 And they had a process, some people
7 just got a letter, some people got a phone call,
8 and other people really got walked through the
9 system. As you can see, that's just not viable
10 victim advocacy. All of our victim advocates are
11 NOVA-certified, and, I mean, that's another thing
12 you have to consider because there generally are,
13 unlike being a lawyer, where carrying a law
14 degree is the minimum that you have to do work in
15 law, victim advocacy in many prosecutions based
16 offices, don't have specific requirements. So I
17 think it's important to establish what
18 requirements you think are important in your
19 specific space.

20 I will say, our office is very
21 different than other prosecution offices in the
22 state of Georgia, there's some people that, you

1 know, if you've graduated from high school and
2 you say you want to be a victim advocate, you can
3 be a victim advocate, right? That would not fly
4 in our office, we require specialized training,
5 we require experience in the field, and then we
6 put our folks through certification.

7 I say all that to say, is that we do
8 use our victim advocates for the handoff.
9 Handoffs are going to happen and so we want our
10 victim advocate to be that constant, if we're
11 going to lose a lawyer or an investigator. And,
12 generally speaking, that is the person in the
13 unit that will really shepherd the victim through
14 the process, even as there might be different
15 judges, or different prosecutors, different
16 faces, we want that constant.

17 Also, our victim advocates sit through
18 the entire trial, and every proceeding, with our
19 victims and/or their families. So they are also
20 the constant through what can be a chaotic and
21 hectic trial process, sitting with them, walking
22 it through them, being with them every step of

1 the way until a verdict is read, and then of
2 course shepherding them through the sentencing
3 process and victim impact statements.

4 So I guess my point is, is I think the
5 underpinnings of losing people is a strong victim
6 advocate program.

7 MS. DEGHANI-TAFTI: I couldn't agree
8 more. Our victim witness advocates, not only are
9 there throughout the process but -- so they
10 initiate the first contact with our office, and
11 they're there for everything. So every meeting,
12 every hearing, they're -- it's like they're their
13 support person.

14 So that's really important but I also
15 think the structure of the office is really
16 important for continuity, because if you have a
17 process where, you know, it's sort of like an
18 assembly line where one set of prosecutors deal
19 with the case before the preliminary hearing and
20 another set of prosecutors deal with it when it's
21 in this other court.

22 What we do is we have vertical

1 prosecution, and in Arlington that didn't exist
2 until January 2020. So now when a prosecutor
3 gets a case, that's their case and they are with
4 that case unless, you know, they leave the
5 office, essentially. We may add a prosecutor for
6 a second chair but we don't shift around cases
7 within the office.

8 MS. GOLD: You know, I was going to
9 say, Ms. Goldberg, I think people tell you who
10 they are, we just don't listen. In looking for
11 people who are particularly well qualified, one
12 is I like to see with my own eyes, or one of my
13 deputies, we go to see them on trial. See how
14 well they're connecting with the people there and
15 the manner in which they comport themselves, are
16 they a bean counter? Just presenting the hard
17 facts, is there a palpable connection between
18 them and a witness? Maybe that adds, maybe it
19 doesn't.

20 However, I look into their resumes and
21 their backgrounds, and I try to see if they have
22 the human kind of activities that might be

1 indicative of someone who wants to work with
2 messy human situations. So I'm looking for
3 people who have anything on their resume
4 involving trauma, refugees, victims, social
5 organizations in college. As opposed to, is this
6 someone who interned at Goldman Sachs who did a
7 summer at a law office, who only did a sports
8 team in college. There is no indication that
9 this is someone who is community oriented or
10 wants to work with those messy emotional
11 situations.

12 So I let them tell me who they are
13 through their backgrounds also. Now if they're
14 applying for the position, they obviously have
15 some interest. I don't know of what it's born,
16 but I'm going to talk to them about that during
17 the interview.

18 I wish I had a Rosetta Stone that
19 would just, you know, clearly indicate who's best
20 suited for this, Ms. Goldberg, but I think that
21 these things are at least beginning points of
22 what to look for, and red flags if they have

1 nothing in their background that suggests this is
2 going to be a good fit. I would ask them about
3 that and let them help me understand why they
4 think they'd be a good fit.

5 MS. GOLD: I was just going to add
6 about the transferring cases, it's great to rely
7 on our victim advocates if they're great, and I
8 rely on the one I work with all the time, but I
9 also think the onus is on us as prosecutors that
10 if we're leaving or going to another unit, then
11 we have to leave our cases in order so that the
12 person coming after us can follow it.

13 And we have to flat out say to our
14 victim, come on, I want to introduce you to the
15 prosecutor who's taking over for me. I mean,
16 that's the human thing to do because we represent
17 -- like I said before, you know, one of the
18 worst, if not the worst, thing that ever happened
19 in their life, and they rely on us. I mean, I
20 say to my victims all the time, if you don't hear
21 from me for three weeks, don't think I forgot
22 about you, because I know they're sitting on pins

1 and needles.

2 So I think the onus is on us as
3 prosecutors, that we have to write out a memo, we
4 have to introduce our victims to the prosecutor
5 succeeding us, and make that part of our
6 obligation. That's the way to transfer and, I
7 mean, victim advocates are great, we should lean
8 on them but it's also our responsibility.

9 MS. MARCUS-KURN: Just two quick
10 things to add -- I agree with all of the above --
11 and that, for the pass off, I do think it's
12 important, if you can, to have the victim's story
13 recorded. Whether it's in a grand jury, whether
14 it's by your law enforcement officer, video if
15 possible, at some appropriate time. I think that
16 helps so that every new prosecutor doesn't have
17 to start from the top, I think that helps with
18 reducing the trauma.

19 And the other thing I would say is,
20 maybe consider giving your new military
21 prosecutors the opportunity to work on a small
22 sexual assault case. I have several people on my

1 staff doing felony sexual assault that never
2 would've thought, coming into the US attorney's
3 office, they were interested in doing this.

4 They might've been the sports guy, you
5 know, who has siblings but had never done it
6 before or something. So I really recommend that
7 and I think that you will see early on who are
8 the ones that want to interface with victims, and
9 I would really listen to them because I think
10 people that want to do this work, I think they
11 know it. And people that don't, in my office,
12 they go to homicide and they have no interest in
13 dealing with us.

14 MEMBER WALTON: Let me just ask,
15 considering your ethical and constitutional
16 obligation as a prosecutor to provide exculpatory
17 information to the defense, and the unfortunate
18 reality that there have been a number of
19 convictions that have been overturned because of
20 the failure to comply with that obligation, are
21 there any processes that you believe an office
22 should have in place to best ensure that that

1 doesn't occur?

2 MS. MARCUS-KURN: Well obviously
3 that's of primary importance to us, and I think
4 in our office, because we deal with so many law
5 enforcement offices, and we have -- because we,
6 you know, as Eric said, many of the sexual
7 assaults involve people that you know, and some
8 of them might have a history together, which
9 means that there's other cases that the local law
10 enforcement had dealt with.

11 So I think it's educating law
12 enforcement, obviously it's instilling from top
13 down, and you have some top people here, but it's
14 absolutely instilling from the top down that this
15 is of primary importance, that everything is
16 turned over, everything that is potentially
17 helpful, and basically almost open discovery but,
18 you know, within the confines of the law.

19 And the other is to educate the law
20 enforcement, I'm doing a training next week to
21 youth division and sexual assault division on,
22 when they take a picture of something they have

1 to turn it over, when they get a voice mail from
2 a victim they have to turn it over, because
3 sometimes they just don't know that these things
4 that, you know, they don't know, they don't think
5 might be something that could be helpful to the
6 defense, they haven't thought about it. So,
7 education, education, and keep reinforcing it as
8 we do in our office.

9 MS. GOLD: And, Judge, you said it.
10 I mean, it is our constitutional obligation, and
11 that is drilled into us. And so, it is --usually
12 my way of thinking is, if you're looking at a
13 piece of evidence and you have a question in your
14 mind as to whether you should turn it over, just
15 turn it over. If there's ever an issue when it
16 comes to the victim's privacy then we can do
17 protective orders and we can have an in-camera
18 review. But it is, you know, it is a law that we
19 are told of it at our first appearances and we
20 all know it, and is not worth our law license.

21 I mean, if the defendant is guilty, he
22 will be guilty regardless of whether we turn

1 piece of evidence over or not. So I say to all
2 the lawyers I work with, when in doubt just turn
3 it over.

4 MR. ROSENBAUM: I think there's an
5 internal ethos that has to be sort of stated,
6 literally stated, and reinforced regularly with
7 your staffs. Our default here, while we a have
8 very comprehensive set of discovery statutes in
9 New York state, our default is, if you have it
10 turn it over. If it exists turn it over, and
11 then those items that you think should not be
12 turned over, you come and see a boss. That's how
13 much we believe in turn it over, for you to not
14 turn it over you actually need executive
15 authorization, because there is almost nothing
16 that you don't turn over.

17 Discoverability does not equal
18 admissibility and we try to teach the assistants
19 to understand that early on, and just as Ms. Gold
20 just said, you seek protective orders, you seek
21 orders in limine, you tailor the remedies, you
22 know, to the specifics of the piece of evidence

1 you're concerned about. But internally, I think
2 there must be regular reinforcement by the bosses
3 to those working for them, we turn it over. That
4 is what I want you to do, that's what I'm asking
5 you to do, that's what the district attorney has
6 ordered us to do, it has to become part of the
7 organization's DNA.

8 MEMBER GARVIN: If I may -- this is
9 Meg Garvin, I think question is mostly probably
10 for our D.C. prosecutor, just because I happen to
11 know that your law is more akin, when it comes to
12 victim's rights, than many of the other
13 jurisdictions. What is your experience, or what
14 recommendations do you have for a special unit
15 that has -- that's focused on these, as
16 prosecutor working with victim counsel?

17 Because, of course, right, in the
18 military the victims of these crimes have access
19 to special victim counsel, or victim counsel, or
20 victim's legal counsel, there's the three
21 different names of it. And then federally, of
22 course, under 18 USC 3771, we have the rights,

1 and I know that in D.C. there are some lawyers
2 for victims, helping them exercise those rights
3 in criminal investigation and prosecution around
4 sexual crimes.

5 So I'm just curious, if you have
6 guidance based on your special -- based on your
7 expertise for how this -- a new division could be
8 set up and taught about how to do that
9 collaboration specifically?

10 MS. MARCUS-KURN: So we have -- yeah,
11 we have several law firms and several NGOs that
12 have counsel, and when a victim asks and we, you
13 know -- we tell a victim they have a right to
14 have a lawyer -- if they ask, we give them, kind
15 of, the list -- we're not allowed to sponsor one
16 of them. So, I mean, we, you know, they handle a
17 variety of things and they're extremely helpful
18 to us, because when the defense seeks to get,
19 let's say, all the educational records, or
20 medical records, they handle that. So we work
21 with them, to assist with those things.

22 MS. GOLD: And you talked about the --

1 (Simultaneous speaking.)

2 MEMBER GARVIN: Do your prosecutors do
3 any --

4 MS. GOLD: I'm sorry.

5 MEMBER GARVIN: I'm sorry. Do your
6 prosecutors go through any special training
7 around that unique, you know, because sexual
8 violence is different, is there anything
9 particularly around the right to confer and how
10 early you start to confer with either, the
11 victim, if they're represented or not?

12 And maybe the answer's no, there's
13 nothing special or unique, you treat all the
14 victims the same. I'm just curious.

15 MS. MARCUS-KURN: Yeah. I mean, the
16 only training is if anybody has a lawyer, they
17 obviously have to get permission to be able to
18 speak with a victim. But I don't -- I'm not
19 quite sure what else.

20 MS. GOLD: Obviously in the --

21 MEMBER GARVIN: Thank you.

22 MS. GOLD: Obviously in the federal

1 system we do have the Crime Victims' Rights Act,
2 I have victims, you know, all over country who
3 have a civil attorney -- sometimes they do,
4 sometimes they don't. Especially when you're
5 doing civil rights prosecutions, they often have
6 civil attorneys who want to file lawsuits.

7 Sometimes the civil attorneys are
8 great and they help facilitate my relationship
9 with them, sometimes they come in later and they
10 aren't so great, and they are looking to have
11 their lawsuit, which, you know -- it presents,
12 quite frankly, what will be arguably a motive to
13 lie, for the victim, right? You're just doing
14 this for money. I mean, we know that that isn't
15 the reason usually, I say to them, why did you
16 hire a lawyer? And they explain, they wanted
17 justice, or whatever the explanation is, but the
18 appearance is, you know, that they're in it for
19 money.

20 Like I said, sometimes it's really
21 helpful, sometimes the civil attorneys file
22 complaints where the narrative in the complaint

1 is totally different than what the victim told
2 us, and that creates potential areas for unfair
3 impeachment, especially when the victim hasn't
4 seen the complaint. Obviously if she has, since
5 we have to reconcile that, make a decision based
6 on that but it is a -- it's not always the best
7 relationship, sometimes it is but it certainly
8 has its pitfalls.

9 MEMBER GARVIN: Thank you. I just
10 want to clarify, I was asking more about the
11 victims rights lawyers that would help in the
12 criminal, not the civil lawyer which is more akin
13 to the victim counsel, victim legal counsel. So
14 just to clarify the question. Thanks.

15 MS. GOLD: Yeah. From a crime
16 victims' rights perspective, I mean, we are very
17 cognizant of the Crime Victims' Rights Act.
18 That's why we have our victim advocates, that's
19 why you make sure that the victims know of every
20 phase of the proceedings, and follow that.

21 So we don't have a separate lawyer to
22 represent them for that, that's our job, to make

1 sure that they -- that we adhere to those rights
2 and uphold them.

3 MS. MARCUS-KURN: We actually have a
4 statute in D.C. called SAVRAA that allows, a
5 victim has a right to have an advocate if they're
6 13 and up -- an independent advocate who's not
7 connected to the prosecution.

8 MEMBER TOKASH: Megan Tokash. So, the
9 new offices that will be established, the Office
10 of the Special Trial Counsel within the
11 Department of Defense, will be overseen and
12 executed by the service secretaries -- so that is
13 the secretary of the Army, the Navy, and the
14 Airforce. They will be run by military members
15 in uniform, obviously, they're the ones who would
16 be able to actually try these cases.

17 My question is, especially for the
18 District Attorneys and the Commonwealth's
19 Attorney, what advice would you give to the
20 service secretaries who are facing the daunting
21 task of standing up independent prosecutorial
22 offices -- the first of its kind ever in the

1 military?

2 And specifically with respect to
3 policies on prosecutorial guidelines, uniformity
4 of those guidelines, and/or of screening
5 mechanisms and charging decisions, and the level
6 of discretion that those counsel in those offices
7 can or should have, with respect to acceptance
8 declination decisions and/or charging decisions?

9 MR. ROSENBAUM: I think that one of
10 the key things someone who's in charge of an area
11 can do, is to find the experts and then rely on
12 them. And to not micromanage the experts, you
13 must rely on their expertise. They have subject
14 matter expertise that you don't and you need to
15 trust it, or you hired the wrong people. So, to
16 make sure you're surrounded by that kind of
17 talent, you build off that.

18 Here in terms of the guidelines and
19 criteria, I think it's a very hard -- it's a very
20 hard question -- which is why you're asking it --
21 and challenge because the cases, they're alike in
22 ways, but they're also distinguishable in most

1 ways. Each one is different and that's, again,
2 why years of experience help you better to assess
3 each unique one as is it comes in.

4 Keeping the victim informed at every
5 critical stage of litigation is essential in
6 both, keeping their cooperation, and making sure
7 that people with axes to grind against your head
8 aren't running around in droves outside in the
9 world. You want to keep the victims informed at
10 every stage, so the guidelines need to
11 incorporate and require that much.

12 There is no disposition without it
13 first, before it is conveyed -- because the
14 district attorney is the one that conveys any
15 offers in our system -- we speak to the victims
16 first. They don't have to agree with us but we
17 must understand their position, and we relay that
18 position to the court, in total candor. It's
19 when you don't do those things that it all comes
20 off the rails later.

21 Charging decisions, those -- after the
22 grand jury -- are done by the senior prosecutors

1 in conjunction with the line assistant who does
2 the initial investigation in the early stages,
3 grand jury has to be authorized by the subject
4 matter experts. Following a grand jury
5 indictment, dismissal of an indictment is treated
6 more seriously than anything else in our office
7 from the victim side, you know, I'm not talking
8 conviction integrity and the defense side.

9 If you've authorized a grand jury
10 proceeding and you've obtained an indictment, you
11 dance with the one you brought, which is your
12 indictment. If things have changed so much that
13 the indictment must be dismissed, that is one of
14 the very few things that has to be signed off on
15 by the bureau chief, the division executive, the
16 chief assistant, and the district attorney, to
17 give you an idea of how important that is.

18 And an assistant knows that, when they
19 come and say, here's what I recommend in this
20 case, you really have to mean it and be
21 thoroughly versed in it. So what are those --
22 the last thing I'll say in terms of the

1 standards, because we've touched on the
2 difference between probable cause and proof
3 beyond a reasonable doubt, when do you not go
4 forward to a trial, say? It's not because you
5 don't think you're going to win, I don't even
6 know what our conviction percentages are because
7 it's not a metric we care about.

8 The standard I use, and most of us in
9 the office would use is, the reasonable
10 probability that it's possible to get a
11 conviction. If there is no reasonable
12 probability that 12 people are going to agree and
13 convict, then why are you using everyone's
14 resources? And why are you putting the victim
15 through this? Now, you may not win, but if you
16 know ahead of time you have no reasonable
17 probability of obtaining a conviction, this can't
18 be a pyrrhic exercise.

19 And that's sort of how we would vet,
20 have things come off the rails enough that it
21 really can't proceed to that point, and that's a
22 totality of the circumstances analysis.

1 MS. BOSTON: So we live in an age
2 where people need to see things in writing in
3 order to understand what their duties and
4 responsibilities are, and I probably engage in
5 disagreements with my chief assistants on a daily
6 basis about which policies should be in writing,
7 and which should just be understood but not in
8 writing. And I fall down on the, if there's
9 anything that we expect of our lawyers to do, it
10 should be in writing.

11 So I will say these two things.
12 First, for external processes, we have a child
13 abuse and sexual assault protocol for external,
14 right? So the expectations of the DA's office,
15 the expectations of the various agencies that we
16 may interface with from the moment a victim
17 perhaps goes and gets a SANE at the rape crisis
18 center, all the way through to how the police
19 department is going to handle it.

20 And there are certain expectations,
21 and having a written protocol that all of those
22 actors sign on externally, really guides the

1 process and holds everyone accountable to the
2 standards that you've all agreed to.

3 Internally, there should be a policy
4 as well, delineating all of those things. Are
5 there certain types of cases, or certain actions,
6 that require some level of leadership to make a
7 decision on? And in our office, we put that all
8 in writing so that everyone understands, there
9 are certain things that a deputy chief is
10 emboldened with the authority -- well, let me
11 back up.

12 There are certain things that a line
13 prosecutor can make a decision on, there are
14 certain things that are limited to a deputy
15 chief, or all the way up to me, right? And so
16 that's all very clear and delineated so that
17 everyone understands who is the primary decision
18 maker for certain things, but also the protocols
19 that are expected to be in place.

20 And the things that you need to do,
21 rather than, oh, I feel like I should get, you
22 know, no one in my office -- we always say, we

1 have an open door policy, if you have a question
2 you're free to go and ask. But there are certain
3 things that, even if you feel resolute in the
4 decision you have made, it is not your decision
5 to make, right? And that there is someone else
6 that has to sign off on that.

7 So having written protocols, both, how
8 you want cases to be handled internally as well
9 as any external relationships that you may have,
10 puts everybody on the same page and no one can
11 say, oh, well I didn't know that, or I just
12 joined the office six months ago and nobody told
13 me about that policy. So I think having those
14 things in written guidelines.

15 Now, I say that to say, guidelines and
16 recommendations are not meant to handcuff anyone
17 and are certainly not meant to take away
18 discretion, and that's important in, I think, the
19 culture of introducing those policies. Because
20 they can easily be used by people as CYA, right?
21 Or, it's not my decision to make so I'm just
22 going to pass the buck.

1 We still have to work really hard and
2 force people to say, well tell me what your
3 thought process is. I understand that I'm still
4 going to make the decision but I need to hear
5 from you what it is you think should be done, and
6 what is the basis of that understanding.

7 CHAIR SMITH: So do your offices
8 typically prosecute sexual contact offenses? And
9 if you do, how do you do that? So not just
10 penetration, but a contact kind of offense.

11 MS. MARCUS-KURN: Yes, our statute, as
12 I'm sure other statutes do -- and the federal
13 system does also -- there's a difference between
14 a sexual contact and a sexual act. So sexual
15 contacts are touching and then our statute
16 clearly identifies where on the body, what are
17 considered areas. And typically the sexual
18 contacts have less potential jail time than a
19 sexual acts. The sexual acts are penetration in
20 the normal orifices and also by object, but it's
21 all just outline by statute and it mirrors the
22 federal definitions.

1 And just one other -- sorry, one other
2 thing. We did have a new statute a couple years
3 ago for child cases, and it lists out what are
4 sexually suggestive conduct, which is different
5 than that. And there's a couple additional
6 things, and one of them is an individual
7 masturbates in front of a child, that's a sexual
8 crime against a child, for registration purposes.
9 And engaging in kissing by using the tongue, so
10 these are -- you know, that's much more expansive
11 than sexual contact, sexual act.

12 MS. GOLD: And I was just going to say
13 yes, we do. I mean, the statute that we use --
14 without getting too much in the weeds -- as I
15 said, is the deprivation of constitutional
16 rights. So it's the idea that government actors
17 owe a constitutional right to the people that
18 they come into contact with, and that's why we
19 have federal jurisdiction over all sorts of
20 government actors.

21 And I have brought cases where there
22 is groping, everything from a police officer

1 putting his mouth on someone's breast, to a state
2 school employee pretextually groping female
3 athletes under the guise of athletic training.
4 So we do prosecute those, for sure.

5 MS. BOSTON: So the act that you're
6 describing, in Georgia would -- primarily if it's
7 an adult -- would be a sexual battery, and so
8 that would be a misdemeanor and go to our
9 misdemeanor office. Although it is not uncommon,
10 in some of our criminal cases, that we would
11 reduce a felony to a sexual battery, in our
12 office.

13 And I will also say that where we may
14 prosecute those cases, particularly in the area
15 of a law enforcement officer engaging in sexual
16 misconduct against someone, that was not
17 penetration related, we would probably charge the
18 misdemeanor but also we would look to charge the
19 felony of violation of oath of office.

20 So anytime we have an actor, a state
21 actor, that's involved in a sex crime against
22 someone, in the course of their duties, we

1 generally are -- even if we only have that
2 misdemeanor sexual battery -- we're likely to
3 charge a felony violation of oath of office,
4 which is a felony.

5 MS. DEGHANI-TAFTI: We have grades of
6 sexual battery and we would treat those the same
7 as the more serious sex crimes, so they would be
8 going to the same people because the victims are
9 no less violated because it was over the clothing
10 as opposed to penetration.

11 MR. ROSENBAUM: At the state level
12 where I am, acts of forcible compulsion, if
13 they're touching, are felonies. Lack of consent,
14 no means no, a groping on the subway when someone
15 was -- didn't see it coming, those are
16 misdemeanors, but the forcible compulsion crimes
17 are still felonies.

18 We also have a class of crime similar
19 to what's been described of misdemeanor -- what
20 would be misdemeanor touchings -- but they're
21 felonies by nature of the position that the actor
22 holds. So medical personnel for instance, and of

1 course medical treatment cannot touch, even if
2 the victim consents as a patient. An officer in
3 the course of an arrest cannot engage in what
4 might otherwise be described as consensual sexual
5 activity, because honestly, how can it ever be
6 consensual.

7 There's other status related offender
8 statutes that we could use, and those would come
9 here just as any penetrative act.

10 CHAIR SMITH: We're supposed to wrap
11 things up, so if anyone has any last minute
12 question, maybe one last question? Otherwise I
13 think we're going to thank our panelists and take
14 a break.

15 Nothing else. So thank you very much
16 for spending your afternoon with us.

17 MR. ROSENBAUM: Thank you.

18 (Whereupon, the above-entitled matter
19 went off the record at 2:59 p.m. and resumed at
20 3:16 p.m.)

21 MS. SAUNDERS: Welcome back from
22 break. If everyone could find your seats. So,

1 we had a terrific panel of our civilian
2 prosecutors that we all just heard from. But of
3 course, we have such a terrific amount of wealth
4 of experience on this committee. Prosecutors,
5 defense counsel and others.

6 So, we had asked four of our own
7 committee members to spend a few minutes each to
8 talk about their own experiences and their
9 perspectives on some of the issues that we've
10 been talking about during these sessions.

11 So, we've asked Ms. Bashford,
12 Mr. Kramer, for defense perspective in his case,
13 Ms. Long and Meghan Tokash, if the four of them
14 would be willing to each spend a few minutes
15 discussing their experiences and perspectives.

16 And then, hopefully, after each of
17 them has been able to speak, hopefully everyone
18 else. If anyone else has something that they
19 would like to add, or any questions that they
20 would like to ask, we could engage in kind of a
21 roundtable on some of those issues.

22 So, Ms. Bashford, would you like to

1 start us off? I think you're on mute. Oh, there
2 you go.

3 MEMBER BASHFORD: I don't think it's
4 a surprise to any of the committee, that for
5 years the services have been under a cloud of
6 suspicion that they don't take sexual assault
7 seriously.

8 Whether there's basis for that or no
9 basis for that is not my point. My point is a
10 foundational question that I think these new
11 units have to decide is -- and it relates to Eric
12 Rosenbaum's facing forward, that there's
13 transparency and there's confidentiality.

14 And you have different audiences. I
15 mean, the first and prime-most audience is the
16 service members themselves.

17 They have to feel that justice is
18 being done. They have to feel safe. They have
19 to feel if you report a crime, it will be
20 investigated thoroughly and taken seriously. And
21 if you're accused, the same thing.

22 So, that's the first and, I think, the

1 most important audience. The next audience is
2 the general public. And you have another
3 audience, which local prosecutors don't usually
4 have, and that's Congress, who is intensely
5 interested in what you all do in this area.

6 So, transparency would allow everybody
7 to see every step of what you're doing. The
8 problem is that it comes right up against
9 confidentiality.

10 It's less important if the decision is
11 made to go forward, because everybody then can
12 see what happens as it plays out in court.

13 If the problem is whether there's a
14 decision not to go forward. You can document it
15 all you want to in private memos, as some of the
16 earlier panel had said. But by definition, the
17 private memos, you can't really share them.

18 And many times a high-profile case,
19 the decision is not to go forward because the
20 complainant's credibility has been hopelessly
21 shredded.

22 And I don't mean in small ways. I

1 mean, in huge ways. But you can't say that.
2 Because if you say that, it's a huge disincentive
3 for other people to come forward. Why would I
4 come forward and report a case if I'm going to be
5 exposed like this?

6 On the other hand, if you don't say
7 it, my recommendation would be that you keep that
8 very private. Then, there's always the suspicion
9 that you caved to external forces.

10 So, I don't know that I have the
11 answer. I only have a recommendation, which is,
12 in many cases I handled, I would have loved
13 people to have understood the reasons for
14 declining.

15 But that's on a personal level. On an
16 institutional level, you simply can't do that.
17 So, I don't have any answers, but that would be
18 my recommendation.

19 And everybody loves transparency. And
20 so, I would say make the process as transparent
21 as you can. But you can't really make the
22 results, or why you got those results,

1 transparent. That's all I have.

2 MEMBER KRAMER: Thank you. One thing
3 I've learned is that I would never get a job that
4 required an empathy quotient based on my resume.

5 I would have been one of those out of
6 college. And now, for 42 years, I've
7 been messing with all the messes in people's
8 lives.

9 So, several things worry me, but also
10 obviously can be taken care of. There's
11 certainly a lot of benefit in specialization,
12 especially nowadays, with scientific evidence and
13 the volume of electronic evidence and social
14 media.

15 But I also wonder if there's some loss
16 in the general, when lawyers specialize in one
17 thing and don't know much about other things.
18 So, there's that tension there.

19 There's also the worry, I think, that
20 an agency set up for specific purpose has to
21 continue to justify its existence.

22 We all know the theory of

1 bureaucracies, and so that they make decisions
2 sometimes with the perception of how it will
3 affect their particular special agency and
4 keeping that in mind.

5 So, sometimes -- and when I heard
6 about the -- again, it's all a double-edged
7 sword. The investigators who specialize in this
8 and may become -- and the same thing with --
9 well, the investigators who specialize in this,
10 and you always worry about them losing their
11 objectivity.

12 At the same time, they have to have a
13 proper empathy quotient. They also have to have
14 a sense of objectivity in there, positions and
15 the function of the office that has to somehow be
16 accounted for, and particularly, I think, with
17 the special victims advocates.

18 Their job is to represent and help the
19 victim. Again, it could come to the point where
20 objectivity has a conflict or comes in tension
21 with that process during the whole process of --
22 that's an issue I think that's important in

1 offices like this. Setting up new offices like
2 this.

3 I think one thing about the decision,
4 there's two big -- and if you have specialized
5 prosecutors that you believe are experts in the
6 field and you trust their decisions, there's two
7 primary decisions that come about. Whether to
8 file charges in the first place, or seek the
9 filing of charges. Whatever the procedure may
10 be.

11 And the second, of course, we heard a
12 little bit about, if there's charge pending and
13 whether to dismiss them for some reason along the
14 way. A witness changes their story, a new piece
15 of evidence comes up.

16 And I was a little troubled to hear
17 that it has to go all the way to the very top to
18 dismiss a charge.

19 If you have a prosecutor that you
20 trust and specializes in this area, and that
21 prosecutor believes that they can no longer
22 obtain a conviction, I'm not clear why that's

1 different than the decision to file charges in
2 the first place. Because something new
3 obviously took place.

4 The decision to file charges in the
5 first place, of course, is, in some ways, more
6 consequential, because you have a victim who is
7 going to be very upset if charges are not filed.
8 And explaining that is very difficult.

9 And, again, there's a tension. If you
10 have standards which I think some people think
11 are very important -- written standards --
12 they're not going to cover everything.

13 There's always going to be situation
14 that's the exception to that rule. And that's a
15 very difficult decision to make, but very
16 consequential. And, of course, then finally,
17 what I think this is really about, is the
18 independence issue, where it's very important I
19 think for an office to be independent.

20 But you got to remember at least three
21 of the people that addressed us are subject to
22 the voters, the local DAs. And so, there's

1 always that.

2 I don't care what they say, I think
3 it's always lurking in the back of their minds.
4 And as much integrity as I'm sure they all have,
5 it's a factor.

6 So, the independence I think is really
7 important for an office like this, especially
8 with the kinds of cases that we're talking about.
9 So, I think that's it. Thank you.

10 MS. SAUNDERS: Ms. Long?

11 MEMBER LONG: Hi. Maybe like everyone
12 else, I feel like I had things I was going to
13 say, and now they're sort of out of the window
14 because I want to --

15 And I think a lot -- I do believe in
16 specialization. I would say, maybe I would enter
17 in that model response to sexual violence for
18 prosecutors, with Aequitas, I was a co-author.
19 We wrote that lays out what we think are best-
20 practices for establishing these units, because I
21 guess the specifics are there.

22 But I think -- and from the years and

1 years, not only as a prosecutor, but then since
2 2004 working with prosecutors across every one of
3 the 58 U.S. jurisdictions and internationally, I
4 do not believe that the community is served, or
5 justice is served, if you don't have specialized
6 prosecutors.

7 Because there is a uniqueness of these
8 crimes. They do co-occur with so many other
9 crimes -- homicide, robbery, human trafficking,
10 exploitation, domestic violence.

11 But you're getting the other general
12 crimes when you do these. And I do agree with
13 the panelist who said that you need to start your
14 expertise on the general crimes.

15 We should never be putting new
16 attorneys on a sexual violence or domestic
17 violence, stalking, human trafficking case. It's
18 really unfair to victims, it's unfair to the
19 prosecutors, because they don't know enough about
20 what they're doing. So, they should cut their
21 teeth on other things.

22 But I do think specialization matters.

1 And I think that it actually, it's the training
2 and the knowledge and the compassion that is
3 almost more important than whatever the written
4 protocols are.

5 I think you could have the best
6 protocols, but if you don't have the right people
7 in there who truly understand enough of the
8 research and have, not only just length of
9 experience, but actually have demonstrated that
10 they understand these cases, they've seen enough
11 of them to not buy into the myths. And I think
12 the panel has talked about that.

13 They are objective, but they also
14 understand that you can't make decisions based on
15 a lot of the behaviors. And a lot of the factors
16 that one may think before they do the workflow on
17 time is a demonstration of a lack of credibility,
18 or is incredulous couldn't happen.

19 I think that all of these things are
20 important so that you have trust in the people
21 who are leading this office. I think it was Eric
22 Rosenbaum who said it really well.

1 I mean, three, they all basically
2 said, three years in and out, you are never going
3 to get that trust, because it's not enough time.
4 They didn't say that, I'm saying that. They
5 said, three years in and out isn't enough time.
6 You need to decide if this is important. If this
7 is a priority.

8 And if it is, then you will stand up
9 an office that is staffed with experienced people
10 that we have trust in, that when they make
11 decisions -- and they will make decisions, like
12 Ms. Bashford said, that others may not agree
13 with, and this certainly is under a spotlight --
14 that you may disagree vehemently with the
15 decision, but you're not losing trust in the
16 office that's making the decision.

17 And I know that's sort of difficult in
18 Washington, and difficult when it is under such a
19 spotlight. But it's certainly possible, because
20 every environment seems very unique, but all of
21 these major offices, small offices, they're all
22 unique in their own communities, and all of these

1 individuals -- some are elected, but some are
2 appointed -- face the same kind of scrutiny and
3 backlash.

4 So, I think making sure you have well-
5 trained, compassionate -- whether it's EQ,
6 thoughtful -- individuals who are able to
7 communicate, not only to their staff, and able to
8 recruit and hire good staff, but also able to
9 communicate to their superiors, to whomever is
10 above the chain of command and to the nation-at-
11 large, or to the services-at-large, about what
12 they do, why they do it, how they do it, without
13 getting into the specifics of cases, is really
14 critical.

15 And I don't think the military is so
16 unique that they can't achieve that. And for the
17 rest of my remarks, I guess I would just refer to
18 the model response so I can keep it short. I've
19 already taken up too much time, I think.

20 CHAIR SMITH: Meghan, I know you have
21 some slides, I think. There we go.

22 MEMBER TOKASH: Okay. And one of the

1 first things they teach you, as an Assistant
2 United States Attorney at the National Advocacy
3 Center, is if you ever have slides, you need to
4 soothe your audience by laying out a roadmap and
5 letting them know how many slides to expect.

6 So, I only have eight slides. But I
7 have slides because I'm really enthusiastic about
8 this historic change in military justice, having
9 been both an active duty judge advocate, and now
10 in U.S.A.

11 So, I think, as I was talking to some
12 of the Army judge advocates on the last break,
13 the establishment of the Office of the Special
14 Trial Counsel is going to be a success.

15 This is such a fantastic step in
16 military justice. And I think that we, as this
17 independent body, have a very important role in
18 supporting the military community to make sure
19 that these offices are rolled out as successfully
20 as possible.

21 And I hope that for the military
22 members who are here at this public meeting, I

1 hope that you lean on us, and that you look to us
2 as a support and a bolster going forward.

3 So, some of the best practices that I
4 hope to convey here that I see from a comparative
5 perspective -- right? -- having been an active
6 duty judge advocate, and now sitting as a federal
7 civilian prosecutor, this is kind of a list of
8 what I wish I knew then that I know now.

9 But also, I'll give you a little bit
10 of a perspective into some of the things that
11 we -- and Jim Schwenk, my colleague, as well as
12 IRC members -- were able to get a glimpse into as
13 well. Maybe not.

14 I hope it's not a firewall between the
15 DOJ and the DoD. I'm just going to start
16 talking.

17 The first thing is having an overall
18 strategic policy perspective. So, one of the
19 things that I think the Defense Department and
20 the service secretaries need to think about at
21 least, is, what do they want the overall policy
22 strategy of these new offices to look like.

1 So, is it going to be legal
2 sufficiency? That is, that the elements of the
3 crime are present. That's it, right? We've got
4 the elements, let's go forward.

5 But what are the consequences of that?
6 The consequences of a legal sufficiency policy
7 are that you have a very high acceptance rate of
8 cases. However, you have very low plea
9 dispositions as charged.

10 You also tend to have a very low
11 conviction rate. For example, you might not
12 consider that there's a constitutional
13 impediment. Perhaps an illegal search-and-
14 seizure. But if your office establishes a legal
15 sufficiency policy, you're not considering that
16 constitutional impediment on the front end. So,
17 that is an overall strategic policy decision that
18 I think the DoD and the individual secretaries
19 need to consider.

20 Or will they look at a system
21 efficiency-type policy? This is one where speed
22 and early disposition of cases takes a priority.

1 This focuses on excellence in pretrial screening
2 for issues like the constitutional impediment
3 that I mentioned for the legal sufficiency
4 policy.

5 Typically, there is no effect on the
6 acceptance rate of cases that are going to be
7 taken to prosecution.

8 But there tends to be a very low plea-
9 as-charged, and a high standard of pleas to a
10 reduced charge, and also a high standard or a
11 high result of conviction.

12 The defendant rehabilitation policy,
13 not really appropriate for the U.S. Attorney's
14 Office. Probably not appropriate for the
15 military community either.

16 However, it is a policy that could be
17 considered nonetheless. This is where early
18 diversion is looked at. This focuses on the
19 circumstances of particular defendants. And this
20 tends to minimize any acceptance of cases for
21 prosecution at all.

22 And finally, there's the trial

1 sufficiency policy. And again, these are just
2 kind of the 30,000-foot view of overarching
3 policy considerations. This is not an exclusive
4 list.

5 But the trial sufficiency policies,
6 the policy that most U.S. attorneys offices
7 function under, that is, that we will only take a
8 case if you can succeed at trial, and that you
9 can have the probability of obtaining and
10 sustaining a conviction.

11 So, under this system, you have,
12 typically, a high acceptance of cases for
13 prosecution, but you also have a high plea
14 turnout of the charge defense, and the goal is to
15 maximize convictions.

16 So, I think that this is a good
17 starting point. This is something that I didn't
18 know as a judge advocate, because I never heard
19 about this within the judge advocate community.

20 What is my SJA's overall policy
21 strategy? And what is the Department of
22 Defense's overall policy strategy, as it pertains

1 to this new office. Next slide.

2 So, I think that there are really
3 three overall takeaways, and that I would suggest
4 for prosecutorial principles for these new
5 offices.

6 That is, that there is some type of
7 standards. And when we talk about standards, I
8 agree with my colleague A.J. that standards are
9 really tough to apply across the board, because,
10 as we all know, these cases are very different.

11 And also, I think that in terms of
12 what Ms. Bashford said too, with respect to
13 transparency, I think it would be of great credit
14 to the department to be able to push forward some
15 type of external policies that are public-facing,
16 so that the public has a very tangible awareness
17 of what these new offices are doing.

18 Because, again, I'd like to stress, I
19 think this is a good news story, the
20 establishment of these offices. And so, I think
21 part of that good news story is showing, not just
22 the service members, not just Congress, but the

1 American public, what the general principles are
2 with respect to these offices.

3 And much like the U.S. Attorney's
4 justice manual, the justice manual states up
5 front that this is an aspirational guide. Right?
6 So, maybe guidelines is too tough a word. Right?

7 We think of guidelines and we think of
8 left and right guideposts that we have to stay
9 within those confines.

10 But being prosecutors is just such
11 this strange dynamic office, that perhaps if we
12 think about some types of uniform standards, in
13 terms of aspirational guides, what we would like
14 to achieve as our best selves, as military
15 prosecutors, within these new offices.

16 And then, specialization. And within
17 that specialization, there is this independence
18 piece. And then, stabilization too. When I say
19 stabilization, both within the U.S. Attorney's
20 Office and as a judge advocate -- and I think we
21 heard from this last panel -- one of the best
22 practices is having this vertical prosecution.

1 And the JAG Corps is not alone in the
2 rotating of prosecutors. It does happen within
3 the U.S. Attorney's Office and within District
4 attorneys offices.

5 However, in the U.S. Attorney's
6 Office, we have a very definite procedure in
7 place for when that happens. We do have
8 permanent staff within the office that came
9 through our victim witness program, that can help
10 transition that particular victim if an AUSA is
11 leaving the office mid-case.

12 Or, we will pull people in from
13 headquarters, like a Farrah Gold, to be that key
14 consistent piece. And much like we did as
15 special victim prosecutors in the Army, where you
16 are that stabilizing piece where other people
17 might be rotating around you. Next slide,
18 please.

19 So, in terms of standards, I think a
20 best-practice would be to have some kind of
21 uniform standards where there are some DoD-wide
22 aspirational guides for asserting jurisdiction.

1 What is that going to look like? What
2 will screening procedures look like? What are
3 the charging considerations?

4 One of my former SJAs told me, Meghan,
5 there is a huge difference between can you do it,
6 versus should you do it.

7 And I think one of the most important
8 questions, as prosecutors, that we must ask
9 ourselves, is, can I prove this case, and, should
10 I prove this case? And of course, that's where
11 discretion comes in.

12 So, none of this is easy, but I think
13 these are the questions that hopefully those who
14 are standing up these offices will start to ask.
15 Also, approval or justification for any deviation
16 from set standards.

17 And then, of course, service-specific
18 standards. I'm governed by the justice manual.
19 However, when I sit in my home U.S. Attorney's
20 Office, we have individual localized office
21 standards. So, we have our own discovery policy.

22 Of course, we follow the large

1 umbrella of Main Justice, but we also have
2 additional requirements that my U.S. Attorney
3 puts in writing, that we must follow.

4 And that also includes things like
5 Brady and Giglio obligations as well. Of course,
6 assignment of cases and caseloads, and then also
7 review processes, and things of that nature.

8 I was very happy to hear one of our
9 panelists talk about victim notification, that
10 that should be a written standard. I feel very
11 strongly that it should. This should be
12 something that can be uniform. I mean, this is
13 an issue that everybody should be able to get
14 behind, adhering to Article 6B, adhering to the
15 Crime Victims' Rights Act, and that the people
16 standing up these offices should also consider
17 sanctions.

18 We're subject to sanctions as
19 Assistant United States Attorneys if we don't
20 follow the Crime Victims' Rights Act. And if you
21 don't believe me, just look at the ethics
22 decision that was issued for the Southern

1 District of Florida in the Jeffrey Epstein case.

2 It's a scathing, scathing expose on
3 the bad behavior of both a U.S. attorney and the
4 assistants in that office who failed to confer
5 with victims in that case. Next slide.

6 Okay, so specialization. I agree with
7 my colleagues, and I think that within this
8 Office of Special Trial Counsel, there is going
9 to be this specialization.

10 But it's still going to be surrounded
11 by the arms of the JAG Corps in general, that has
12 a very generalized practice.

13 So, I think that that's going to be a
14 challenge for these new offices and for the
15 military. But I think that specialization is a
16 best-practice, especially for the covered and
17 related offenses. Next slide.

18 This addresses the problem of
19 inexperienced counsel, which, as members of the
20 IRC, we heard time and time again from various
21 stakeholder groups.

22 We heard from many victims and

1 survivors, that the change midstream of whether
2 it be special victims counsel or special victim
3 prosecutor, was highly disruptive, and sometimes
4 caused a case to grind to a halt, or caused a
5 victim to stop participating in the military
6 justice process.

7 It cultivates expertise. It creates
8 confidence in victims and the public, and it
9 ultimately helps retain good and willing judge
10 advocates who love doing this work.

11 And I think that that was a resounding
12 theme from the previous panel members too, that
13 if you have prosecutors who love doing this work,
14 then they are going to want to stay doing this
15 work.

16 And I think that this is going to be
17 the toughest thing for the military to have to
18 figure out a workaround, in terms of billeting,
19 for those who really, really love this work, to
20 be able to stay in this work and specialize.

21 Next slide.

22 Okay, and then independence within the

1 specialization. Right? It is an industry
2 standard. It's a best-practice. It's addressed
3 in the justice manual, it's addressed in our
4 local U.S. Attorney's Office rules. Right?

5 We, as IRC, recommended a prosecution
6 office with civilian oversight, and Congress
7 agreed, and we have this without intervening
8 authority piece.

9 And we landed on that because of the
10 different perspectives that we heard from
11 stakeholders about how important it is to have an
12 independent prosecutorial function that is
13 completely removed from the command, completely
14 removed from the judge advocate's general, and is
15 charged solely with determining whether there is
16 jurisdiction to cover an offense, and whether
17 charges should be brought. Next slide.

18 Okay, so stabilization. Again, I
19 talked about vertical prosecution. It's a best-
20 practice, and it's a best-practice within the
21 U.S. Attorney's Office too.

22 There are at least ten U.S. Attorney's

1 Offices nationwide that have special victims
2 units, which is rather unique.

3 We also have special designated
4 offices at our headquarters. Right now, I'm
5 detailed to the human trafficking prosecution
6 office, so I work with Farrah.

7 And we have these specialized units so
8 that we can try to stabilize and have these
9 vertical prosecution concepts.

10 Again, I think the military's going to
11 have to take a hard look at what career
12 advancement looks like for those special
13 prosecutors, and perhaps correct course.

14 And then, as head of OSTCs, the
15 secretaries, I would recommend that they make
16 prosecutor billeting a priority. Next slide.

17 So, again, just to wrap up -- and
18 thank you for your gracious patience as I got
19 through these slides, but I hope they're
20 important things for people getting ready to
21 stand up these offices to consider -- this is an
22 historic moment in military justice. I think

1 it's a great moment.

2 I'm personally very enthusiastic about
3 this. I think that this is a great thing. As
4 former Commissioners, we envision this being the
5 Office of the Special Victim Prosecutor.
6 Congress happened to call it something different,
7 but it's essentially what the Commission
8 recommended.

9 And so, this is a great, great start
10 to what I think is going to be a fantastic
11 program for the Department of Defense.

12 And I think as long as, over the next
13 year, the service secretaries and the heads, the
14 lead special trial counsel can establish some
15 types of standards or aspirational guides for
16 their prosecutors, make those public, make them
17 known, focus on specialization, and then really
18 start thinking critically about the billeting
19 piece and what that looks like for those
20 prosecutors who really, really love this work and
21 want to stay in this work, because I think it can
22 be done.

1 Just because it hasn't been done that
2 way historically in the military, shouldn't mean
3 that it's a door that should be closed. I think
4 that we've come this far and it's going to be a
5 great ride. Happy to be a part of it.

6 MS. SAUNDERS: Well, thank you all.
7 I'd like to invite any of our other Committee
8 members, if they want to weigh in or discuss
9 anything you've heard, either in this session or
10 in the prior session. Judge Walton.

11 MEMBER WALTON: Yes, I'd like to add,
12 having had the experience in the civilian world
13 of serving both as a defense lawyer, having been
14 a public defender, and also as a prosecutor,
15 having been an Assistant U.S. Attorney and also a
16 supervisor in that office, there is, I think, a
17 friction between some of the things that we've
18 heard, as it relates to specialization, which I
19 think is critical, especially when it comes to
20 these type of cases, and especially when it comes
21 to prosecuting child cases.

22 I think specialization is critical,

1 and I think also experience level is critical,
2 because we heard, and I tend to agree with it,
3 that it probably takes three-to-four years as a
4 prosecutor, and as a defense lawyer, to really
5 become proficient in performing those tasks.

6 And obviously, with the limited tenure
7 that some JAG officers have, that becomes a real
8 challenge for them to be able to acquire
9 specialization, and to acquire experience, to
10 become as proficient as you would hope they would
11 be.

12 And also, there is a different mindset
13 that one has to have when you're a prosecutor, as
14 compared to a defense lawyer.

15 Because, as a prosecutor, your
16 obligation is to do justice. And that doesn't
17 necessarily mean that you're always going to get
18 a conviction.

19 Whereas, as a defense lawyer, your
20 perspective is very different. You're
21 not -- this may be cynical to say -- necessary
22 trying to acquire justice. You're trying to

1 acquire the best result for your client that you
2 can acquire, using the skills that you have as a
3 lawyer.

4 And that may mean that there is an
5 injustice, from the perspective of some, because
6 maybe you're getting someone off who the evidence
7 would support that person being convicted, but
8 for whatever reason -- skill level or whatever --
9 you're able to acquire a result inconsistent with
10 what conceivably the evidence suggests should be
11 the result. So, that friction I think does
12 exist.

13 So, I think if you have still the
14 system where you have JAG officers doing both
15 defense work and prosecution work within their
16 tenure, that there has to be an appreciation that
17 the perspective that one has to have to do one
18 job as compared to the other, is, in fact,
19 different.

20 So, I think it is a challenge if
21 you're going to have that dual representation
22 process that continues, because, as I say, I

1 think there can be a friction between those two
2 positions.

3 MEMBER GRIMM: Paul Grimm, Madam
4 Chair, whenever there's a moment.

5 CHAIR SMITH: Go ahead, Judge.

6 MEMBER GRIMM: My comment is simply to
7 echo the notion that the challenge would be to
8 the military to be able to address the issues
9 that all the panelists and all the Advisory
10 Committee members have just spoken to. But it
11 can be done.

12 I'm old enough and was involved in the
13 process back in the early 1970s, when the 1969
14 manual for courts martial had just sort of
15 revolutionized the approach to the way in which
16 military justice was to take place, and they were
17 trying to stand up to criticisms that military
18 judges were just rubberstamps for the command,
19 and they had to determine how they were going to
20 get an independence and special career tracks for
21 military judges.

22 And they did that. And they did that

1 in ways that were novel and I think has worked
2 rather well.

3 So, they're going to have to bring
4 that same level of creativity to it. But the
5 need to have the specialization and the certain
6 skill set, and then once you've developed it, not
7 to lose, that's going to be very important.

8 And they may have other challenges
9 too, because once you train these people up and
10 they get the experience, then retention is going
11 to be an issue, and maybe they have to think of
12 some things that happened in other services for
13 other specialties that they want to keep, that
14 they may have to have incentives to keep people
15 to stay in when they acquire this expertise. It
16 may make them highly desirable in the outside
17 community.

18 So, getting that kind of fresh
19 approach from the ground up and trying to come up
20 with something that will accomplish these goals
21 will be the test as to whether or not they can
22 fulfill the degree of enthusiasm that I think all

1 of have for this opportunity at this particular
2 time for the military justice system.

3 MEMBER WALTON: Can I just say, and
4 while I don't disagree completely about
5 specialization, I do have mixed feelings about
6 it. But if your -- and this is beyond the topic
7 I know, and I'm sorry -- but unless you then set
8 up similar defense offices, you've created a
9 tremendous imbalance in both resources, skill
10 sets, and the ability to assess and try the
11 cases.

12 And I know that's beyond the topic
13 about it, but it is an interesting dynamic if
14 you're going to create these specialized offices
15 and you don't have similar defense offices.

16 MEMBER GOLDBERG: Yeah. And just
17 interestingly, and I appreciate your comment and
18 I'm on the thinnest of ice in just offering this
19 thought, which is wondering whether there are
20 some skills that defense lawyers develop that are
21 more transferable from other kind of general
22 defense representation, that don't necessarily

1 carry over to representing victims, so that there
2 may be different kinds of ways that there may
3 even be currently an imbalance that may be being
4 made up for by some of the enhancements, if there
5 are here. But again, I say that unencumbered by
6 facts.

7 MEMBER KRAMER: Don't ever let the
8 facts get in the way of a good story, as they
9 say.

10 MEMBER GOLDBERG: Exactly.

11 MEMBER KRAMER: But I think yes and
12 no. I mean, cross-examination of a child witness
13 is a much different skill set than cross-
14 examining a teller in a bank robbery.

15 There really is the same
16 specialization. The scientific evidence, the
17 dynamics of whatever, if most of them are known
18 to each other, the dynamics of the relationship,
19 it really is, I think, a much different process
20 than the regular, so to speak, or other types of
21 criminal cases.

22 There is clearly some skill set that

1 carries over. But I think in many ways it is a
2 totally different type of case from the defense
3 standpoint too.

4 MEMBER GOLDBERG: So, I would love to
5 continue that part of the conversation. But for
6 now, I'll just also add in a couple of other
7 comments.

8 One, I was quite struck just as I've
9 been reading materials, of the value of hearing
10 directly from people who are holding these
11 positions, and why they stay and why they go.

12 And as in many domains, incentives
13 matter a lot, and recognition matters a lot. And
14 so, I think there are some important questions
15 about what types of recognition are missing
16 currently, that if they were there would
17 incentivize people to really see this as a valued
18 set of skills, and to want to deepen --

19 And I know there are some suggestions
20 along those lines, and I wonder if there might be
21 more that are drawn from other areas, where there
22 have been other kinds of positions, even very

1 different from this one, that sort of fairly had
2 turnover, that then were able to -- where there
3 was sort of an ability to learn to shift course.

4 And I guess my other point relates to
5 that, and this is a theme you'll probably here
6 for me in a number of areas. But I think that
7 there is almost nothing we can do better than
8 take lessons learned. Right?

9 And so, I think from that it strike me
10 that there were a lot of value to lessons offered
11 by our speakers today, and I think a lot about
12 while there is no replacement for the experience
13 of either standing up in court or learning how to
14 gain the trust of a client, or any of these other
15 skill sets, there is better and worse training,
16 and there is more and less frequent training.
17 And then, there are the issues of office culture
18 that I think we also heard about.

19 And so, thinking about whether there
20 are ways to sort of distill some of the many
21 lessons learned that were shared today, and that
22 are sort of out there beyond even what we've

1 covered, as a way of really feeding, and very
2 intentionally, to the work going forward. Right?

3 Not reinventing wheels, but really
4 using the many wheels that have been invented in
5 this area.

6 MEMBER WALTON: I mean, I do think the
7 skills are transferable, because I think there's
8 no question that my ability to be a successful
9 prosecutor were enhanced by the experience I had
10 acquired first as a defense lawyer.

11 And my anticipation -- but it was
12 waylaid by me being appointed to the bench -- was
13 to go back into defense work. And I'm confident
14 that my ability to do good defense work would
15 have been enhanced by that experience I acquired
16 as a prosecutor.

17 MS. SAUNDERS: I'm sorry, I realized
18 I didn't have my microphone on. We're down to
19 our last couple of minutes. Does anyone have a
20 final comment they'd like to make, keeping in
21 mind I think there will be some time tomorrow
22 during your deliberation sessions in the

1 afternoon, to pick up the thread of this
2 conversation, if you'd like. So, if not, I think
3 we can transition to the next and final session
4 on the SVC/VLC Report.

5 COL BOVARNICK: Yeah, so thank you to
6 all our speakers, and for Ms. Saunders for
7 hosting that. So, yeah, we'll have Mr. Yob come
8 up, and Ms. Critchley, to talk about the report.
9 And then, Ms. Julie Carson, our Deputy Director,
10 will help facilitate some deliberations.

11 MR. YOB: Okay, are we just going to
12 roll right into it? Yes, okay.

13 So, Chair Smith, Committee members,
14 good afternoon. I think that I heard, driving in
15 this morning, that this is the first day of
16 summer, which I believe means that it's the
17 longest day of the year.

18 And even if it's not the longest day
19 of the year, we've done our best with this
20 schedule to make it feel that way.

21 But this is it. This is the last
22 session of the day. My name is Pete Yob. I'm

1 joined by my colleague and fellow staff attorney,
2 Audrey Critchley, for this session's presentation
3 on the SVC/VLC Report, a copy of which you have
4 all been provided in advance of this meeting.

5 Ms. Julie Carson, our Deputy Director,
6 is also with us to talk about deliberations at
7 the end of this presentation.

8 So, I was the lead staff member for
9 this project. And as an aside, among my past
10 experience in military justice from 2017 to '19,
11 I was the Army Special Victim Counsel Program
12 Manager. So, I do have some background and
13 experience on this topic. And for the two years
14 prior to that, I was a SJA, where I supervised SVC
15 in that job.

16 Audrey was one of four other members
17 on the team that produced this report, who also
18 included Eleanor Vuono, Marguerite McKinney and
19 Nalini Gupta. Next slide, please.

20 Okay, this is my roadmap slide.
21 Ms. Tokash, I'll follow your lead. We don't have
22 eight slides, we have seven slides to go through.

1 The purpose of this briefing is to
2 provide background on the Service's SVC/VLC
3 programs, to provide an overview of the SVC/VLC
4 Report, as prepared by the DAC-IPAD staff,
5 provide a summary of the feedback that we have
6 received from you the Committee members, and
7 finally, to facilitate a discussion and decisions
8 by you the Committee, on the action you will take
9 on this report.

10 I'll note that it's confusing, but the
11 Services refer to their victim counsel programs
12 by different acronyms.

13 Sometimes, it's special victim
14 counsel, SVC, sometimes it's victim legal
15 counsel, VLC. Recently, the Air Force has gone
16 to victim counsel, which is VC. For the purposes
17 of this brief, we'll just use the term SVC, to
18 avoid any confusion. All right, I think we are
19 on slide 3. Perfect.

20 So, in general, SVCs, special victim
21 counsel, support the interest of victims of
22 military sexual assault and domestic violence,

1 typically by forming an attorney-client
2 relationship with the victim who's their client.

3 This benefits victims by providing
4 confidentiality in communications with their
5 attorney, and requiring the SVC to advocate for
6 the client's stated interests, unless these are
7 illegal or unethical.

8 SVC should be experts in the military
9 justice process, so that they can effectively
10 advise their clients in making decisions, and
11 help to manage their client's expectations in the
12 process.

13 The Air Force created the first SVC
14 program in 2013. So, this was less than ten
15 years ago when the program started.

16 Shortly after they began their
17 program, DoD directed all of the services to
18 stand up their own SVC programs, and Congress
19 passed legislation requiring SVC representation
20 in the military for sexual assault victims.

21 Congress has amended this legislation
22 multiple times since its initiation, that

1 expanded the scope of eligibility to child
2 victims, to Reserve service members, to DoD
3 civilians, and more recently, to victims of
4 domestic violence.

5 When the programs began, they created
6 a lot of additional work for military judge
7 advocates, without providing additional JAG
8 authorizations, personnel, or billets.

9 The Air Force first used legal
10 assistance attorneys who worked in installation
11 SJA offices, to provide SVC services.

12 But they soon -- and that would be
13 within six months of starting their program --
14 removed their SVC from local supervision, and
15 created a stovepipe on independent rating
16 structure, for the supervision of the SVC within
17 their program, as opposed to leaving rating and
18 supervision as part of their local SJA, who's in
19 turn rated by the local commander. So, this
20 helped to facilitate independence.

21 All of the services followed this Air
22 Force model, except the Army, who retained their

1 SVC within their local SJA offices, and to
2 include their supervision and their rating.

3 The Navy and the Air Force do not
4 assign new judge advocates to SVC positions.
5 Since later assignments tend to not split their
6 time between their duty positions, these SVC tend
7 to have longer tour lengths, because their tour
8 length encompasses the entirety of their
9 assignment.

10 Oftentimes, when new judge advocates
11 are assigned to a position in their first three-
12 year position, they'll split their time to
13 develop them, eighteen months in one job and
14 eighteen months in another job. Next slide,
15 please?

16 The impetus for this report and report
17 was a June 2021 letter from Representative Jackie
18 Speier and Senator Kirsten Gillibrand to the
19 Secretary of Defense. That's included as an
20 appendix to the SVC Report.

21 In this letter, they lauded the SVC
22 programs for the benefit they had provided to

1 sexual assault victims who are represented by
2 counsel.

3 However, they further noted the
4 difference in services program reveals gaps in
5 best-practices.

6 They noted that they have heard
7 consistent concerns from victims who have been
8 represented by SVC, about the lack of
9 independence and continuity of their counsel.

10 In this letter, they suggested that
11 DoD establish uniform guidance for the services
12 mandating a minimum two-year assignment duration
13 for SVC, as well as uniform guidance mandating
14 independent supervisory chains for all SVC, as
15 currently exists for defense counsel in the Army,
16 and SVC in the other services.

17 Between June and October of 2021, the
18 Army TJAG and the Inter-service Coordination
19 Committee of the Service's SVC program managers,
20 provided memorandums for the DoD general counsel,
21 non-concurring with the recommendations of
22 Representative Speier and Senator Gillibrand.

1 In October and November of 2021, the
2 DoD general counsel requested that the DAC-IPAD
3 staff director conduct a study and report on
4 whether it's practicable to adopt a minimum tour
5 length for SVC assignments, with the appropriate
6 exceptions for operational concerns. If so, that
7 report should also set forth what the terms
8 should be.

9 The general counsel also requested an
10 assessment of the Army rating chain for SVC
11 evaluation reports, a comparison between the Army
12 rating of SVC and those of the other services,
13 and a study of whether the Army rating system
14 creates an actual or apparent limitation on its
15 SVC independence, or ability to zealously
16 represent their clients.

17 And finally on this topic, asking for
18 any recommendations for change.

19 While this was assigned as a DAC-IPAD
20 project, given the circumstances of this zero-
21 based review and the DoD general counsel's
22 request to complete the report by April 5, 2022,

1 the professional staff understood this project.

2 The report includes a background
3 section with the information about the initiation
4 of service SVC programs, and a brief description
5 of service differences in their SVC programs.

6 The report also includes a section on
7 the methodology employed by the staff in this
8 study and report. That included a review of
9 background materials related to SVC/VLC programs,
10 an RFI, and a follow-up RFI to the services, as
11 Mr. Mason described in his dated brief earlier
12 today, and interviews with SVC program managers,
13 current and former SVC, several civilian-
14 practicing SVC, and victims who had been
15 represented by SVC.

16 Ms. Critchley will provide a summary
17 of the report findings and recommendation on
18 issue one, which dealt with the tour lengths of
19 SVC.

20 MS. CRITCHLEY: Thank you. The staff
21 recommends that the services mandate an eighteen-
22 month minimum assignment length for SVC, with

1 exceptions for personal and operational reasons.

2 This recommendation was based on the
3 following findings. First, research showed
4 significant discrepancies in the assignment
5 lengths of SVC in the different services.

6 Neither the Air Force nor the Navy has
7 a directive or policy mandating a minimum SVC
8 assignment length. But as a matter of practice,
9 their assignments are two-to-three years.

10 Ninety-five percent of Navy SVC, and
11 100 percent of Air Force SVC, who completed their
12 assignments after January 1, 2018, served
13 eighteen months or longer.

14 On the other hand, only 24 percent of
15 Marines and 21 percent of Army SVC served
16 eighteen months or longer in that role.

17 Eighteen percent of Marine SVC and
18 48 percent of Army SVC, served less than twelve
19 months.

20 Our second finding, the research
21 showed that it is not uncommon for victims to be
22 represented by multiple successive SVC in any

1 given matter.

2 The interviewed victims represented by
3 Marine and Army SVC were more likely than the
4 victims from the other services to be represented
5 by more than two counsel.

6 Third, changing SVC negatively impacts
7 victims and their representation. Victims found
8 it stressful to have to retell their stories and
9 build trust in successive SVC.

10 And SVC and their clients noted
11 inefficiencies and delays in the process when
12 there was a change of counsel, especially when
13 the handoff to the incoming SVC was not well-
14 managed.

15 Fourth, longer assignments create
16 concerns among SVC for their own psychological
17 well-being. Issues with burnout and compassion
18 fatigue tended to emerge in the second year of
19 the assignment, but few felt comfortable seeking
20 support from the behavioral health resources
21 available to them.

22 And fifth, many SVC, especially Army

1 and Marines, voiced concerns that the billet
2 negatively impacts career progression.

3 However, due to the relative newness
4 of the programs and the fact that three of the
5 four services do not track this, there's
6 insufficient data to determine whether the SVC
7 billet is in fact detrimental to a judge
8 advocate's promotion potential.

9 The staff weighed these findings, in
10 considering the advantages and disadvantages of
11 requiring 24-month SVC assignments, as proposed
12 by Congressional leaders.

13 While 24 months would provide
14 stability for victims, even eighteen-month
15 minimum assignments would dramatically improve on
16 recent past practice in the Army and Marine
17 Corps, where fewer than 25 percent of SVC serve
18 eighteen months or longer.

19 At the same time, many SVC told the
20 staff that longer assignments exacted a greater
21 psychological toll on SVC.

22 Based upon the findings, the staff

1 concluded that mandatory minimum eighteen-month
2 assignments, with appropriate exceptions, would
3 result in significantly longer average
4 assignments for Army and Marine SVC, would
5 decrease turnover of SVC so that fewer victims
6 have to go through multiple counsel, and would
7 best balance the needs of victims and SVC.

8 There's also reason to believe the
9 uniform mandatory eighteen-month minimum would be
10 feasible, and would satisfy the interests of the
11 services.

12 The vast majority of Navy and Air
13 Force SVC already serve 24 months or longer, as a
14 matter of practice.

15 The Marine Corps recently set 24
16 months as its goal, while the Army recently
17 increased SVC tour lengths to eighteen months.

18 At this point, I'll turn it back to
19 Mr. Yob to summarize the findings and
20 recommendation on Issue 2.

21 MR. YOB: Thank you, Audrey. On
22 Issue 2, the Army rating chain for SVC report

1 recommendation, is that the Army should establish
2 an independent stovepipe supervisory rating
3 structure for SVC that is outside of their OSJA,
4 and outside of their local chain of command.

5 Report findings on this issue
6 included, the Army has noted that, more than any
7 other services, the Army has a tradition of
8 allowing locally-rated legal assistance attorneys
9 to help their clients resolve legal issues, even
10 if resolution is in conflict with local command
11 priorities.

12 The Army also notes advantages to SVC
13 of being part of a local SJA office. However,
14 most of the advantages of SVC being part of an
15 installation legal office structure, noted by the
16 Army, apply mainly to new or very junior judge
17 advocates, who need more direct mentoring,
18 direction, management, and inclusion as an office
19 structure, than more experienced judge advocates
20 require.

21 SVC should be more experienced and
22 less reliant on that sort of structure, like Army

1 defense counsel, who must have prior military
2 justice experience, and are therefore
3 independently rated and co-located near SJA
4 offices for support, but independently supervised
5 and rated within defense counsel chains.

6 Most advantages cited by the Army can
7 be obtained by co-located SVC who are not
8 supervised or rated by the SJA structure.

9 SVC have an attorney-client
10 relationship with the victims that they
11 represent. And unless there is a legal or
12 ethical conflict, they must zealously advocate
13 for their clients' stated interests.

14 Interviews with current and former SVC
15 made it clear that there are times when the local
16 command and SJA's interest conflict with those of
17 the clients of SVC.

18 It was clear that some Army SVC had to
19 balance their clients' interest with supporting
20 the office in which they are supervised and
21 rated.

22 Albeit by a small margin, Army SVC

1 that we interviewed as a plurality, believed that
2 their system of rating should be converted into
3 an independent and stovepiped chain of command.

4 Other SVC services, SVC and VLC, that
5 we interviewed, unanimously endorsed their
6 independent rating structure, citing the pressure
7 that they would otherwise be under in cases where
8 their clients' interests are opposed to those of
9 their raters.

10 Several of the victims interviewed as
11 part of this project felt that their former SVC
12 were at times not zealous enough in their
13 advocacy, and believed that this could be because
14 their counsel had concerns about conflicts within
15 their own local rating chain. Next slide,
16 please.

17 So, in addition to Recommendation 1
18 and Recommendation 2 that we just covered, that
19 answer the DoD general counsel's request for us
20 to work, the staff also noted eight other
21 recommendations, listed here, for improvement in
22 the SVC/VLC programs. These were derived from

1 information that we obtained in preparing this
2 report.

3 The staff initially noted and
4 identified these as best-practices, but in
5 editing the report, chose to list them as
6 additional recommendations, for reporting
7 consistency.

8 These were not fully analyzed and
9 developed as much as our two primary
10 recommendations. But the staff believes that
11 these could serve as issues that the services or
12 others should study further and consider
13 implementing. Next slide, please?

14 This session now turns to Committee
15 member feedback on the report that we've
16 received. Ms. Critchley will address the
17 feedback on Issue 1, length of tours.

18 MS. CRITCHLEY: In response to the
19 staff report and recommendation for 18 month
20 minimum SVC assignments, one committee member has
21 proposed that SVC serve minimum 24 month
22 assignments.

1 This recommendation is supported by
2 evidence of the impact of multiple SVC on victims
3 and the recognition that frequent changes of SVC
4 contravene the victim centered approach to
5 assisting crime victims.

6 Further support for this
7 recommendation is found in the absence of data
8 showing that longer assignments are detrimental
9 to a judge advocate's career or psychological
10 well-being.

11 The recommendation is also consistent
12 with Senator Gillibrand and Representative
13 Speier's recommendation that the DoD mandate 24
14 month minimum SVC assignments.

15 The Services do not support a
16 mandatory minimum assignment length for SVC.
17 Although, as I noted earlier, Navy and Air Force
18 SVC already serve 24 months or longer in most
19 instances, and the Army and Marine Corps are
20 moving toward longer assignments for their SVC,
21 the Services oppose a mandatory minimum,
22 prioritizing their own flexibility to develop

1 judge advocates to serve in other positions and
2 gain professional experience. Mr. Yob will now
3 address feedback on the issue too.

4 MR. YOB: Thank you, Ms. Critchley.
5 There was no committee member feedback on Issue 2
6 other than all committee member responses
7 received concurred with the recommendation in
8 terms of independent rating structure for the
9 Army.

10 On the additional recommendations, one
11 committee recommended two additional
12 recommendations. The first would be that all SVC
13 have military justice experience, meaning there
14 would be no first tour judge advocates performing
15 as SVC.

16 The second additional recommendation
17 that was proposed by this committee member would
18 address the concerns the victim raised about poor
19 transitions between SVC that was noted in the
20 report.

21 This recommendation would require more
22 communication from SVC to clients about

1 transition from one SVC to another and also would
2 require SVC to provide contact information to
3 their clients from SVC that could be used at any
4 time during the transition period.

5 Other committee member's responses
6 that contributed to the additional
7 recommendations -- and actually can you go back
8 one slide so we'll just leave that up here?
9 Okay.

10 On Recommendation 4, one of the
11 committee members non-concurred in the
12 recommendation that part-time SVC should be
13 eliminated. The committee member's non-
14 concurrence was based on the fact that burnout
15 was listed as an issue for SVC and that having
16 part-time SVC could be a way to prolong an SVC's
17 assignment by allowing them to transition to less
18 than full-time duties.

19 Finally on Recommendation 5, one
20 committee member agreed with the need for greater
21 communication between SVC and the prosecutors but
22 also would go further and believes that there

1 should be some avenue of redress created for
2 victims when there is a failure of a prosecution
3 to provide information that is required.

4 And one final note on the additional
5 recommendations, another committee member
6 suggested that the additional recommendations be
7 re-characterized as best practices due to the
8 limited analytical detail provided in support of
9 these that are included in the report and to sort
10 of highlight the difference between the primary
11 recommendations and then these additional matters
12 that were brought up.

13 Next slide, please. And next slide
14 again. There we go. Okay. So the committee has
15 heard a lot from us and read the report. You now
16 have the opportunity to consider what actions to
17 take on this report that has been presented by
18 the staff.

19 Ms. Carson is here with us. And she
20 is going to sort of facilitate this conversation
21 and take us through the different issues and help
22 guide your committee deliberations. So I'll turn

1 it over to Ms. Carson. Thank you.

2 MS. CARSON: Thank you. Good
3 afternoon. Between the 18 months recommended by
4 the staff based on -- and I think they sell
5 themselves short by not telling you exactly how
6 much they did although it's in the report, but
7 they conducted 60 interviews. Thirty-nine of
8 them, I believe, were current and former SVCs.
9 They also included victims and the program
10 managers for the SVC program.

11 They also asked for the data for every
12 SVC since 2018 and when their terms began and
13 ended. And so I think they did a terrific job of
14 pinpointing what the average tour lengths were.

15 So I think their recommendation, the
16 staff's recommendation, comes with a lot of
17 background work. So it's up to you now to decide
18 whether you agree with the Services who prefer to
19 maintain the flexibility with the staff, with the
20 recommendations of one of our members already as
21 well as Senator Gillibrand and Representative
22 Speier.

1 So I'll turn it over to the Chair to
2 kick us off with her thoughts.

3 CHAIR SMITH: I didn't see that
4 coming. Well, it's interesting because, you
5 know, to me having done sex offenses and all of
6 that for a decade or 15 years, however long I did
7 it, 18 months, 24 months doesn't seem that long.
8 But I had to ask General Schwenk, folks don't
9 have a choice, right?

10 They get sent into this division,
11 which makes things different. What all of our
12 panelists talked about before was the desire to
13 be involved in those types of cases and that it
14 takes a certain kind of person who can
15 compartmentalize, who has an EQ and can manage
16 victims and all the things that come along with
17 victims of sexual assault or sex abuse because
18 they're very different than a burglary victim.
19 So I understand this idea of 18 months versus 24
20 months and the concept that 24 months might
21 produce burnout in some people because they
22 didn't elect to be there.

1 That being said, with respect to
2 understanding how those cases move along, how
3 they operate dealing with victims, et cetera, I
4 would probably lean towards 24 months. I would
5 be open to hearing from anyone else.

6 MEMBER TOKASH: This is Meghan Tokash.
7 I will just put on the record that I was the
8 member who informed the staff that I think 24
9 months would be more appropriate and not because
10 I'm from New York State, which is where Senator
11 Gillibrand is from. It has nothing to do with
12 that. I'm just putting that on the record.

13 It's really because of the data that
14 the staff did such a great job of pulling
15 together. The Navy currently has at least 90
16 percent of their special victim counsel are
17 already on 24 month or longer tours. For the Air
18 Force, it's 87 percent.

19 You know, those are high percentages.
20 I understand the Marine Corps is a very special -
21 - I'm not sure what to say without getting
22 punched in the arm by General Schwenk sitting

1 next to me, but a very special Service.

2 But I think, you know, the language
3 that you can fall back on, even with respect to
4 burnout, is that with appropriate exceptions for
5 personnel, right? So if people can't chug along
6 for those last six months, you have this
7 exception for personnel or operational
8 requirements. So I think that that language
9 continues to give the military the flexibility.

10 And, honestly, for me the most
11 important thing is the evidence that you receive
12 via speaking with counsel and speaking with
13 victim survivors who said that this has a very
14 deleterious effect on victims.

15 And I also was the member who
16 commented that we should have some type of salve
17 or some type of a mechanism put in place for one
18 special victim counsel to be able to have a
19 seamless transition to another.

20 I can't recall specifically in the
21 report. But I was abhorred to hear that a victim
22 or several victims came forward and said we

1 didn't even know our SVC was leaving. You know,
2 that's unsat. That just should not be happening.
3 So those are my reasons for having a strong
4 opinion on the 24 month minimum and, yeah.

5 CHAIR SMITH: Let me just say one
6 thing with respect to what Meghan said. There
7 was concern about having it held against them
8 with respect to the ratings, right? If someone
9 was to come forward and say, I can't handle this.
10 And I want to move before that 24 month period is
11 up, it kind of goes hand in glove that you would
12 have to have a system where it's not going to
13 affect their movement later on, which I think is
14 something that we've been discussing.

15 MEMBER TOKASH: Yeah. And this is
16 Meghan again. I think the way I read the report
17 was that those who are in the billet, regardless
18 of whether they want to get out, being in the
19 billet itself and correct me if I'm wrong, you
20 know, Audrey and Pete, but being in the billet
21 itself they saw as detrimental, perhaps, to their
22 career, not a detriment if they wanted to throw

1 in the towel early and get out although I could
2 see that being stigmatizing as well.

3 MS. CRITCHLEY: We heard both of those
4 views. And, you know, in terms of being in the
5 billet itself, more so in some Services than
6 others. But we also heard the other viewpoint
7 about if you needed to get out early.

8 MEMBER TOKASH: Right. And that's a
9 narrative that the military is going to have to
10 correct. Being in a special victim billet should
11 not create any stigma. And leaders in the
12 military should not be placing stigma on those
13 who are serving in those billets. So I think
14 that's actually an additional reason why it
15 should be 24 months.

16 MR. YOB: I'll just put out one thing
17 quickly is that from a factual perspective is
18 that what we learned from most of the services so
19 that they do try to select -- do a thoughtful way
20 of selecting people. They interview them. They
21 want the right personalities to be in these jobs.
22 And they want them to want to be in the jobs.

1 So the vast majority of SVC are people
2 who want to take the jobs and are screened to be
3 in the jobs, however, not 100 percent. And so
4 there are some people just because of reality who
5 are required to take the position and don't
6 necessarily think it's a great career opportunity
7 or it's something they really want to do. We
8 learned that.

9 MEMBER GOLDBERG: It's Suzanne
10 Goldberg. I just had two thoughts. One is when
11 I read the report I actually in my head was
12 thinking, yes, 24 months makes sense in light of
13 the evidence you found and the related -- and the
14 issues around people not wanting to be in the
15 billet because it's seen as undesirable or not
16 giving them skills that they need for career
17 advancement and so forth I think underscore the
18 importance of seeing this recommendation as part
19 of the whole package of recommendations, right?

20 So if it's standalone it makes some
21 sense, right? Why should people have to stay in
22 a billet where they don't want to be? But if

1 there are other recommendations that shift the
2 way in which that is viewed and shift the
3 experience of those who are in the position, then
4 the 24 months seems fairly obvious actually given
5 the points made.

6 And I guess, like I was thinking
7 about, you know, the idea that of course there
8 should be an exceptional circumstances option to
9 get out, but it sounds like that is present
10 whether we recommend it or not. But even still,
11 I think it's worth noting.

12 And I guess the other thing that
13 struck me as short about 18 months based on the
14 evidence in the report was that if people spend
15 the first 6 to 12 months getting up to speed and
16 then they spend maybe 2 months transitioning out,
17 that really only gives somebody four months when
18 they are in their strongest position in the role.
19 And that strikes me as an inefficient use of the
20 Services' human capital resources as well as --
21 you know, particularly in an area where the need
22 is too great to have people with experience.

1 So it just sort of -- all the pieces
2 to me added up to having a 24 month
3 recommendation makes sense.

4 And since I'm talking, I'll just
5 footnote one other thing if you don't mind which
6 was that, you know, one of the points made was
7 that the Army really liked the idea of, or the
8 experience of, having special victim's counsel
9 being able to feel supported in the community of
10 the -- the local legal community.

11 And the other Services, you know, with
12 a different reporting structure seemed still to
13 be able to have that sense of community for the
14 special victim's counsel. So it seemed to me
15 that was another place where lessons learned from
16 -- I understand the Services are all different,
17 but lessons learned from the others may be
18 helpful for the Army here.

19 MEMBER O'CONNOR: Madam Chair, I'm not
20 sure how to get attention. But I have a sort of
21 comment and question on this as well.

22 I found the, you know, staff

1 recommendation of the 18 months to be compelling
2 for the reasons that they stated, but I also
3 think it makes sense to have as many people as
4 possible serving in these positions for longer.

5 And since there is data supporting the
6 notion that many, many people, you know, stay for
7 longer periods than that and presumably if they
8 are being chosen because of an affinity for the
9 work, they're going to want to. I wonder if the
10 staff considered or if it would make sense to
11 have, you know, sort of an option where people
12 can opt-in to staying longer than 18 months so
13 that it's sort of less of a stigma to say no, 18
14 months is all I can take, and you don't have to
15 ask for an exception. But that everybody who is,
16 in fact, committed to and, you know, feeling like
17 they are enjoying wanting to continue doing the
18 work can do that for longer.

19 And if the kind of enhancements that
20 would go along with it to make it sort of a more
21 unofficial and preferential, you know, preferred
22 option, go into place, it seems like the problem

1 might solve itself.

2 MS. CRITCHLEY: I don't think we ever
3 looked at a ceiling on, you know, a maximum of
4 what the tour length ought to be. But the
5 additional recommendations or best practices were
6 intended to support the two primary
7 recommendations. They're kind of the pieces of
8 the puzzle that would make it work.

9 So, for example, if there were 18
10 month tour lengths, the training would need to
11 happen before the 18 months began so that it's
12 not eating into the time.

13 The vetting, you know, recommending
14 improved vetting processes for SVC could include
15 selecting the people who want the job and are
16 suited in terms of experience and temperament.

17 So all of the additional
18 recommendations, if making mental health services
19 more readily and easily available to SVC would
20 make it easier for them to stay longer so that
21 people could choose to stay and nothing -- I
22 mean, I guess you're sort of -- I appreciate the

1 question the way you flipped it.

2 No, we didn't consider looking at it
3 that way except that all of these recommendations
4 are intended to support that option for the
5 people who want this position can have it and
6 stay there and continue to do their work.

7 MEMBER O'CONNOR: I mean, that's
8 helpful. It seems to me that you end up then
9 with only people who really have a compelling
10 reason to want to get out saying that they would
11 want to get out at the 18 months. And I wouldn't
12 want them to be stigmatized by feeling like they
13 had to ask for an exception.

14 MEMBER SCHWENK: Suppose somebody
15 wants to be a VLC but they also want to get
16 experience doing something else in their first
17 tour, are first tours still generally 36 months?

18 MR. YOB: It seems that most first
19 tours are 36 months tours. And because they're
20 developmental, they typically do split them down
21 the middle at least if not further and allow
22 them, as they're, you know, getting a sense of

1 what they want to focus on, what interest they
2 want to show in the military, like, what can they
3 do, at least two different jobs. So that
4 happens.

5 That goes hand-in-hand with the, you
6 know, those are very inexperienced counsel. And
7 that goes to the other side of the coin, which is
8 inexperienced counsel really shouldn't be put in
9 that situation where they're in a developmental
10 assignment as an SVC or VLC.

11 So it kind of goes hand-in-hand. If
12 you have -- the reason why the Air Force and Navy
13 are more successful in having longer tours is
14 because they don't assign first tour people.
15 They are second, third -- they're not even
16 second. They're usually in the Navy. They're
17 third or fourth tour, more senior people, who go
18 into an assignment.

19 It's like this is your two year
20 assignment. Expect to spend two years in this
21 SVC job. That's the expectation. And they don't
22 have any minimum length but that's just the

1 assignment length. And there's no reason to cut
2 it short so if that helps that's the information
3 that we derived.

4 MEMBER SCHWENK: Yes. Thank you. I
5 guess that leads me to wonder if we're comparing
6 an apple with an orange in comparing people who
7 are third tour with somebody who is first tour
8 and their developmental opportunities.

9 Clearly if they do two years as a
10 VLC/SVC, whatever the current combination is,
11 they're only going to have a year left to do
12 something else, which is not a lot of time to
13 learn whatever the second thing is.

14 So my thought was when I read the
15 report, 18 and 18 was a good start considering
16 we're starting from 0. We are starting with, as
17 I understand it, nobody has got a minimum tour
18 length. You know, there are goals and
19 aspirations, but nobody has one.

20 So now if we recommend to have one,
21 we're breaking new ground completely. And I
22 thought by breaking new ground at the lower

1 level, 18 months, allowing an 18/18 split, if
2 you're going to use first tour people seemed to
3 strike a good balance.

4 I completely agree with my compatriots
5 that, you know, in an ideal world, you wouldn't
6 have first tour people doing it. You would have
7 second, third, whatever tour and that would be
8 their job. And they could keep it as long as
9 they wanted it, two years or more. But reality
10 being reality, I think we have to address the
11 first tour people. And so 18 and 18 seemed to me
12 a good start that's reasonable and moves the ball
13 forward. So those are my thoughts.

14 MEMBER BASHFORD: It's Martha
15 Bashford.

16 MEMBER WALTON: I have another query.
17 Based upon what the good general said, could
18 there be two different tracks where during that
19 first tour it's 18 months, but in subsequent
20 tours it could be 24 months?

21 CHAIR SMITH: Or just not having
22 someone do it in their first tour, that would be

1 ideal.

2 MR. YOB: Just to answer the second
3 question, I mean, that is a recommendation that
4 we think from what we found perhaps not possible
5 but ideal.

6 On the other issue of could they have
7 18 months and 24, I think, as Ms. Critchley was
8 saying, you know, 18 months would be a minimum,
9 but it wouldn't preclude a later tour being two
10 years. And so an 18 month tour would do what
11 you're saying, I think, by saying for first tour
12 people could be 18 months. For later people,
13 they can say you're going into a two year tour
14 and just expect to be there for two years.

15 So I think what you're saying it would
16 be done within 18 month tour.

17 MEMBER SCHWENK: I think the
18 recommendation could clearly read that for first
19 tour 18 months, for subsequent tours 24 months as
20 the minimum standard and take it from there. So,
21 Judge Walton, I hate to say it, but great idea.

22 MS. CARSON: If I could just note one

1 of the additional recommendations that we
2 received from a member was that the SVC/VLC must
3 have prior military justice experience and not be
4 a first tour judge advocate. So if you want to
5 consider that in conjunction with Recommendation
6 1 or take it separately, it's up to you.

7 MEMBER GOLDBERG: May I ask is there
8 room in something like that for an exceptional
9 circumstances kind of provision because I can
10 imagine there could be some people who would come
11 into the role as a first tour and have that
12 capacity to do this although in general the
13 recommendation seems to me to make good sense.

14 MS. CARSON: Absolutely, the
15 recommendation is exactly what you want it to be
16 so that's absolutely possible.

17 MR. YOB: One quick comment to the
18 two, if you have a 36 month tour, it doesn't
19 happen all the time, but if you came into your
20 first tour, and you were immediately the
21 prosecutor or trial counsel for the first 18
22 months, then you could do your second 18 months

1 as an SVC. That's something that could be
2 possible theoretically.

3 MEMBER SCHWENK: Yeah. I guess the
4 issue is you also have defense counsel, you know.
5 And we have had the age old argument that nobody
6 should get a defense counsel who just got off the
7 boat from the basic course of whatever Service
8 you're in. That person ought to have at least
9 been in the courtroom for a while.

10 And so if we say the same thing, which
11 I happen to believe, that if we say the same
12 thing as a recommendation for VLCs suddenly
13 everybody has got to be a trial counsel so that
14 you can fill the defense counsel and the VLCs
15 after they've been trial counsel.

16 And personally I would like to talk to
17 the Service or have you guys talk to the Service
18 people and find out what's the effect of that on
19 just managing an office before we would take that
20 step.

21 But, like I said, I do believe the
22 desire should be no defense counsel until you

1 have been a trial counsel and no VLC until you've
2 been a trial counsel. But reality somehow rears
3 its ugly head and makes that hard. So I would
4 caution against going too far in our
5 recommendations at this point.

6 And I will, let me say one other
7 thing. Hello. One other thing, I'm the person
8 that said that now that I find out that the staff
9 was right to begin with in my opinion by saying
10 best practices rather than recommendations for
11 Recommendations 3 through 8.

12 And the reason that Pete gave was
13 exactly my reason. There is not the fulsome
14 development of the background, the options and
15 the rationale for the recommendations. Three
16 through eight have a couple of paragraphs and
17 some of them only have one paragraph.

18 It seems to me that we owe the
19 recipients of our recommendation just as fulsome
20 a development of the recommendation for
21 Recommendations 3 through 8 as we do the others.
22 That got me thinking what we're really doing here

1 is we're putting together best practices for VLC,
2 SVC, VC program. That's really what we're doing.

3 And so my thought then was maybe we
4 should consider answering the mail on 1 and 2,
5 the two questions we got asked. And then either
6 ask for permission or determine we have the
7 independent authority to do it ourselves. Give
8 ourselves the project of developing a list of
9 best practices, starting with Recommendations 3
10 through 8 and continuing on to these other ideas
11 of, you know, no VLC unless you've been a TC or
12 whatever else we have that we can think of and
13 put a nice big package together of that. Here's
14 what we think are best practices for VLC, SVC, VC
15 program. So that's how I would tie all that
16 together.

17 PARTICIPANT: Can I add one more thing
18 to the mix, please?

19 MS. CARSON: So let me just -- no. I
20 think we're running close to our time on this.
21 So potentially we could take a pause and take
22 this up again in the strategic planning tomorrow

1 and let everybody marinate on their thoughts on
2 this for the night. That sounds good with
3 everybody?

4 CHAIR SMITH: That sounds good.

5 MR. YOB: Okay. Well, thank you for
6 your time and consideration.

7 MEMBER SCHWENK: Hey, that was a
8 terrific report, let me just say. That was
9 really a good report. And I understood where 3
10 through 8 came from, but I just think we probably
11 owe more.

12 MEMBER GOLDBERG: Right. I'll say I'm
13 new to this. But I also thought this was an
14 outstanding report. Thank you for it.

15 MR. YOB: Thank you very much. It was
16 a great team and a great synergy of the team that
17 allowed that.

18 COL BOVARNICK: Chair Smith, yeah,
19 that can conclude the meeting now if there are no
20 other comments.

21 MR. SULLIVAN: All right. Today's
22 meeting is closed.

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COL BOVARNICK: And we reconvene
tomorrow morning at 9:00 a.m.

(Whereupon, the above-entitled matter
went off the record at 4:43 p.m.)

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Before: US DOD DAC IPAD

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