

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

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32ND PUBLIC MEETING

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TUESDAY
 DECEMBER 5, 2023

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The Advisory Committee met in the
 General Gordon R. Sullivan Conference and Event
 Center, located at 2425 Wilson Boulevard,
 Arlington, Virginia, at 2:40 p.m., Hon. Karla
 Smith, Committee Chair, presiding.

PRESENT

Hon. Karla Smith, Chair
 MG (R) Marcia Anderson
 Ms. Martha Bashford
 Mr. William Cassara
 Ms. Suzanne Goldberg
 Hon. Paul Grimm
 Mr. A.J. Kramer*
 Ms. Jennifer Gentile Long
 Dr. Jenifer Markowitz
 BGen (R) James Schwenk
 Dr. Cassia Spohn
 Ms. Meghan Tokash
 Hon. Reggie Walton

ALSO PRESENT

Mr. Dwight Sullivan, Designated Federal Official
 Mr. Pete Yob, Director
 Ms. Meghan Peters, Acting Deputy Director
 Mr. Dale Trexler, Chief of Staff

Ms. Stacy Boggess, Paralegal
Ms. Alice Falk, Technical Writer-Editor
Ms. Breyana Franklin, Communication Specialist
Ms. Theresa Gallagher, Attorney Advisor*
Ms. Nalini Gupta, Attorney Advisor
Ms. Amanda Hagy, Paralegal
Mr. Michael Libretto, Attorney Advisor
Ms. Marguerite McKinney, Mgmt & Program Analyst
Ms. Janelle McLaughlin-Ali, Paralegal
Mr. Blake Morris, Paralegal
Ms. Stayce Rozell, Paralegal
Ms. Terri Saunders, Attorney Advisor
Ms. Kate Tagert, Attorney Advisor
Ms. Eleanor Magers Vuono, Attorney Advisor

* Present via video-conference

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

2 2:42 p.m.

3 MR. SULLIVAN: Good afternoon,
4 everybody. Welcome. I'm the Designated Federal
5 Officer of the Advisory Committee on
6 Investigation, Prosecution, and Defense of Sexual
7 Assaults in the Armed Forces, better known as the
8 DAC-IPAD.

9 This public meeting of the DAC-IPAD is
10 open. Judge Smith, you have the comms.

11 JUDGE SMITH: Thank you, Mr. Sullivan,
12 and good afternoon to everyone. I would like to
13 welcome the members of the DAC-IPAD and everyone
14 in attendance today to the 32nd public meeting of
15 the Defense Advisory Committee on Investigation,
16 Prosecution, and Defense of Sexual Assaults in
17 the Armed Forces, or DAC-IPAD.

18 Today's meeting will be in-person,
19 with video conference via Zoom also available for
20 members, presenters, and other attendees.

21 The DAC-IPAD was created by the
22 Secretary of Defense in 2016 in accordance with

1 the National Defense Authorization Act for Fiscal
2 Year 2015, as amended, for a ten-year term.

3 Our mandate is to advise the Secretary
4 of Defense on the investigation, prosecution, and
5 defense of allegations of sexual assault and
6 other sexual misconduct involving members of the
7 armed forces.

8 I'd like to begin by acknowledging,
9 with gratitude, the military justice experts for
10 each of the military services through the law
11 divisions who generously serve as the DAC-IPAD
12 service representatives who have joined us today
13 for the meeting. Welcome and thank you.

14 To summarize our two-day agenda, we
15 will begin with the full Committee and recommend
16 deliberations on two draft reports. First, they
17 will deliberate the draft report on randomizing
18 court-martial panel member selection. And, prior
19 to adjournment, the Committee will deliberate on
20 the draft report on sharing information with
21 victims and their counsel.

22 Tomorrow will be devoted to internal

1 briefings and updates. First, the Committee will
2 hear from the DAC-IPAD criminologist, who will
3 provide an update on the preliminary results of
4 the panel selection study. Next, professional
5 staff will provide a briefing on the current
6 proposals for assessing the implementation and
7 performance metrics for the offices of special
8 trial counsel. After a break, the Committee will
9 receive a briefing from the Special Projects
10 Subcommittee, followed by the Policy
11 Subcommittee. After the lunch break, we will
12 receive public comment from five individuals to
13 conclude the two-day meeting.

14 Now, for a few housekeeping items. To
15 those joining by video, I ask that you please
16 mute your device's microphone when not speaking.
17 If any technical difficulties should occur with
18 the video, we will break for ten minutes, move to
19 a teleconference line, and send the dial-in
20 instructions by email.

21 Today's meeting is being recorded and
22 transcribed. And, a complete written transcript

1 will be posted on the DAC-IPAD website.

2 Thank you all for being here today.

3 And, I'll now turn the meeting over to the DAC-

4 IPAD Director, Mr. Pete Yob.

5 MR. YOB: Thank you, Chair Smith. I

6 will now turn over the meeting to Ms. Terri

7 Saunders, Staff Attorney, who will conduct DAC-

8 IPAD deliberations on the draft report on

9 randomizing court-martial panel member selection.

10 Terri?

11 MS. SAUNDERS: Thank you. And good

12 afternoon, everyone. Over the course of the last

13 year, the Policy Subcommittee has reviewed

14 Article 25 panel member selection criteria and

15 the court-martial panel selection process.

16 At the September DAC-IPAD public

17 meeting, the Policy Subcommittee presented

18 information received and the perspectives of

19 stakeholders on these issues, and the committee

20 approved nine recommendations for changes to the

21 member selection criteria and process.

22 Following that meeting, the Policy

1 Subcommittee drafted a report, "Randomizing
2 Court-Martial Panel Member Selection: A Report on
3 Improving an Outdated System," and provided it to
4 the Committee for edits and comments, which you
5 have at Tab 2 of your materials.

6 At an administrative session earlier
7 this afternoon, the Committee reviewed the
8 proposed edits and comments provided by several
9 members. The members concurred with the majority
10 of the edits and they will be incorporated in the
11 final report.

12 There was one issue that the members
13 did want to discuss further. So, the members
14 will deliberate on that issue in this public
15 session.

16 At the end of the discussion and if
17 the members feel it appropriate, they will vote
18 on an additional recommendation and vote whether
19 to approve the report.

20 The issue that the members flagged for
21 further discussion regards Recommendation 61.

22 And, I'm just going to go ahead and read the

1 draft recommendation as -- with the suggested
2 edits incorporated.

3 So, Recommendation 61 would read, the
4 Joint Service Committee on Military Justice
5 should draft an amendment to the Rules for Court-
6 Martial to establish uniform criteria for
7 automatic exemption from serving as a court-
8 martial member.

9 Such criteria may include whether the
10 potential members have a felony conviction or
11 pending felony charges. The amendment should
12 delegate authority to each department's secretary
13 to promulgate regulations that establish
14 additional basis for automatic exemption.

15 To ensure maximum transparency, any
16 additional exempting criteria established by the
17 military departments should be made public
18 through the Federal Register and by other
19 appropriate means.

20 The issue that was flagged at the
21 administrative session earlier, concerns whether
22 the proposed language using felony charges or

1 felony convictions as an example of something
2 that may constitute an automatic exemption, is
3 something that should be incorporated into the
4 recommendation.

5 And, you know, so do we want to hear
6 some discussion on that?

7 MR. CASSARA: Well, since I'm the one
8 who brought it up, I guess that means me. My
9 concern was that over the year, there's been a
10 considerable amount of research and debate back
11 and forth as to what convictions in the military
12 constitute a misdemeanor versus a felony.

13 I'll just say that the bottom line
14 answer is, it's complicated. And, there is no
15 bottom line answer as to what conviction
16 constitute a misdemeanor or a felony.

17 My concern was that by using language
18 such as the criteria may include whether the
19 potential members have a felony or pending felony
20 charges, does that mean that it may not include
21 whether the member has a misdemeanor or pending
22 misdemeanor charges?

1 For example, I'm using the Air Force,
2 because they prosecute drug cases more. If
3 somebody on a panel is pending a special court-
4 martial for use of marijuana or use of cocaine,
5 most jurisdictions would consider that a felon --
6 a misdemeanor, rather. Although not all.

7 Does that mean that that person may
8 not be included, or excluded, excuse me, from
9 court-martial membership as a result of that
10 pending charge?

11 I don't know the answer. I don't know
12 that I have an opinion on the answer. But, I
13 wondered whether it was something that we should
14 discuss further before finalizing the report.

15 MS. SAUNDERS: Just to clarify, is
16 your concern with felony charges? Or, do you
17 also have concern with felony convictions?

18 Meaning felony conviction being used
19 as an example.

20 MR. CASSARA: I think it's both.

21 MS. SAUNDERS: Okay. Do any of the
22 members want to comment on that?

1 BGEN (R) SCHWENK: Well, I'll offer a
2 couple of thoughts. One is, the sentence is not
3 essential.

4 I mean, I think the recommendation
5 reads fine without it. The sentence could say, a
6 court-martial conviction instead of a felony
7 conviction and that way avoid the issue.

8 And then, it could say, criminal
9 charges rather than felony charges and avoid the
10 issue in both places. And, still be a very
11 useful, you know, might include this, might not.

12 MS. SAUNDERS: Okay.

13 BGEN (R) SCHWENK: You know, I don't
14 know, those are two thoughts to accommodate those
15 concerns.

16 JUDGE GRIMM: I think that General
17 Schwenk's suggestion is very simple. I think
18 that that suggestion is very helpful to eliminate
19 what felony is as well.

20 While keeping the impact of what the
21 recommendation is in getting the, just tied to
22 military charges and military courts martial

1 rather than felonies would be a useful way of
2 doing that.

3 MR. CASSARA: I wonder if we could
4 just take out the word felony, to have, or -- and
5 replace it with criminal, to have a criminal
6 conviction or pending criminal charges.

7 BGEN (R) SCHWENK: That's fine too.

8 MR. CASSARA: Although I know that the
9 question came up previously about whether that
10 would include non-judicial punishment Article
11 15s.

12 Again, I don't know the answer. I'm
13 just raising, just causing trouble.

14 JUDGE WALTON: I guess I don't have a
15 problem with convictions. But, I do, I guess,
16 have a problem with pending charges.

17 Because somebody is presumed to be
18 innocent. And, there are a lot of people who are
19 arrested who didn't do what they're accused of
20 having done.

21 And, I have questions about whether
22 that should be a criterion as to whether someone

1 can even qualify to potentially sit as a panel
2 member.

3 MS. SAUNDERS: Would it resolve the
4 issue if we just said, such criteria may include
5 whether the potential members have a criminal
6 conviction?

7 And just leave it there for that
8 sentence?

9 JUDGE SMITH: Well, I'd say some
10 states, including Maryland, do. You cannot serve
11 as a juror if you have pending criminal charges
12 which face more than a year in jail.

13 So, not to disagree with the more
14 senior smarter Judge, but, I think it makes sense
15 to leave that language in, in some way. One form
16 or another.

17 MS. SAUNDERS: And, I'll just
18 emphasize that these were supposed to be -- these
19 are really examples. What we're really doing is,
20 we're punting to the JSC to actually come up with
21 what those exclusion criteria should be.

22 We're just trying to say, such as.

1 So, I guess more comment? Ms. Goldberg?

2 MS. GOLDBERG: Not being a Judge,
3 perhaps I shouldn't say anything. But, that
4 hasn't stopped me before.

5 So, I tend to align with Judge Smith
6 on this. In part because of the different nature
7 of military service as I have come to learn, and
8 the idea of demands on a person's time associated
9 with being a criminal defendant, or a court-
10 martial defendant.

11 And, some other possible concerns
12 including perhaps an interest or an incentive for
13 that person to appear to be sort of aligning with
14 the prosecution to receive more favorable
15 treatment and some other things.

16 So, I think it is, I think there are
17 complications there that make it a worthy
18 consideration.

19 I don't -- I'm not necessarily
20 recommending a change, but one point that jumped
21 out to me when I was reading some of the text on
22 this, was there was initially a reference to a

1 misdemeanor or a felony conviction.

2 And, the misdemeanor raised a flag for
3 me in terms of not knowing the extent to which
4 misdemeanor convictions are sort of, are
5 happening. And, whether all misdemeanors would
6 need to be excluded.

7 And so, I appreciate the move away
8 toward the more general reference to a
9 conviction, or at least from misdemeanors.

10 But, I just raise the question,
11 because I don't have the information about
12 whether we -- it would be appropriate to signal
13 some kind of -- that it is worthy to -- for the
14 next body that will be thinking about this, to
15 consider convictions in a calibrated or a
16 textured kind of way. I don't have the wording
17 to offer right now.

18 And, I would be interested to know the
19 response on that. But, that was the one question
20 that popped up for me.

21 MS. LONG: This is Jennifer Long. I
22 don't have a response to that. So, Bill, did

1 you? Because -- okay.

2 This was more of a wording, because
3 when I initially read this, even though it says
4 may, I did think we were limited, I -- it did
5 sound like the instruction to whoever was making
6 the recommendation was limited.

7 So, if you mean such as, I would say,
8 you know, e.g., or such as, just to be clear that
9 these are examples.

10 And, Suzanne, I think your question is
11 good. I just don't -- I don't have the answer on
12 that, on how to fix it.

13 MS. SAUNDERS: Are there additional
14 comments on that? Does anyone else want to weigh
15 in on the proper wording?

16 It sounds like we're between criminal
17 conviction or criminal conviction and pending
18 criminal charges.

19 (Simultaneous speaking.)

20 MR. KRAMER: This -- I'm sorry. This
21 is A.J. Kramer. Can I ask you a question?

22 So, you're saying that misdemeanors

1 would disqualify someone? That would be contrary
2 to the laws of almost every state, I think.

3 MR. CASSARA: A.J., I'm not saying one
4 way or the other on it. My comment was that by
5 using the language, have a felony conviction or a
6 pending felony criminal charges, or pending
7 felony charges, are you therefore also saying
8 that it may not include whether they are pending
9 misdemeanor charges.

10 And, I think in the court-martial
11 arena, a service member pending a special court-
12 martial conviction for example, or a professional
13 court-martial for example, we should at least
14 consider.

15 You know, look this may all come out
16 in court even. This may be a nonissue because I
17 would imagine that that person may be challenged
18 for cause.

19 I'm just, like I say, I'm causing
20 trouble. But, I want to make sure that our
21 language is what we are intending.

22 MR. KRAMER: Okay. And, by

1 misdemeanors you're excluding things like
2 reckless driving, shoplifting, and a whole host
3 of what I think most people would consider
4 relatively minor offenses.

5 MR. CASSARA: Yeah. My concern A.J.,
6 is that in the military, if one is charged with,
7 for example, shoplifting, it is unclear whether
8 that constitutes a misdemeanor or a felony,
9 because the military does not make that
10 distinction.

11 MR. KRAMER: And, they -- then it
12 doesn't say military, by the military, I think.

13 MS. SAUNDERS: These are really
14 supposed to be examples of something that may,
15 that the services may consider, the Joint Service
16 Committee may consider as an exclusion criteria.

17 Would saying something such as, court-
18 martial conviction, as has previously been
19 mentioned by General Schwenk, would that -- would
20 everyone be happy with that language?

21 Or, do you -- would you rather have
22 criminal? Or, we could just take, you know, we

1 could take the whole sentence out and not provide
2 examples. That would be another option.

3 JUDGE SMITH: I don't think it's a
4 good idea to take those examples out. I think
5 it's a good idea to give examples.

6 But, could we say, instead of making
7 it a sentence, could we say something like, such
8 as, prohibiting members with prior convictions or
9 pending charges?

10 Or, whatever language you need --
11 whatever language you want to use. But then, if
12 we're saying such as, it's clear we're just
13 providing examples. Which, I think was part of
14 the issue.

15 And, not saying felony or misdemeanor
16 kind of takes away the issue that Bill was
17 referring to. It doesn't really address Judge
18 Walton's issue of pending charges.

19 You know, if you wanted to say
20 something --

21 MS. SAUNDERS: Serious pending
22 charges, I don't know.

1 JUDGE SMITH: You know, something
2 along those lines. But, definitely making it one
3 sentence to make it clear that we're providing
4 examples.

5 But, by no means, an exhaustive list
6 or anything we think must be included.

7 MR. CASSARA: And, I think we also
8 need to keep in the back of our minds, but what
9 about a summary court-martial conviction, which
10 the Supreme Court has said does not equal a
11 criminal conviction.

12 I think that might further complicate
13 matters. But, I think we do need to consider
14 that. Because I think, I forget the name of the
15 case, Dwight might have it, because he's smarter
16 than me.

17 MR. SULLIVAN: Middendorf.

18 MR. CASSARA: Middendorf, there you
19 go. The Middendorf case, which specifically said
20 that a summary court-martial conviction does not
21 mean a criminal conviction.

22 So, that's a concern.

1 DR. SPOHN: Just a point of
2 clarification. Can someone -- as someone who
3 knows very little about the criteria for being a
4 member of the military, could someone join one of
5 the military services with a misdemeanor
6 conviction for shoplifting or reckless driving or
7 possession of marijuana?

8 Are these -- does this refer
9 specifically to things that happened while they
10 were in the military? Or, something that could
11 have happened before they joined the service?

12 MR. CASSARA: I can answer one of
13 those questions. Given the lax in recruiting,
14 standards change pretty regularly.

15 And, certainly if you've gotten a
16 conviction expunged, you are certainly eligible
17 to enlist. And, I'm fairly sure that misdemeanor
18 convictions are no longer a disqualifying factor.

19 But, that -- that changes pretty
20 regularly, I think.

21 MG (R) ANDERSON: This is Marcia
22 Anderson. I concur with Bill's comment. And, to

1 go ever further, I have issued waivers within the
2 last ten years for inserting for people to enlist
3 for a variety of things. We usually look at them
4 as youthful indiscretions.

5 So, but, it would be, I think, unfair
6 to resurrect that and then say that they're no
7 longer eligible to serve on court-martial.

8 MR. CASSARA: Is there a solution that
9 sort of says, such criteria may include by a, and
10 just list more generic language which, you know,
11 giving the JSC, giving them more discretion
12 without using a specific example that's giving up
13 some of the language, making it more their
14 knowledge?

15 MS. SAUNDERS: So, what we have right
16 now is, the JSC drafted an amendment or the rules
17 for court-martial to establish uniform criteria
18 for automatic exemption for servicing as a court-
19 martial member, such as, and that's where we're
20 looking for selected.

21 (Laughter.)

22 MS. SAUNDERS: We have the such as,

1 and we're working on it.

2 MS. GOLDBERG: This is Suzanne. I'm
3 wanting to say, I don't know enough of the
4 differences between a general and a, specific, I
5 don't know, special court-martial.

6 As to whether that is a meaningful
7 distinction here or not. But, we might say just
8 in the, to make for the fuzzy language, court-
9 martial, with convictions to court-martial to the
10 extent they may be worthy of consideration.

11 I mean, just something that sort of
12 points toward court-martial convictions, but
13 doesn't, kind of, direct -- doesn't appear to be
14 directing the next body to take what we said
15 without considering it fully.

16 MR. CASSARA: So, my concern is that
17 these are categorical exclusions. And, so,
18 that's not supposed to have any discretion.

19 Earlier in the recommendations we
20 talked about eliminating the inconsistency
21 between the language that previously allowed the
22 convening authority to decide whether they were,

1 had that special sauce necessary to be on a
2 military panel.

3 That cut against the whole idea of
4 manualization of the assignment. And, the minute
5 we get into something that looks like you're
6 reopening the doors to that discussion in the
7 guise of a categorical exclusion, we haven't
8 helped much.

9 CHAIR BASHFORD: Your finding 14,
10 right below that paragraph, I'm not sure why that
11 couldn't be, for example, federal courts require,
12 et cetera. And, say, and current Department of
13 Defense exception regulations.

14 MS. SAUNDERS: So, --

15 CHAIR BASHFORD: Without recommending
16 that they do anything that's specific. You're
17 just saying --

18 MS. SAUNDERS: Just providing this --

19 CHAIR BASHFORD: There's a -- for
20 example, here's what another jurisdiction does.

21 MS. SAUNDERS: So, would the --

22 CHAIR BASHFORD: Yeah, you have to

1 renumber all of your findings. But, sorry.

2 MS. SAUNDERS: I think we could do
3 that.

4 (Laughter.)

5 MS. SAUNDERS: No, so, it would read,
6 criteria for automatic exemption from serving as
7 a court-martial member -- serving as court-
8 martial members, period. An example is that
9 federal courts have --

10 CHAIR BASHFORD: For example, and then
11 the other.

12 MS. SAUNDERS: For example, Federal
13 Courts require. And, inserting that sentence
14 from the finding. Yeah. There you go.

15 Would that work for everyone? I'm
16 seeing nods. So, -- no? I'm not seeing -- you
17 don't see how --

18 MR. CASSARA: I don't see how. I'm
19 one vote. I don't, you know, it's more than I
20 get at home. But, I'm still only one. So, --

21 (Laughter.)

22 MS. SAUNDERS: Well, it seems like

1 that is an elegant solution. And, it seems like
2 I'm seeing a lot of nods that people seem to
3 support that idea.

4 So, we will -- so we will incorporate,
5 unless I hear otherwise, we will incorporate that
6 sentence, the finding -- finding 14, the sentence
7 from finding 14 into that spot.

8 And then, we will renumber the other
9 points. So, are there any other issues or
10 concerns or comments that anyone wishes to raise
11 on the recommendations or the report as a whole?

12 (No response.)

13 MS. SAUNDERS: I will mention one
14 point, our excellent technical writer, Alice Falk
15 came up to me during a break. And, she said, on
16 page 26 that we have -- we're talking about the
17 personnel computer systems that we are proposing
18 conduct the random selection.

19 You know, the language we have in
20 there in red is pro -- the person who is assigned
21 to run the selection program -- process, programs
22 the database. And she helpfully pointed out, no,

1 they don't. They create an algorithm.

2 So, I obviously do not have a computer
3 background. So, I propose we substitute her
4 suggestion, creates an algorithm in that spot.

5 But, that was all we had. If everyone
6 -- if there are no other comments or questions,
7 there are two -- two issues that need to be voted
8 on.

9 The first is recommendation 54, which
10 had not previously mentioned, which is -- which
11 we had not -- you had not previously voted on.

12 Which says, Congress should retain the
13 Article 25(e)(4) requirements for the convening
14 authority to detail members randomly selected
15 under regulations prescribed by the President.

16 The qualifying words, to the maximum
17 extent practicable, should be removed. So, that
18 recommendation would require a vote.

19 And then, there would have to be a
20 vote on the report as a whole. So, if everyone
21 is ready to do that, this would be a great time
22 for that.

1 So, I'll turn it over to you, Madam
2 Chair.

3 MS. TOKASH: Judge Smith, I'm sorry.

4 MS. SAUNDERS: Yes?

5 MS. TOKASH: Ms. Tokash. I just have
6 a question, Ms. Saunders. So, while I agree with
7 the majority of the findings and recommendations,
8 I do not agree with the part of the
9 recommendation as it pertains to the commander
10 retaining the availability and excusability
11 determination.

12 So, my question is, in terms of
13 voting, because 54 is kind of a bifurcated
14 recommendation in that regard. I'm just not sure
15 whether I should just state that on the record
16 and abstain from voting.

17 MS. SAUNDERS: I'll turn that -- I'll
18 let our Director answer that question.

19 MR. YOB: Yeah. So, I understand what
20 you're saying to be that you will not vote in
21 favor of it with that provision in it.
22 Therefore, you could abstain or you could vote

1 no.

2 But, I think that, you know, as
3 drafted, you would have those options.

4 MS. TOKASH: Thank you.

5 MR. CASSARA: Meghan, I can tell you
6 that when I was on the Judicial Proceedings
7 Panel, I actually wrote a dissenting comment on
8 one of the votes. And, I think that may still be
9 available.

10 MS. TOKASH: And, I have one prepared
11 to submit to the staff.

12 MR. CASSARA: That does not surprise
13 me.

14 (Laughter.)

15 MS. GOLDBERG: May I ask a question?
16 Was it already discussed in the administrative
17 session, the substance of your concern?

18 MS. TOKASH: I did not raise it.

19 MS. GOLDBERG: It wasn't?

20 MS. TOKASH: I did not raise it in the
21 administrative session. I raised it at the
22 September meeting.

1 MS. GOLDBERG: Okay. Thank you.

2 MS. TOKASH: And, it's really just
3 specific to that very point. That in my opinion,
4 if we're making these recommendations that the
5 administrative -- again, my opinion, what seems
6 to be an administrative type of a function in
7 determining the availability and excusability of
8 potential panel members being retained by the
9 commander, still creates a perception of non-
10 objectivity and a lack of transparency based on
11 stakeholder input that we heard from both the
12 survivor community and also those who had been
13 accused of military crimes.

14 JUDGE SMITH: I think if I, just to
15 paint the whole picture, and Terri, you'll
16 correct me if I'm wrong.

17 There was an additional recommendation
18 that the convening authority -- or that there be
19 guidelines for the convening authority
20 documenting the reasons for finding somebody
21 wasn't available to serve.

22 So, there would be a record if that's

1 adopted. Right?

2 MS. SAUNDERS: You are correct. In
3 addition, recommendation 56 recommends that the
4 Secretary of Defense direct a pilot project to
5 create a court administrator position.

6 And, that potentially could be one of
7 the duties of that administrator.

8 JUDGE SMITH: Okay. So, with that,
9 let's go ahead and vote first on recommendation
10 54. And, I think if you're voting against it,
11 let's just hear from you.

12 I know Ms. Tokash is voting against it
13 54.

14 MS. TOKASH: Yes.

15 JUDGE SMITH: Anybody else?

16 CHAIR BASHFORD: Yes, I could vote
17 against it, Martha Bashford.

18 JUDGE SMITH: All right. Ms. Bashford
19 votes against it.

20 MR. KRAMER: A.J. Kramer votes against
21 it.

22 JUDGE SMITH: Okay. Mr. Kramer votes

1 against it.

2 JUDGE WALTON: Reggie Walton votes
3 against it.

4 JUDGE SMITH: And, Judge Walton votes
5 against it. I think that leaves everyone else
6 for it.

7 MR. YOB: That's four votes that are
8 opposed. In the event that we might have
9 abstentions, could those voting favorably, please
10 be recognized?

11 (Hand voting.)

12 MR. YOB: I have a count of eight
13 votes in favor and four votes opposed.

14 JUDGE SMITH: All right. So, then
15 we're going to adopt the recommendation. But,
16 before, let's go on and vote on the report in its
17 entirety.

18 Let's start with those who are voting
19 against the report.

20 CHAIR BASHFORD: Martha Bashford votes
21 no for the reasons as set forth in the meeting of
22 -- our last meeting in September.

1 JUDGE SMITH: Ms. Bashford. Ms.
2 Tokash, are you voting against it as well?

3 MS. TOKASH: I would vote for the
4 adoption of the report with the footnote about
5 the recommendation regarding the availability and
6 excusable determinations.

7 JUDGE SMITH: Okay. All right.
8 Anybody else voting against or voting for with a
9 caveat?

10 Yeah. Oh, yes, Reggie?

11 JUDGE WALTON: Reggie Walton, I agree
12 with Ms. Tokash.

13 JUDGE SMITH: All right. So, Judge
14 Walton is the same as Ms. Tokash.

15 MR. KRAMER: And, A.J. Kramer is the
16 same.

17 JUDGE SMITH: And, Mr. Kramer. Do you
18 want us to take a yea vote?

19 MR. YOB: Would you please.

20 JUDGE SMITH: Yes, those voting in
21 favor of the report.

22 (Hand voting.)

1 JUDGE SMITH: Further back our hands
2 are waved as we vote on the last report.

3 MR. YOB: Okay. So, my tally is nine
4 in favor, one opposed, and three -- would it,
5 would it be fair to say opposed with comment?

6 Is that your position?

7 MS. TOKASH: Yes. Thank you.

8 MR. YOB: Okay.

9 MS. SAUNDERS: I'm sorry. I thought
10 it was supporting but --

11 JUDGE WALTON: It's the other way
12 around.

13 (Simultaneous speaking.)

14 MR. YOB: It's my mistake. That's why
15 I'm clarifying it.

16 MS. SAUNDERS: Okay.

17 MR. YOB: So, --

18 MS. TOKASH: Yes. Sorry.

19 MR. YOB: So, nine in favor, one
20 opposed, and three supporting but with a caveat
21 comment.

22 JUDGE WALTON: Correct.

1 MR. YOB: Thank you. Thank you, sir.

2 JUDGE SMITH: And, we can work with
3 those members who have the caveat to make sure we
4 get the language correct. And that we, you know,
5 fairly note that in the report.

6 MS. SAUNDERS: All right. So, with
7 that, the report is passed. Accepted fruit by
8 the Committee.

9 JUDGE SMITH: Okay. Thank you all.

10 MS. SAUNDERS: Thank you. We're going
11 to move onto the second report. Ms. Vuono?

12 MS. MAGERS VUONO: Okay. Hello. Now,
13 can you hear me? Great. So, if we could
14 please turn to the third tab of the read ahead
15 materials.

16 We're going to vote on the second
17 report today. The report titled Recommendations
18 for a Uniform Policy for Sharing Information with
19 Victims and their Counsel.

20 And, as background, this was a
21 Congressional tasking that was part of the FY23
22 National Defense Authorization Act, tasking the

1 DAC-IPAD to submit a report by the end of this
2 year, December of 2023, on the feasibility and
3 advisability of establishing a uniform policy for
4 sharing information with special victims'
5 counsel, victim's legal counsel, or other counsel
6 representing a victim of an offense under the
7 UCMJ.

8 The tasking asks the DAC-IPAD to
9 assess three categories of information. The
10 Special Projects Subcommittee took on this
11 tasking.

12 And, at a series of public meetings,
13 the DAC-IPAD heard from civilian, military,
14 victims' counsel, victim advocates, prosecutors,
15 defense counsel, military criminal investigators,
16 and military justice policy experts.

17 In September, the DAC-IPAD deliberated
18 and voted to recommend a uniform policy. And
19 then, the staff has drafted a report explaining
20 the recommendations that the DAC-IPAD voted to
21 approve in September.

22 So, we're here to vote on the final

1 language of that recommendation, as well as the
2 report. And so, if you turn to page four in your
3 clean copy, not your redlined copy, under Tab
4 Three, I'm just going to read the DAC-IPAD
5 recommendation for your vote.

6 There's no numbers assigned with these
7 three recommendations. So, they just have XX's.
8 But, we will assign numbers in order.

9 Now it reads the Joint Service
10 Committee on Military Justice, JSC, should draft
11 an amendment to the rules for courts martial to
12 establish uniformity with respect to the sharing
13 of the following information with the victim and
14 their counsel if represented. Listing then the
15 three categories with information as part of the
16 statutory tasking.

17 The rules should specify the
18 Government's obligation to inform individuals
19 that these three categories of information,
20 including copies of statements, recordings, or
21 documents, shall remain available promptly upon
22 request by a victim or their counsel, subject to

1 the following conditions:

2 One, the prosecutor shall disclose the
3 information requested promptly, in consultation
4 with the Military Criminal Investigation
5 Organization, MCIO, unless otherwise prohibited
6 by law.

7 Or, unless a military judge or
8 magistrate finds upon a written submission by the
9 prosecutor demonstrating good cause, that the
10 disclosure of the record of a forensic
11 examination would impede or compromise an ongoing
12 investigation. The prosecutor shall state in
13 writing any reasons for non-disclosure and may do
14 so in camera to a military judge or magistrate.

15 Three, the rules should ensure that in
16 any case, the policy must not be construed to
17 interfere with the provision of healthcare to a
18 victim or the victim's access to veterans'
19 benefits.

20 The next recommendation is to the
21 Joint Service Committee on Military Justice.
22 Should draft an amendment to the rules for court-

1 martial to provide a process for issuance of a
2 protective order by a military judge or
3 magistrate upon a showing of good cause, the
4 disclosure of the record of a forensic
5 examination would impede or compromise an ongoing
6 investigation to accompany disclosures to victims
7 and counsel before referral of charges in
8 accordance with Article 38 of the UCMJ.

9 And the third and final recommendation
10 is that the Secretary of Defense should modify
11 DoD instructions to align with the new rules for
12 sharing these three categories of information.

13 I'm going to pause here to see if
14 there's any additional comments or discussion
15 before the Chair calls for a vote on those three
16 recommendations and the report as amended.

17 MR. CASSARA: Ma'am, I'm sorry, I just
18 thought of a question that I should have asked
19 during the other session. But, as it relates to
20 the prosecutor shall say, in writing, any reason
21 for non-disclosure may do so in camera to a
22 military judge or magistrate.

1 MS. SAUNDERS: Recommendation One.

2 MR. CASSARA: Thank you.

3 Recommendation One. Is there a discussion -- has
4 there been any discussion as to whether or not
5 the defense is even notified of the fact that the
6 prosecution is seeking that information for that
7 protective order?

8 MS. MAGERS VUONO: Thank you. Yes, so
9 at the administrative session we flagged a few
10 additional comments to the point you just made. It
11 is, what due process is the defendant entitled to
12 as part of this policy?

13 And the recommendation of the DAC-IPAD
14 was addressed in the yellow highlighted portion
15 on page ten to ask the Joint Service Committee to
16 convene a working group to address these nuances,
17 these important concerns about due process for
18 the accused.

19 So, this report does not spell that
20 out. But, recognizes that that needs to be part
21 of the policy.

22 MR. CASSARA: Thank you very much.

1 MS. MAGERS VUONO: So, with that, I
2 can turn the mic back over to the Chair to call
3 for a vote on the three recommendations as well
4 as the report as amended.

5 JUDGE SMITH: Okay. So,
6 Recommendation XX, those are all labeled XX.
7 Okay. Well, Recommendation One, which is on page
8 four.

9 All those in favor of voting against?
10 (No response.)

11 JUDGE SMITH: Nobody's voting against
12 it so, with that, that will be adopted.

13 Recommendation Two, all those voting
14 against Recommendation Two?

15 MR. CASSARA: Chair, just a point of
16 clarification. Recommendation Two is the -- on
17 page five.

18 JUDGE SMITH: On page five.

19 MR. CASSARA: Thank you.

20 JUDGE SMITH: The first one in the
21 white box. All right. Thank you.

22 Anyone voting against that?

1 (No response.)

2 JUDGE SMITH: No one voting against
3 that. So, that will be adopted.

4 And, Recommendation Three, which is in
5 the gray box on page five. Anyone voting against
6 that recommendation?

7 (No response.)

8 JUDGE SMITH: No votes against that.
9 So, we will -- and so, that will be adopted.

10 Let's move onto a vote on the report,
11 Recommendations for a Uniform Policy for Sharing
12 Information with Victims and Their Counsel.
13 Anyone voting against adoption of the report?

14 CHAIR BASHFORD: This is Martha
15 Bashford. I'm not voting against. But, footnote
16 11, in our recommendations that we just voted on,
17 it says subject to applicable law.

18 Footnote 11 again, refers to DNA
19 results. I just think there should be one more
20 sentence about, you know, the dissemination of
21 DNA results may be subject to various
22 restrictions by federal and state law.

1 We brought it up before. And, I know
2 what our DFO said, now the military people here
3 are aware of it, but I think the general public
4 might not be.

5 So, because you're getting -- often on
6 these forensic results you're getting the
7 suspects DNA profile. And, you would then be
8 disseminating a suspect's DNA profile to a
9 victim, which is prohibited in -- by federal law.
10 Not specifically to a victim, but it's
11 prohibited.

12 MS. MAGERS VUONO: If the Committee
13 agrees, we could add an additional sentence to
14 footnote 11. It was added to the first
15 recommendation to ensure that the information has
16 to be disclosed unless otherwise prohibited by
17 law.

18 So, that's actually in the
19 recommendation. But we can repeat that language
20 in footnote 11 to say any dissemination of DNA
21 results must be in accordance with federal and
22 state law.

1 CHAIR BASHFORD: Perfect.

2 JUDGE SMITH: I think that's perfect.
3 Everyone agree to add that? I see heads nodding
4 yes. Okay. Very good.

5 So, with that addition, let's vote on
6 this report. Anyone voting -- did you have a
7 question?

8 MS. SAUNDERS: No.

9 JUDGE SMITH: Okay. Anyone voting
10 against the adoption of this report?

11 (No response.)

12 JUDGE SMITH: Seeing no one, everyone
13 is voting for it. Oh, yeah. Okay.

14 MR. YOB: I'll record that vote as 13
15 in favor and zero opposed.

16 JUDGE SMITH: All right. Very good.
17 It's adopted. Thank you, Ms. Vuono.

18 MR. YOB: I think that's it. It
19 concludes the business that we have to do today.
20 There are no administrative announcements that
21 I'm aware of.

22 So, I'll turn it over to the Chair or

1 if anyone else has any administrative
2 announcements or otherwise?

3 (No response.)

4 JUDGE SMITH: Okay. All right.

5 CHAIR BASHFORD: Well, since we have
6 a little bit of time, I would ask the Chair or
7 the Director, where do we stand on senior
8 enlisted or investigative membership coming to
9 the Committee?

10 MR. YOB: Yes. The question is about
11 additional members. The nominations have been
12 made. The nominations are proceeding to SECDEF
13 level to be approved.

14 I checked on that, the process for
15 this earlier in the week. I was told by the
16 people in charge of that, that they're
17 anticipating an estimated time of mid to late
18 January as being the best possibility.

19 But, so, for what that's worth, I
20 mean, that what was conveyed to me and I'm
21 conveying it to you. We just checked and that's
22 where we're at.

1 JUDGE SMITH: All right. Anything
2 else before I turn the comms back over to Mr.
3 Sullivan? I'm learning. It took me two years.

4 MR. YOB: Madam Chair, I think we're
5 on schedule to reconvene at 0845 in the same
6 place, right here.

7 MR. SULLIVAN: Today's public meeting
8 is closed.

9 (Whereupon, the above-entitled matter
10 went off the record at 3:24 p.m.)

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Before: DOHA DAC-IPAD

Date: 12-05-23

Place: Arlington, Virginia

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