

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
FEBRUARY 21, 2023

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The Advisory Committee met in Salon 4
in the Renaissance Arlington Capital View, 2800
South Potomac Avenue, Arlington, Virginia, at
1:00 p.m. EST, Hon. Karla N. Smith, Chair,
presiding.

PRESENT

Hon. Karla N. Smith, Chair
MG(R) Marcia Anderson
Ms. Martha Bashford
Mr. William E. Cassara
Ms. Meg Garvin
Hon. Suzanne Goldberg
Ms. Jenifer Markowitz
BGen(R) James Schwenk
Ms. Meghan Tokash

ALSO PRESENT

Mr. Dwight Sullivan, Designated Federal

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, Editor
Ms. Stacy Boggess, Senior Paralegal
Ms. Theresa Gallagher, Staff Attorney
Ms. Amanda Hagy, Senior Paralegal
Mr. Chuck Mason, Staff Attorney
Ms. Marguerite McKinney, Management and Program Analyst
Ms. Meghan Peters, Staff Attorney
Ms. Stayce Rozell, Senior Paralegal
Ms. Terri Saunders, Staff Attorney
Ms. Kate Tagert, Staff Attorney
Ms. Eleanor Magers Vuono, Staff Attorney

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

2 1:0-6 p.m.

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

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

11 CHAIR SMITH: Thank you, Mr. Sullivan.
12 And good afternoon. I want to welcome the
13 members and all attendees to the 26th public
14 meeting of the Defense Advisory Committee on
15 Investigation, Prosecution, and Defense of Sexual
16 Assault in the Armed Forces, or DAC-IPAD.
17 Today's meeting will be in person and by
18 videoconference via Zoom for members and
19 presenters.

20 For those joining by video, please
21 mute when not speaking. If we have technical
22 difficulties, we will break for ten minutes, move

1 to a teleconference line, and send the
2 instructions by email.

3 The Secretary of Defense created the
4 DAC-IPAD pursuant to the National Defense
5 Authorization Act for fiscal year 2015. The DAC-
6 IPAD's statutory purpose is to advise the
7 Secretary of Defense on the investigation,
8 prosecution, and defense of allegations of sexual
9 assault and sexual misconduct involving members
10 of the armed forces.

11 Representatives from the military
12 services' Criminal Law Division to serve as the
13 DAC-IPAD service-specific experts and liaisons to
14 their services have joined us today. Welcome.

15 We will begin the afternoon with a
16 review of the military justice provisions
17 contained in the National Defense Authorization
18 Act for fiscal year 2023. Next, we have a panel
19 of representatives from the services' Trial
20 Defense Organizations to address the Committee's
21 interest and resources for the defense as
22 compared to the increase in resources for the

1 Offices of Special Trial Counsel.

2 After a break, we will hear public
3 comment and end the day with an update from the
4 Special Projects Subcommittee. The public
5 meeting will continue tomorrow at 8:55 a.m., when
6 the Committee will receive an update on military
7 sentencing and then hear from former military
8 judges. After lunch, the full Committee will
9 receive updates on the work of the Policy and
10 Case Review Subcommittees, including their input
11 to the fifth annual report and proposals for
12 stand-alone reports.

13 The Committee will then deliberate on
14 the fifth annual report, which is due on March
15 30th, and end the day with a wrap-up of the
16 meeting and preview of our next public meeting,
17 set for June 13th and 14th.

18 This meeting is being recorded and
19 transcribed, and the complete written transcript
20 will be posted on the DAC-IPAD website at
21 www.dacipad.whs.mil.

22 If a meeting attendee wants to make a

1 public comment, please submit your name no later
2 than 2:00 p.m. to
3 whs.pentagon.em.mbx.dacipad@mail.mil. Comments
4 will be heard at my discretion at 3:45 p.m.
5 today.

6 To assist the court reporter and to
7 avoid multiple people speaking at the same time,
8 Committee members should signal if they have a
9 question or wish to speak by stating your name
10 and waiting to be acknowledged before proceeding.

11 Thank you to everyone for attending
12 today. Over to you, Colonel Bovarnick, to start
13 the meeting.

14 COL BOVARNICK: Thank you, Chair
15 Smith. So, I just want to do a real quick update
16 for the members before we get to our first
17 speaker.

18 So, based on the Committee request at
19 the last meeting, we submitted an official
20 request for the Internal Review Team on Racial
21 Disparities in the Investigative Military Justice
22 Systems, the IRT, but because that report is

1 still pending before the Secretary of Defense,
2 we're unable to secure a briefing for this
3 meeting; however, the request will be renewed for
4 the June meeting. At tomorrow's wrap up session,
5 I'll raise some other requests for presenters to
6 appear before the Committee at a further session,
7 also perhaps in June.

8 And then, finally, for the full
9 Committee's consideration, there's a request from
10 Judge Gregory Maggs in the United States Court of
11 Appeals for the Armed Forces for one or more
12 Committee members to speak at the Court's annual
13 training and continuing legal education
14 conference at the George Mason Law School in
15 Arlington, Virginia, on May 10th and 11th.

16 They usually have about 100 to 150
17 attendees, including most of the judges from the
18 Service Courts of Criminal Appeals and numerous
19 government and defense appellate attorneys. At
20 last year's conference, attendees indicated they
21 would like to learn more about the DAC-IPAD and
22 insight into what the DAC-IPAD is currently

1 working on.

2 And so I throw that out to the
3 members, and anyone that's interested in doing
4 that, we can talk about that separately. But I
5 just wanted to make sure the full Committee was
6 aware of that invitation.

7 At this time, I'll hand it over to Ms.
8 Terri Saunders, who will introduce our first
9 speaker.

10 MS. SAUNDERS: Thank you, sir. So,
11 Chair Smith and Committee members, for our first
12 speaker today we have Captain Anita Scott from
13 the U.S. Coast Guard. Captain Scott is currently
14 serving as the Chair of the Joint Service
15 Committee on Military Justice, and she's going to
16 be providing you a briefing on the fiscal year
17 2023 National Defense Authorization Act, the
18 military justice provision.

19 So Captain Scott's biography can be
20 found at Tab 3A in your public meeting materials,
21 and the text of the NDAA military justice
22 provisions can be found at Tab 3B in your

1 materials.

2 So over to you, Captain Scott.

3 CAPT SCOTT: Thank you, ma'am.

4 Good afternoon, Madam Chair, ladies
5 and gentlemen. It's good to be back to see you
6 all again. Today I am, as was mentioned,
7 briefing on behalf of the Joint Service
8 Committee, where I did recently assume the Chair
9 from my esteemed colleague, Colonel Elizabeth
10 Hernandez of the United States Air Force.

11 Prior to today, I was provided four
12 questions to address with you this afternoon. My
13 plan was to do so first and then jump into the
14 slides that were prepared involving the NDAA
15 provisions.

16 MEMBER BASHFORD: I'm sorry, Captain.
17 Could you move your mic just a little bit closer?
18 Great. Thank you.

19 CAPT SCOTT: Yes, ma'am. How's that?
20 Perfect.

21 So, with that -- so the four questions
22 I was provided prior to today include, what is

1 the Joint Service Committee's role in
2 implementing statutory changes to the UCMJ? And
3 to speak to that specifically, the Committee aids
4 the Department of Defense in proposing executive
5 orders to amend the Manual for Courts-Martial,
6 which implements the UCMJ.

7 The Committee's operation and the
8 manner in which we do that is governed by DODI
9 5500.17 specifically. To prepare any proposed
10 amendments consistent with our mandate, the
11 Committee conducts an annual review of the code
12 and the UCMJ to ensure that the manual carries
13 out the UCMJ and is consistent with applicable
14 case law, that the rules and procedures in the
15 manual are uniform to the extent practicable, and
16 that the rules and procedures apply the Federal
17 Rules of Criminal Procedure and Evidence to the
18 extent the President deems practicable pursuant
19 to Article 36 of the UCMJ.

20 While conducting this review, the
21 Committee also solicits input from both within
22 the military services as well as the public.

1 After its review is complete, it submits proposed
2 amendments to the DOD General Counsel. So, from
3 a process perspective, that is how our role
4 functions.

5 The second question was specifically
6 regarding -- and I will touch on this again
7 later, but Section 543 of NDAA Fiscal Year 2023.
8 And it says, regarding Section 543, Randomization
9 of Court-Martial Panels, who will be responsible
10 for developing the randomization procedures, and
11 what will the process for developing these
12 procedures be?

13 So Section 543 of the NDAA for fiscal
14 year 2023 gave the President additional authority
15 to prescribe regulations to permit the randomized
16 selection of qualified personnel. This is to be
17 done while retaining the statutory requirement
18 that the convening authority detail, as court-
19 martial members, those members of the armed
20 forces who, in the convening authority's opinion,
21 meet the Article 25 criteria because they are
22 best qualified for the duty by reason of age,

1 education, training, experience, length of
2 service, and judicial temperament, or that,
3 unless it cannot be avoided, that no member of
4 the court-martial panel be junior to the accused.

5 So, consistent with the process that I
6 described in question 1, the Committee will study
7 the topic and provide any proposed amendments to
8 the Manual for Courts-Martial to the DOD General
9 Counsel.

10 Question 3 involves Section 541, and
11 it says, Section 541 includes sexual harassment
12 as a covered offense under the jurisdiction of
13 the Office of the Special Trial Counsel. Can you
14 remind us what the other covered offenses are?

15 So, effective 27 December of this
16 year, the term covered offense means offenses and
17 -- it means offenses as well as conspiracies and
18 attempts thereof of the following articles: so
19 Article 117 Alpha, Wrong Broadcast of Intimate
20 Visual Images; Article 118, Murder; Article 119,
21 Manslaughter; Article 120, Sexual Assault;
22 Article 120 Bravo, Sexual Assault of a Child;

1 Article 120 Charlie, Other Sexual Misconduct;
2 Article 125, Kidnapping; Article 128 Bravo,
3 Domestic Violence; Article 130, Stalking; Article
4 132, Retaliation; and Article 134, Child
5 Pornography.

6 Additionally, as added by NDAA FY '23,
7 there are three new covered offenses to the
8 original 11. These include Article 119 Alpha,
9 Death or Injury of an Unborn Child; Article 120
10 Alpha, Mails Deposit of Obscene Matter; and then,
11 of course, the stand-alone offense of sexual
12 harassment under Article 134, in each instance
13 where, one, a formal complaint is made and, two,
14 such formal complaint is substantiated in
15 accordance with regulations promulgated by the
16 Secretary concerned.

17 So all of those become effective at
18 the end of this year with the exception of the
19 sexual harassment article, which will become
20 effective 1 January of 2025. So, at that point,
21 there will be a total of 14 covered offenses.

22 And switching gears just a little bit

1 on the last question, as to the general topic of
2 the EO and changes to the Manual for Courts-
3 Martial, the question posed was, understanding
4 that you aren't permitted to comment on the
5 substance of the Joint Service Committee's draft
6 executive order concerning changes to the Manual
7 for Court-Martial, can you tell us the process
8 for getting the executive order approved and the
9 anticipated timeline?

10 So the typical process for issuing an
11 executive order is found itself in an executive
12 order, specifically EO 110-30. The Office of
13 Management and Budget coordinates the process by
14 which -- so, OMB, after review and submission by
15 the proponent department or agency, will review
16 the draft order, and then they may receive
17 additional comments or language from impacted or
18 interested agencies.

19 The draft order is then sent to DOJ
20 Office of Legal Counsel and then on to the
21 President for signing. And any estimate I give
22 you on timeline would be hopeful and well out of

1 my personal control.

2 So, jumping to the slides, my
3 intention is to cover -- some of the sections
4 involve things like technical amendments. I will
5 gloss over those and kind of stick to the more
6 meaty topics. But should you have a question
7 about something, happy to double back if desired,
8 as there's certainly a lot of sections to go
9 through.

10 So, starting with Section 541, Matters
11 in Connection with Special Trial Counsel, as I
12 already mentioned with the earlier questions,
13 Section 541 introduces sexual harassment as a
14 covered offense, effective 1 January of '25. And
15 this section also includes the Article 119 Alpha,
16 Death or Injury of an Unborn Child, as well as
17 the Article 120 Alpha, Deposit of Obscene matter
18 into the Mail, as covered offenses.

19 So those are -- that's the section
20 that includes the new covered offenses. And then
21 Section 541 also, for covered cases, divests the
22 -- there is a number of residual prosecutorial

1 duties and judicial functions of convening
2 authorities that needed to be addressed. So
3 things like granting immunity, ordering
4 depositions, hiring experts -- this now will take
5 those functions and shift them over to the
6 purview of either the military judge, the Special
7 Trial Counsel, or other authority as appropriate.

8 Section 541 also requires the de-
9 identification of the name of the convening
10 authority during a court-martial. So, on the
11 record where they would normally list the name of
12 the convening authority, that will no longer
13 happen. So, in open court, you will not identify
14 the name, rank, or position of the convening
15 authority unless the convening authority is the
16 service Secretary, the Secretary of Defense, or
17 the President.

18 So Section 541 additionally has
19 asserted new reporting requirements that include
20 providing an overall assessment of the effect of
21 the reforms as they pertain to the military
22 justice system at-large and the maintenance of

1 good order and discipline in the ranks.

2 It requires some statistics on
3 specific covered offenses as to what percentage
4 of caseload it is remaining with the STCs versus
5 being potentially deferred back to non-STC trial
6 counsels and/or convening authorities, an
7 assessment of the prevalence and data on
8 disposition by commanders after a declination or
9 deferral by a Special Trial Counsel, assessment
10 on the effects, if any, on non-judicial
11 punishment concerning covered and uncovered
12 offenses, an update on required resourcing, and a
13 description of any other factors or matters
14 important for a holistic assessment of the
15 military justice reforms to date.

16 So 541 is fairly broad. I have the
17 clicker. I am not sure what I am doing wrong
18 since there's only two buttons.

19 MEMBER SCHWENK: While we're waiting
20 for that technical correction, do you happen to
21 know offhand what other residual prosecutorial
22 duties they're referring to besides the three

1 that are listed, granting immunity and experts,
2 for example?

3 CAPT SCOTT: I'm going to say no,
4 because we're still taking a look at it, trying
5 to see if there's anything we've missed.

6 MEMBER SCHWENK: Okay. Did Congress
7 do anything about defense experts, or is -- the
8 IRC had recommended that defense be given the
9 authority to hire their own experts with their
10 own pot of money, and I don't know what happened
11 to that because this just says experts, which
12 sounds to me like if the defense wants an expert,
13 they're going to go to whoever gets this
14 authority.

15 CAPT SCOTT: Yes, sir. The
16 conversation is certainly ongoing, but I believe
17 that piece is predecisional. So there hasn't
18 been a final resolution at this time.

19 So, with respect to Section 542, this
20 deals with technical corrections relating to
21 STCs. It's a very minor wordsmithing of the
22 statutory language and updating of some

1 codification numbers.

2 543 -- so, as discussed a few minutes
3 ago, this addresses the requirement for
4 randomization of court-martial panels,
5 specifically giving the President additional
6 authority in Article 25 to prescribe regulations
7 to enable the randomized selection of qualified
8 members to court-martial panel duty to the
9 maximum extent practicable. And this has an
10 implementation date of December 23rd, 2024, to
11 prescribe these regulations.

12 So, for Section 544, the jurisdiction
13 of the Courts of Criminal Appeals, this section
14 adjusts the right of appeal to anyone convicted
15 by a general or special court. So it used to be
16 you had to meet certain criteria to seek appeal
17 by the CCA. Those are no longer effective. Now
18 it is regardless of the sentence imposed as well
19 as the section also extends jurisdiction to
20 include summary court-martial review under
21 Article 66.

22 So the section goes on to clarify the

1 scope of the authority of the Judge Advocate
2 General over post-court-martial matters,
3 including that the Judge Advocate General may
4 modify or set aside in whole or in part the
5 findings and sentence of any summary-court court-
6 martial conviction as well as adjust the timeline
7 to appeal from a court-martial on the tail end of
8 that section. So fairly expansive additions
9 there.

10 With Section 545, 545 is essentially
11 addressing -- it's a legislative fix that
12 provides for a singular Special Trial Counsel
13 Office and a singular Lead Special Trial Counsel,
14 or LSTC, to oversee matters arising from both the
15 Air Force and the Space Force. So the Air Force
16 OSTC and LSTC will cover the Space Force.

17 In Section 546, this section covers
18 independent investigation of sexual harassment
19 and establishes a definition of an independent
20 investigator, which will serve to mean a
21 specially trained employee of the DOD or
22 specified branch responsible for investigating

1 charges of sexual harassment, so.

2 For 547 -- so this section pertains to
3 existing research efforts and directs them to now
4 include a focus on the effects of violence on
5 different subpopulations of the military,
6 potential factors including both violence and
7 self-directed violence amidst members and the
8 difference between sexual harassment training in
9 the military as compared to other federal
10 entities.

11 548 is a limitation on availability of
12 funds for relocation of Army CID Special Agent
13 Training Course. It is no more interesting than
14 it sounds, so I will push forward.

15 Section 549 pertains to a requirement
16 of -- or on the Secretary of the Army to review
17 certain personnel files from the Army, Army
18 Reserve, and National Guard for members who are
19 either titled or indexed where, in the opinion of
20 the Secretary, there's a need for a corrective
21 action in the case of an individual member and
22 imposes an additional reporting duty on both the

1 Secretary of the Army and the Secretary of
2 Defense.

3 549 Alpha -- so this is a briefing and
4 report on resourcing required for implementation
5 of military justice reform. This imposes a
6 requirement on the respective Secretaries to
7 submit updated briefings and reports on the
8 resources necessary to implement the FY '22 NDAA
9 Title 5 Military Personnel Policy in Subtitle D,
10 Military Justice Reform in a specified format.

11 This is substantially similar to the
12 FY '22 NDAA Section 539 Foxtrot reports and
13 briefings, but the difference is that with the
14 inclusion of the new covered offenses, more
15 specifically to sexual harassment, those would
16 not have been factored into the earlier
17 resourcing calculations across the services. And
18 there are both briefing and report requirements
19 on that, with the next briefing due 1 March.

20 549B, the report on sharing
21 information with counsel for victims of offenses
22 under the UCMJ, this one requires you to produce

1 a report opining on the feasibility and
2 advisability of establishing a uniform policy for
3 sharing privacy-related information with counsel
4 representing victims. This specifically includes
5 recorded statements of the victim to
6 investigators, the record of any forensic exam of
7 the person or property of the victim, including
8 the record of any sexual assault forensic exam of
9 the victim that is in the possession of the
10 investigators or the government, and/or any
11 medical record of the victim that is in the
12 possession of investigators or the government.

13 So your report should also include an
14 assessment of the potential effects of such a
15 policy on the privacy of individuals, the
16 criminal investigative process, and the military
17 justice system generally. If your assessment
18 determines that such a policy is feasible and
19 advisable, your report should also include the
20 stages of the military justice process when the
21 information should be made available to counsel
22 representing a victim and any circumstances under

1 which some or all of the information should not
2 be shared.

3 And your report is due 27 December of
4 '23. Usually, I'm the one being given the
5 deadline, so that's a little awkward.

6 Section 549 Charlie -- and I think we
7 missed a slide -- is dissemination of civilian
8 legal service information requires the Secretary
9 of Defense through the head of the DOD Sexual
10 Assault Prevention and Response Office to ensure
11 the information on the availability of legal
12 resources from civilian legal service
13 organizations is distributed to military-
14 connected sexual assault victims in an organized
15 and consistent manner.

16 So that is an overview of the NDAA FY
17 '23 provisions, subject to your questions.

18 Yes, ma'am.

19 MEMBER MARKOWITZ: This is a very fast
20 question. When you were going through the litany
21 of covered offenses -- it's entirely possible I
22 missed this -- was 128 Bravo mentioned as one of

1 the covered offenses?

2 CAPT SCOTT: Yes, ma'am.

3 MEMBER MARKOWITZ: Okay. Great.

4 Thank you.

5 MEMBER BASHFORD: I have a question
6 about the OSTC criteria for acceptance or
7 declination of cases and then what happens if
8 they decline. As you may know, the DAC-IPAD in
9 the past has suggested that the criteria for
10 proceeding is an assessment that the evidence
11 could prove guilt beyond a reasonable doubt as
12 opposed to simply probable cause. Do you know
13 whether OSTC has decided yet what standards
14 they're going to apply in reviewing a case
15 presented to them?

16 CAPT SCOTT: I would assume that no
17 final decisions have been made.

18 MEMBER BASHFORD: Okay. And then, for
19 cases where, for whatever reason, a declination
20 is given -- say it's a declination on Article 120
21 -- what happens to that?

22 CAPT SCOTT: Well, that would depend

1 on whether it's deferred back to the commander or
2 not, so meaning if the facts -- so, typically, if
3 a STC has declined prosecution on a covered
4 offense but there are either other options
5 available given the particular facts at issue --
6 could be returned or deferred back for, we'll
7 say, disposition by the commander for non-
8 covered offenses at that point.

9 MEMBER BASHFORD: But just so I'm
10 clear, if a declination is made for a covered
11 offense, that covered offense can't then be
12 prosecuted back at the command?

13 CAPT SCOTT: Correct.

14 MEMBER BASHFORD: Okay. Just other
15 things that might have been associated with it.

16 CAPT SCOTT: Correct.

17 MEMBER BASHFORD: Thank you.

18 CAPT SCOTT: Yes. Only the STC can
19 take it forward.

20 CHAIR SMITH: What will be the JSC's
21 role in developing the randomization procedures,
22 if any?

1 CAPT SCOTT: The JSC will look at
2 drafting a proposed change or changes to the
3 rules as they would pertain to the procedures in
4 question.

5 CHAIR SMITH: Any process at this
6 point, or it hasn't really been developed or
7 thought about?

8 CAPT SCOTT: It's predecisional.
9 Predecisional. I'm sorry, ma'am.

10 MEMBER TOKASH: This is Meghan Tokash.
11 This isn't a question about the NDAA provisions -
12 - more tied back to some of our members'
13 experiences in November when we came to the JSC
14 public meeting. Has the JSC considered
15 advertising beyond the Federal Register so that
16 the public might have a better way of being
17 informed of those meetings? Because I think, if
18 I'm not mistaken, the members who went to that
19 meeting were the only civilian members that
20 attended.

21 So we were just wondering if you had
22 any consideration in other forms of advertisement

1 so that members of the public could be a part of
2 the process. Thank you.

3 CAPT SCOTT: Well, I believe the
4 Federal Register notices is the required
5 mechanism for notice. However, informally, we
6 did look across the services, and the notice of
7 the hearing was sent through military channels --
8 call it far and wide -- to any military justice-
9 interested individuals.

10 As far as broader advertisement, we
11 would have to look into that. I will note that
12 there was -- and while some commenters only had
13 one or two comments on the draft, other
14 commenters had a lot more than one or two. So,
15 cumulatively, there was upwards of, I'd say, as I
16 recall, close to 150 total comments.

17 So, while the public hearing may not
18 have garnered a large volume of attendance, I
19 think based on the response, we certainly did --
20 people showed interest in the changes.

21 MEMBER TOKASH: Just to follow up --
22 but that was mainly military members; would that

1 be fair? Or were there comments from National
2 District Attorneys Association, ABA
3 subcommittees, DOJ, any external organizations?

4 CAPT SCOTT: Well, to the extent that
5 some commenters remained -- they chose to remain
6 anonymous, we don't know who they are. The folks
7 that chose to identify themselves were largely
8 military.

9 MEMBER GOLDBERG: I was going to ask a
10 variation on that question, but just -- I'll ask
11 my question in response to what you just said,
12 which is I think I remember your saying that the
13 outreach was to military justice-connected
14 individuals. So it could be civilians who
15 represent members of the military.

16 Did you receive any comments from
17 people outside of -- who are nonmilitary as far
18 as you know, understanding that you didn't know
19 who the anonymous comments were from? And were
20 any of them from organizations, or were they from
21 individuals or individuals with practices? Or
22 what did you see?

1 CAPT SCOTT: I mean, at the risk of
2 misstating, I know that we saw several comments
3 from civilians who are -- and from the
4 colloquially referred to as both sides of the
5 aisle and other interested parties. So there was
6 not a strong prevalence of just one type of
7 comment.

8 MEMBER GOLDBERG: Thank you.

9 MEMBER BASHFORD: With respect to 549B
10 requiring the DAC-IPAD to produce a report on
11 sharing information with victims' counsel, do we
12 have a baseline of what is happening in that area
13 now? Is that routinely happening? Rarely
14 happening?

15 CAPT SCOTT: I would have to look
16 across the services so that I didn't give you a
17 service-specific answer.

18 CHAIR SMITH: Any more questions for
19 Captain Scott? No?

20 Thank you very much.

21 CAPT SCOTT: Thank you.

22 (Off-microphone comments.)

1 MS. SAUNDERS: Good morning, Chair
2 Smith and Committee members. It's my pleasure to
3 welcome the Chiefs of each service's trial
4 defense organization. Their biographies and a
5 list of topics and questions can be found at Tab
6 4 of your materials along with an insert that are
7 a couple of slides from Colonel Landry with the
8 Air Force kind of structure.

9 At the December public meeting, you
10 asked to speak with the services' Trial Defense
11 Representatives to discuss whether the Trial
12 Defense Services were receiving increases in
13 personnel, training, and resources comparable to
14 the OSTC.

15 During the first half of the panel, we
16 asked the representatives to provide brief
17 introductions, including responses to question 1
18 that you see at Tab 4 concerning their resources,
19 leaving time for questions and answers on these
20 points and other related questions. So the first
21 45 minutes is just on the resourcing.

22 Also, at the December meeting, you

1 requested input from the Trial Defense Services
2 on victim impact statements. So the
3 representatives are prepared to answer questions
4 on that topic in advance of your deliberations on
5 the victim impact report tomorrow.

6 The remainder of the time is open for
7 questions on the panel's selection processes and
8 victims' counsel access to information, which is
9 the discovery. I will offer brief introductions
10 and then turn the floor over to the panelists for
11 their brief introductory remarks on the
12 organizational resources.

13 We have Colonel Sean McGarry, who is
14 the Chief of the United States Army Trial Defense
15 Service and has been since July of 2022. He
16 served as the Dean of the Army JAG School and a
17 Staff Judge Advocate. Prior to entering the JAG
18 Corps, Colonel McGarry was an armor officer and
19 served as an armor platoon leader.

20 We have Captain Mark Holley, who is
21 the Director of Defense Services Office of
22 Operations for the United States Navy, and he has

1 been for over a year. He served as a Force Judge
2 Advocate for the Commander Naval Air Force
3 Pacific, legal counsel for the Commander Navy
4 Personnel Command, a Commanding Officer of a
5 regional legal service office, and a Naval Legal
6 Services Command Inspector General.

7 Next we have Colonel Valerie Danyluk,
8 who is the United States Marine Corps Chief
9 Defense Counsel of the Marine Corps, and she has
10 been since August of 2019. Her previous
11 assignments include Director of the Appellate
12 Government Division, a Command Inspector General,
13 a military judge, a Staff Judge Advocate, and a
14 Regional Defense Counsel.

15 We have Colonel Brett Landry, United
16 States Air Force Chief Trial Defense Division for
17 Military Justice and Discipline Directorate, and
18 he has been providing the defense services to
19 both the Air Force and Space Force since August
20 of 2022. He's also served both as a military
21 judge and a Staff Judge Advocate.

22 We next have Lieutenant Commander

1 Jennifer Saviano from the United States Coast
2 Guard, Chief of Defense Services. She has also
3 served as the Coast Guard's Chief of Command
4 Services and a defense counsel.

5 And with that, I turn it over to the
6 panelists to decide which end they want to start
7 at with their introductory remarks.

8 COL MCGARRY: Okay. Well, good
9 afternoon, Madam Chairwoman and distinguished
10 panel members. I'm Colonel Sean McGarry. I come
11 with 28 years of active federal service in the
12 Army, 26 of which have been as a Judge Advocate.
13 For the majority of those 26 years, I have been
14 in positions where I have been advising commands.

15 I've been fortunate to have been
16 assigned as a Deputy Staff Judge Advocate twice
17 and a Staff Judge Advocate three times in both
18 garrison and deployed environments. I'm
19 currently serving as the Chief of Army TDS and I
20 assume those duties this summer.

21 U.S. Army Trial Defense Service is
22 organized into eight geographically based

1 circuits, and that's intended to enable effective
2 trial support across the globe and to match the
3 circuit-based organization of our Office of
4 Special Trial Counsel.

5 Our structure is not intended or
6 expected to change with the establishment of the
7 OSTC. In fact, the OSTC is adopting our
8 geographically based regional structure. All of
9 our TDS field offices are going to continue to
10 provide legal support for both covered and non-
11 covered offenses as well as the full range of
12 administrative actions.

13 I've assessed that we generally have
14 equal access to training and resources. We have
15 the ability to leverage most of the institutional
16 training offered by the Judge Advocate General's
17 Legal Center and School, and we also have the
18 continuing benefit of our own internal training
19 and trial support team known as the Defense
20 Counsel Assistance Program, or DCAP.

21 Army DCAP is currently staffed with
22 four active-duty military justice experts who

1 serve as training officers. We have two civilian
2 highly qualified experts, former military judges.
3 And we round them out with a legal administrator
4 -- who together develop and execute DCAP
5 organizational training as well as managing
6 participation of USA TDS personnel in training
7 events hosted by other organizations.

8 Similar to other service DCAPs, the
9 Army DCAP also produces reference materials,
10 newsletters, and podcasts in addition to
11 providing direct support to trial defense teams
12 on specific cases by responding to field
13 inquiries and also, as necessary, being detailed
14 as actual counsel.

15 Our biggest challenge, I think, with
16 the establishment of the Office of Special Trial
17 Counsel is staffing, specifically ensuring that
18 the Army has enough experienced military justice
19 practitioners to support both the government and
20 the defense side of our military justice practice
21 while still maintaining appropriate capability
22 with our other core functional areas, with

1 national security law, administrative and civil
2 law, client services, contract and fiscal law.

3 To that end, the leadership of our
4 Corps continues to be very deliberate in the
5 assignment process and the allocation of
6 personnel growth. Through FY '25, we are
7 expected to add 16 complex litigators at the O-4
8 and O-5 level, 16 paralegals to accompany those
9 complex litigators, eight GS-12 legal
10 administrators, and 28 defense investigators that
11 were authorized in the 2020 NDAA.

12 We are also in the midst of a data
13 analysis right now related to a paralegal
14 manpower study that was completed this past
15 October as we continue to look at how we right-
16 size our organizations.

17 And then, finally, with effective
18 parity in mind, our circuit organization that we
19 share with OSTC and USA TDS, I think, will be
20 helpful as we continue to look at effective
21 parity by seeing what is operating by both
22 numbers and experience in each of the eight

1 circuits that we share.

2 At Secretary of Defense direction, we
3 have also started the planning process related to
4 the establishment of administration of an
5 independent TDS budget for funding and production
6 of both expert and lay witnesses. However, that
7 effort is still relatively new and ongoing. And
8 because of the developing nature, the full nature
9 of the resources associated with that remains to
10 be seen, and we'll have to report that to you
11 later.

12 But at this point, I will yield to
13 Captain Holley, and I will thank you for the
14 opportunity to participate in today's discussion.

15 CAPT HOLLEY: Good afternoon, Madam
16 Chairwoman and distinguished panel members. I'm
17 Captain Mark Holley. I'm the Director Defense
18 Service Office Operation.

19 Defense Service Offices, or DSOs, are
20 the Navy commands that provide defense counsel
21 services to both Navy and Coast Guard members.
22 We have four DSOs. These commands and their

1 attachments are located throughout the world in
2 generally the same locations as our current
3 prosecutors as well as the planned locations for
4 the OSTC.

5 As Director Service Office Operations,
6 I'm the Senior Defense Counsel in the Navy with
7 the responsibility for services provided at these
8 four DSOs. I've been serving in that position
9 since October 2021. I've been in the Navy JAG
10 Corps for 28 years. My first two tours in the
11 Navy were in military justice litigation tours,
12 first as a defense counsel and then as a
13 prosecutor.

14 I've also had senior leadership tours
15 on both sides of the aisle, first as an Executive
16 Officer for the Defense Mission and later as a
17 Commanding Officer, where I supervised
18 prosecutors and provided advice to convening
19 authorities. I also served as a Naval Legal
20 Service Command's Inspector General, where my
21 primary duties were to assess those field
22 commands.

1 I have also developed an expertise
2 regarding the Navy's administrative processes
3 over several tours, which is helpful because we
4 also represent service members at administrative
5 wards as well as providing legal advice regarding
6 other punitive and administrative processes.

7 Our structure will not change for the
8 establishment of the OSTC. All of our offices
9 will provide counsel to clients charged with both
10 covered offenses and non-covered offenses. We do
11 generally have equal access to training and
12 resources. The Office of the Judge Advocate
13 General and the Naval Justice School support us
14 to the same extent they support the OSTC and
15 other parts of Naval Legal Service Command.

16 In addition, we have our own internal
17 training and trial support team known as the
18 Defense Counsel Assistance Program, or DCAP.
19 DCAP has a staff of three military justice
20 experts and a civilian subject-matter expert.
21 DCAP manages our defense counsels' specific
22 training as well as producing reference

1 materials, newsletters, and podcasts.

2 They also provide direct support to
3 the trial defense teams on specific cases by
4 responding to field calls, serving as supervisory
5 counsel, conflict-free counsel, and when required
6 can even be detailed as defense counsel for a
7 specific case.

8 There are numerous challenges
9 associated with the establishment of the OSTC.
10 The first is that staffing and additional
11 prosecution organization will spread out our most
12 senior and most experienced military justice
13 members across an additional prosecution
14 organization. The second is there are numerous
15 additional and significant changes to our
16 military justice system that are happening at the
17 same time.

18 The establishment of the OSTC is
19 taking away the requirement for an independent
20 probable cause determination. We are also
21 establishing both judge-alone sentencing and
22 sentencing guidelines. And finally, we're making

1 changes to the way we charge and investigate
2 sexual harassment cases.

3 These are all major changes, and it's
4 not clear exactly how these changes will affect
5 our ability to provide quality representation for
6 military members accused of a crime. Because of
7 the broad scope of these changes, we are looking
8 at what additional resources we need. When we
9 are looking at what additional resources we need,
10 we're concentrating on resources that will have a
11 broad impact on our overall capability.

12 The Navy is a truly global force. Our
13 biggest challenge is having the right balance of
14 talent and experience appropriately spread out
15 across the world. Now that we are facing two
16 different prosecution organizations, this will
17 become an even bigger challenge.

18 Our DCAP office that I described
19 earlier is our best and most flexible resource to
20 meet this challenge. It gives us a reserve of
21 talent and experience that we can use to meet
22 whatever training or trial support needs arise,

1 wherever they arise.

2 I requested a second civilian subject-
3 matter expert to join this organization. This
4 billet would add significant expertise to both
5 directly support our trial teams and provide the
6 training they need. We have also requested the
7 Coast Guard to provide an experienced litigator
8 to augment the DCAP staff.

9 The other two resources that we expect
10 will provide critical support to the Defense
11 Mission are the new Independent Defense Funding
12 Program and dedicated defense investigators. We
13 are just starting the process of establishing our
14 Independent Defense Funding Program. However, we
15 have had a pilot program several years that has
16 established our basic processes.

17 The Secretary of Defense has directed
18 us to expand that program. We've recently hired
19 five new employees and been given significant
20 funding for this fiscal year. We are working to
21 establish a program that will efficiently provide
22 travel funding and expert support to our trial

1 defense teams.

2 We also have an established defense
3 investigator program that we hope to expand. We
4 currently have eight investigators spread out
5 across the world. Our current staffing allows
6 for one investigator in each significant
7 geographic region.

8 A recent assessment has validated a
9 requirement for three additional investigators to
10 meet the increased workload in three of our major
11 fleet concentration areas. Based on that
12 assessment, we hope to add an additional
13 investigator in Norfolk, San Diego, and
14 Jacksonville.

15 Thank you for this opportunity to
16 speak to you. I look forward to the remainder of
17 the discussion.

18 COL DANYLUK: Good afternoon. I'm
19 Colonel Danyluk, Chief Defense Counsel of the
20 Marine Corps. I have nearly 28 years of active-
21 duty service, most of which has been in
22 litigation.

1 Our Defense Service Organization
2 represents service members around the globe and
3 is divided into four broad regions. The vast
4 majority of my attorneys are junior counsel.
5 Despite their relative inexperience, we must
6 trust our counsel to handle very serious criminal
7 litigation, including sex crime cases and other
8 covered offenses.

9 Our service is the smallest, except
10 for the Coast Guard, in the DSO with a
11 corresponding small number of counsel,
12 investigators, and supervising attorneys, though
13 our cases and our contested cases are almost
14 identical to the Navy.

15 One unique aspect of the Marine Corps
16 is that we do not have a JAG Corps. I am, and
17 all my counsel are, line officers. We rotate in
18 and out of litigation billets, legal billets, and
19 other non-legal billets, including things like
20 command and the Inspector General. Similarly, we
21 compete for promotion in the same board with and
22 against all other line officers.

1 Your question is whether the Marine
2 Corps Defense Service Organization is receiving
3 personnel, training, and resource increases
4 comparable to the Marine Corps OSTC. And the
5 short answer is no. The most obvious imbalance,
6 of course, is the General Officer billet that's
7 been afforded to the prosecution and not to the
8 defense. This alone negatively impacts the
9 assignment, retention, and promotion into the
10 DSO.

11 Given this difference, the OSTC's
12 General Officer will be more effective in
13 lobbying and advocating on behalf of their
14 counsel and their causes. And I anticipate that
15 this will put the DSO even further behind the
16 OSTC in terms of resources and personnel in the
17 years to come.

18 Congress, fearing unlawful influence,
19 required the OSTC to operate outside of the
20 service. Ironically, it is the defense counsel
21 who are far more likely to be negatively impacted
22 by UCI, unlawful command influence, in the Marine

1 Corps. Yet the DSO is not independent.

2 I report directly to the Staff Judge
3 Advocate of the Commandant, the ultimate
4 convening authority. There is no neutral General
5 Officer or SCS to lobby on behalf of the DSO in
6 the Marine Corps for resources, personnel, or to
7 protect my counsel from UCI.

8 The greatest and scarcest resource we
9 have within the Marine Corps are our seasoned
10 litigators. We are critically low in these
11 tested trial counsel. With the mandatory 100
12 percent staffing requirements for VLC and the
13 OSTC for experienced counsel, that leaves the
14 Defense Services Organization with a staggering
15 ratio of inexperienced counsel.

16 The DSO maintains 71 percent first-
17 tour litigators. They are routinely detailed as
18 lead counsel on sexual assault and other covered
19 offenses within six months of joining the Defense
20 Services Organization.

21 On paper, the DSO is to receive 25
22 percent of Special defense counsel -- in

1 quotation marks, Special defense counsel --
2 compared with the OSTC. And even of that 25
3 percent, only 75 percent will actually be
4 detailed this summer. And notably, in order to
5 fill these billets, the intention is to gap our
6 Supervisory Senior Defense Counsel billets and
7 our Defense Counsel Assistance Program billet.

8 The OSTC, I believe, has 34 officers.
9 I am expected to have eight Special defense
10 counsel, six of which will be filled this summer.
11 There is no increase in investigators. I have
12 three --

13 (Off-microphone comment.)

14 COL DANYLUK: Oh, the numbers again?
15 Okay. Of course. I'm not great at math, but
16 this is what I believe it is. Okay. The DSO
17 maintains 71 percent first-tour litigators. On
18 paper, the DSO received 25 percent Special
19 defense counsel compared to what the OSTC is
20 expected to have this summer and into October.

21 Of those that I believe I'm going to
22 have on paper, which is eight Special defense

1 counsel, only six of them will be filled. And in
2 order to fill those billets, they will be gapping
3 my Senior Defense Counsel billets, which are the
4 supervisory counsel at each of the legal services
5 support teams, and my Defense Counsel Training
6 Assistance Program.

7 MEMBER TOKASH: This is Meghan Tokash.
8 I'm sorry to interrupt you, Colonel, but -- so
9 eight defense counsel within the Marine Corps,
10 but you said there were 34 Special Trial Counsel
11 billeted right now for the Marine Corps.

12 COL DANYLUK: That's what I
13 understand.

14 MEMBER TOKASH: Okay. Thank you.

15 COL DANYLUK: Thank you.

16 MEMBER GOLDBERG: And sorry. One more
17 quick follow-up question to that based on a
18 conversation we had earlier. Are you able to
19 rely on counsel outside of the Marine Corps,
20 also, to provide defense services for Marines, or
21 does that not cover the gap that you're talking
22 about?

1 COL DANYLUK: No. We generally are
2 Marines defending Marines. We have relied on our
3 sister services from all the services to defend
4 in places where there have been conflicts due to
5 UCI or other conflicts.

6 MEMBER GOLDBERG: Great. Thank you.

7 MEMBER TOKASH: And can you just tell
8 us what gapping means?

9 COL DANYLUK: What we're gapping?

10 MEMBER TOKASH: Yes. I don't
11 understand what that means technically.

12 COL DANYLUK: Okay. So, essentially,
13 we're not getting eight additional people.
14 They're just calling them something different,
15 right? They are filling newly created Special
16 defense counsel billets, but they are not filling
17 the supervisory billets.

18 CAPT HOLLEY: So, in the military,
19 when we say a billet's gapped, it means the
20 billet exists, but for a period of time, somebody
21 is not filling it. It's gapped. Yeah.

22 CHAIR SMITH: So you said 71 percent -

1 - we keep interrupting you. Sorry about this,
2 but you said 71 percent of your attorneys are
3 first-tour litigators. What's the comparison, if
4 you have it, for what will be OSTC or VLC?

5 COL DANYLUK: So VLC are required to
6 have some litigation experience before they come.
7 They may be first-tour litigators as well, but in
8 the Marine Corps, they're required to have -- I
9 believe it's one year of litigation experience
10 before they enter into a VLC billet.

11 And the OSTC, by the criteria created
12 within the Marine Corps, are required to have
13 litigation experience as well. They are, from
14 the list that I've seen, at least second-tour
15 litigators, so at least one full tour of
16 litigation under their belt. I think the minimum
17 is two years, but from the list that I've seen,
18 they'll all be rotating out of finishing a first
19 three-year tour.

20 MEMBER ANDERSON: This is Marcia
21 Anderson. So you'll have eight -- well, you're
22 supposed to have eight Special defense counsel,

1 and you said OSTC will have 34?

2 COL DANYLUK: That's right.

3 MEMBER GOLDBERG: So this is probably
4 a question for everybody to think about when we
5 get there. When you talk about the gap across
6 the services -- I mean, obviously Colonel Landry
7 hasn't spoken yet, and Lieutenant Commander
8 Saviano hasn't either.

9 It would be helpful, I think, at least
10 for me, to understand more of what that means in
11 terms of people having access to representation,
12 and does that mean that there's a substantially -
13 - will you consider your defense counsel to be
14 overloaded or, really, not able to represent all
15 of the clients? Or is it more that maybe OSTC is
16 going to be overloaded as it sort of ramps up,
17 but you will have -- let me phrase the question
18 differently.

19 So if you could give us more
20 explanation of what the insufficiency of
21 personnel that you're talking about is going to
22 mean in terms of the day-to-day for

1 representation of defendants. Doesn't have to be
2 right now because it's a question, really, for
3 all of the services. But I think that will be
4 helpful.

5 As you can hear, we're all sort of
6 looking at the differences in the numbers, but I
7 think it's also important to understand what that
8 means on the ground.

9 COL DANYLUK: So, essentially, there's
10 no change for the Marine Corps. DSO will
11 continue to detail first-tour litigators starting
12 within their first six months to cover defense
13 cases.

14 MEMBER GOLDBERG: Okay.

15 COL DANYLUK: We have four
16 investigators compared to, for example, 8 going
17 to 11 for the Navy and up to 20 in other
18 services. We are the only service that has
19 restrictions put on our defense litigation funds
20 by the Staff Judge Advocate to the Commandant on
21 how we spend our new litigation funds.

22 The new structure is a considerable

1 departure from how prosecutors and public
2 defenders operate, I believe, in the civilian
3 world, and I expect the imbalance of experience
4 will be evident in the courtroom. It will
5 negatively impact retention, and most
6 importantly, it will negatively impact the
7 effective assistance of counsel demanded by the
8 Constitution.

9 This momentous change to the structure
10 of military justice community will put a strain
11 on the DSO resources. In criminal litigation,
12 there is, of course, no substitute for practical
13 experience. Yet the defense will be forced to
14 attempt to try to substitute that experience
15 through training.

16 They say there are lies, damn lies,
17 and statistics. And if higher conviction rates
18 are the goal, I have no doubt that this change in
19 resources in favor of the OSTC will work on
20 increasing the conviction rate because there are
21 so many factors at play.

22 However, I would close by suggesting

1 that doing so does not make our community safer.
2 It doesn't strengthen America's belief in the
3 honor of our military or the trust in the
4 military justice system.

5 COL LANDRY: Good afternoon, Judge
6 Smith, panel members. I'm Colonel Brett Landry,
7 as Ms. Gallagher, said to lead us off.

8 I've been in this job as the chief of
9 the Air Force Trial Defense Division for about
10 eight months now. In addition to the other jobs
11 that she mentioned, I have also served as a
12 senior trial counsel, which is the Air Force's
13 precursor to OSTC, if you will, and then as the
14 chief senior trial counsel later in my career for
15 the Air Force.

16 I've also served as an area defense
17 counsel, military justice instructor, staff judge
18 advocate, deputy staff judge advocate, and a
19 deployed staff judge advocate as well in
20 Afghanistan.

21 In my current job, I oversee almost
22 200 officers, enlisted, and civilian personnel

1 who are responsible for defending Air Force
2 airmen and Space Force guardians against the full
3 spectrum of allegations that arise under the
4 military justice system, up to and including
5 covered and uncovered defenses and offenses that
6 rise to the level of court-martial, as opposed to
7 offenses that are handled at the administrative
8 level.

9 The majority of the personnel in my
10 division are area defense counsel and defense
11 paralegals who man shops that are usually two-
12 deep shops, although we have a few larger units
13 across the Air Force. And they are located at 69
14 different Air Force installations worldwide.
15 Those are our first line of defense, if you will,
16 and the first contacts that we have with airmen
17 and guardians who are facing disciplinary action.

18 In addition to those personnel, we
19 have currently 18 senior defense counsel billets
20 plus 8 different leadership positions, to include
21 my job, which could theoretically be detailed to
22 cases. My what we call chief circuit defense

1 counsel soon to be chief district defense counsel
2 as I will explain, they do routinely, I would
3 say, get out and represent clients, particularly
4 senior clients and serve as counsel at courts-
5 martial.

6 But primarily it's our 18 senior
7 defense counsel who are detailed a little bit
8 later in the process but are available initially
9 for reach back assistance to the more junior area
10 defense counsel who have first contact with
11 clients.

12 Our area defense counsel are generally
13 third, sometimes second assignments, second or
14 third assignments, probably about a 50/50 split
15 in experience. And that means they have anywhere
16 from two to five years of experience as judge
17 advocates. Many of them come to us with some
18 civilian experience beforehand. But at the very
19 least, they have about two years of experience as
20 judge advocates before going to the defense --
21 coming into the defense community.

22 With movement to the Office of Special

1 Trial Counsel, the prosecution function in the
2 United States Air Force shifted from being
3 organized around five geographic circuits into
4 six districts. And those districts are aligned
5 with major commands within the Air Force.

6 After reviewing the defense's
7 organizational structure, we internally made the
8 decision to follow suit for several reasons and
9 to realign our defense community into six
10 districts around those major commands.

11 The primary reason for that is that
12 now that JAs, judge advocates, will be decision
13 makers are some of the most important fences that
14 we see airmen facing. It was my judgment and the
15 judgment of people who outrank me that it is
16 important to have trial defense personnel,
17 equivalent trial defense personnel, best situated
18 to engage with their counterparts at that level
19 about specific cases.

20 I believe that's going to help with
21 efficiency, help with communication because, as
22 I've discussed with, I believe, members of this

1 Panel in different settings that having the
2 opportunity to exchange information on cases
3 early can help with some of the communication
4 issues that we see sometimes when JAGs are solely
5 advisors to commanders who hold ultimate decision
6 authority. I believe this will make defense
7 counsel more comfortable with sharing information
8 and improve trust between prosecutors and defense
9 counsel.

10 Moving on to the area of identifying
11 areas of inequality, I will say that I have been
12 very happy with Air Force leadership in
13 addressing and taking seriously issues when we
14 have raised them regarding possible future
15 disparities between defense services and
16 prosecution services.

17 As a result of those initial meetings
18 that we've had to this point, last year we added
19 eight investigators, meetings that took place
20 before my time in this job. And we have manned
21 five of those positions right now. We anticipate
22 filling the remaining three within the next month

1 to two months.

2 We've had input into the development
3 of the JAG course career litigation development
4 program, which makes service as a defense
5 counsel, mainly an area defense counsel but also
6 a circuit or senior defense counsel, a track by
7 which one can become eligible for our most senior
8 positions, such as the one that I'm sitting and
9 the ones within the Office of Special Trial
10 Counsel.

11 I undertook a study in coming into
12 this job in terms of our caseload. And to the
13 extent we have any need for additional personnel,
14 it is not so much at the senior defense counsel
15 level at this point although I believe we are
16 going to add two in the next fiscal year to serve
17 as senior defense counsel.

18 It is more in terms of our area
19 defense counsel and defense paralegals, when you
20 have these two-deep shops worldwide and
21 individuals who can take things, as they should,
22 such as parental leave and other occasions or

1 other circumstances that will take them out of
2 the office. It sometimes becomes a strain to
3 maintain that initial first contact capability
4 for when that young airman accused of a serious
5 crime has the ability to walk into an office and
6 speak face-to-face with a defense paralegal or an
7 area defense counsel.

8 And that's my goal in leading this
9 organization. And I can say that the Judge
10 Advocate General of the Air Force and others in
11 our chain of command have been very receptive to
12 hearing me out. And I anticipate that we will be
13 able to remedy some of those shortfalls through
14 personnel actions in coming years based on
15 information that I'm pushing up to them.

16 Finally, in regard to defense experts,
17 we're continuing to work in response to the
18 Review Commission's Recommendation 1.7e as
19 adopted by the Secretary of Defense.

20 The Air Force's current plan is to
21 place approval for experts within the Trial
22 Defense Services Organization although there will

1 not be an independent pot of money within the
2 Trial Defense Services Organization, Trial
3 Defense Division, to fund those experts.
4 Essentially, approval would take place that would
5 then compel the convening authority who has
6 jurisdiction over that airman or guardian to fund
7 the expert to consult with defense counsel and
8 that could be done pre-referral. It could be
9 done at any point in the process.

10 With that, those are my initial
11 remarks. I look forward to answering your
12 follow-up questions.

13 CHAIR SMITH: Can I ask one question?
14 Why, if you know, isn't the money for experts in
15 a pool that would be governed by some kind of
16 defense body, I don't know what it would be, as
17 opposed to the convening authority?

18 COL LANDRY: That is a good question.
19 I do not know why that was the final decision
20 made. Obviously, some questions have arisen
21 which are good questions. What is the incentive
22 factor within the defense community other than,

1 of course, we will, as officers, follow the legal
2 standard for appointing experts.

3 But to be judicious in our use of
4 someone else's money, I would probably not make
5 light of it, but I would probably be more
6 concerned with my checkbook than if Colonel
7 Danyluk wrote me a blank check right now.

8 I don't anticipate -- I'm very pleased
9 with the officership of the people in my
10 organization. And we're not going to approve
11 frivolous requests. But certainly that does add
12 another layer of bureaucracy and intrigue.

13 LCDR SAVIANO: Hi. Good afternoon,
14 members. I'm Lieutenant Commander Jennifer
15 Saviano. I'm the Coast Guard's Chief of Defense
16 Services and have been in this role for
17 approximately seven months now.

18 I have about 16-1/2 years in the Coast
19 Guard. My first 11 years were serving on a
20 cutter at a district as Sector Miami's Waterways
21 Management Division chief and then three years of
22 law school.

1 After law school, I had the good
2 fortune to go to a Defense Service Office as a
3 Navy defense counsel or as a Coast Guard defense
4 counsel in a Navy Office. I did that for
5 approximately two years and then I went to our
6 legal service command as the command services
7 branch chief, which is sort of like a deputy SJA
8 type position for the support side of the Coast
9 Guard and then, again, have been here for
10 approximately seven months now.

11 The comments I make today are solely
12 my own based on personal experience and
13 discussions I've had with other defense counsel
14 and may not reflect those of the Coast Guard.

15 I do want to note that the Coast Guard
16 is unique from our sister services in that we do
17 not have our own internal defense services. We
18 have a memorandum of understanding with the Navy
19 where the Navy -- thank you, sir -- provides us
20 all of our defense required needs for military
21 justice, whether that's at the administrative
22 level or court-martials. And in exchange, we

1 provide the Navy, currently right now, with eight
2 O-3 billets. And as such, I will also have defer
3 to the Navy when it comes to some of those more
4 trial defense specific related questions that may
5 arise later.

6 Having had an opportunity to review
7 the questions, I will offer the following general
8 thoughts. With respect to Question Number 1, the
9 Coast Guard's current trial shop is within the
10 legal service command, which is quite unique
11 compared to our sister services as well. But the
12 Coast Guard has decided to create what we call
13 the Office of Chief Prosecutor, essentially the
14 same idea as the OSTC.

15 It will be growing by, I would say, at
16 least 40 percent of what it currently is. Some
17 of that is much needed growth just because they
18 are basically separating from the current command
19 structure that they are currently in. However,
20 they are building with regard to their trial
21 counsel as well.

22 The Coast Guard currently has eight

1 lieutenant billets embedded with our Navy DSOs,
2 and we are currently looking to add three
3 additional billets at the O-4 level with the
4 thought of 104 being on each coast, capable of
5 fulfilling a more senior defense counsel role and
6 then also putting one of those O-4 billets
7 embedded into the Navy's DCAP program.

8 In terms of equal access to personnel,
9 training and resources, I would say the Coast
10 Guard definitely is on par with that. We, again,
11 are fully embedded with the Navy so when it comes
12 to any defense counsel needs, we go through the
13 same training that our Navy counterparts go
14 through and Marine counterparts go through for
15 that matter.

16 And then also the Navy provides DCAP
17 services to Coast Guard defense counsel. And
18 Coast Guard defense counsel and Navy defense
19 counsel are interchangeable within DSO. So there
20 is no difference once you get assigned to a DSO.
21 We have Navy folks, Navy JAGs representing
22 Coasties and vice versa.

1 In terms of additional resources down
2 the line, my billet is an O-5 billet. And it is
3 the most senior defense billet that the Coast
4 Guard has, and it is more managerial. I have two
5 appellate defenders that work for me. And I'm a
6 little bit more hands on at the appellate level.
7 And then in terms of trial counsel, it's
8 predominantly just detailing and acting as a
9 subject matter expert or being a liaison for
10 certain cases with convening authorities as
11 needed.

12 So I think down the line as our OCP
13 grows, we're going to look to have an O-7, a
14 couple O-6's, a handful of O-5's, a handful of O-
15 4's and then quite a few O-3's.

16 And if you look at the current
17 structure of our defense right now, it is a
18 handful -- about 10 O-3's, including our
19 appellate defense counsel and then my one sole O-
20 5 billet. So I think down the line we can look
21 to grow Coast Guard defense as well in terms of
22 seniority for ranks, which ultimately I think

1 will help the Chief Prosecutor Office as well.

2 Thank you for this opportunity, and I
3 look forward to answering any questions.

4 MEMBER BASHFORD: I think Colonel
5 Landry may have touched on this, but what input
6 do you expect to have with the OSTCs before
7 they've made the decision to either decline or to
8 go forward?

9 COL LANDRY: I can follow-up from the
10 Air Force perspective. I expect that my
11 subordinates will develop relationships with the
12 decision makers within OSTC. And I expect that
13 they will routinely discuss cases that they will
14 be comfortable enough to take, although
15 understanding all of the cases discussed won't be
16 the cases that those subordinates will be
17 detailed to.

18 But for example a district chief
19 within my community, the defense community,
20 should be able to walk down the hall -- they will
21 be geographically co-located to his or her
22 counterpart -- and talk about factors that

1 mitigate for or against the referral of certain
2 charges to court-martial, essentially advocate on
3 behalf of a client prior to the time when
4 decisions are made to bring a case to trial.

5 I do think the new organization is
6 going to carry some advantages for the defense in
7 regard to that level of communication.

8 MEMBER BASHFORD: Anybody else? It
9 seems to me that the most effective
10 representation often comes before final decisions
11 are made.

12 CAPT HOLLEY: Yeah. I think probably
13 to some degree, it will be a little bit
14 personality driven as far as the people in the
15 different areas and whether they are -- you know,
16 what their relationships are before referral.
17 You're asking how much of an impact the defense
18 counsel will have before they even decide a
19 referral.

20 Yeah, I mean, you know, we already
21 have a relationship with the, you know,
22 professional relationships with the SJAs that are

1 assisting the line officers to make the referral
2 decisions. So I think it will be fairly similar
3 to the way it is now.

4 MEMBER CASSARA: Hi. So as I'm
5 understanding the Office of Special Trial Counsel
6 and Office of Special Defense Counsel, my
7 question is there are very serious criminal
8 allegations against a service member that may
9 not be a covered offense. So I'm hearing that
10 all of these really experienced litigators are
11 going to be dealing with the covered offenses.

12 So then you've got, you know, Sergeant
13 X over here who may be facing very serious time
14 for a larceny or something, you know, that's not
15 a covered event -- I'm picking off the top of my
16 brain as to what is covered and not covered, but
17 a very serious non-covered event. And I'm kind
18 of concerned or curious as to who is going to be
19 left to represent that person.

20 In other words, can you all step down
21 a senior defense counsel to a serious, non-
22 covered event?

1 CAPT HOLLEY: In the Navy, there is no
2 distinction. I mean, the DSO's represent
3 everyone. And our DSO COs who ultimately make
4 the decision on who to assign to what case aren't
5 -- I mean, they're going to look at each case and
6 decide what counsel is qualified to do that case
7 regardless of whether it's a covered offense or a
8 non-covered offense. You know, some of our
9 biggest cases lately have been cases that
10 wouldn't be considered covered defenses.

11 CHAIR SMITH: Is that true for all the
12 services?

13 CAPT HOLLEY: Yes.

14 COL DANYLUK: Yeah, it's true for the
15 Marine Corps. The DSO doesn't really
16 discriminate -- this idea that we have special
17 defense counsel assigned are really just part of
18 the DSO team and hopefully they have a little
19 more experience.

20 LCDR SAVIANO: I think that also
21 highlights the importance of DCAP. I know we
22 have a couple cases - a Coastie case right now

1 specifically where there is somewhat junior
2 counsel assigned to it but pretty serious
3 allegations. And we were actually able to assign
4 one of the DCAP experts as a supervisory counsel
5 to that particular case, which I think will be
6 more important going forward potentially as we
7 are seeing maybe more junior defense counsel.

8 MEMBER MARKOWITZ: I know that the
9 Army has a complex litigation team within TDS.
10 Do the other services also have a similarly
11 situated group of trial defense counsel?

12 CAPT HOLLEY: Well, we have DCAP,
13 which is essentially -- I mean, they usually
14 aren't assigned directly to cases, but they're
15 there to advise on cases. Otherwise, each of our
16 DSOs has more senior litigators assigned.

17 The Navy, we're kind of going through
18 this process of change. They did on the trial
19 side have an O-6 complex litigation, one
20 individual. We did not have that. That billet,
21 I mean, so where we get our senior people is
22 within our particular DSO structures, our four

1 DSO structures, commands.

2 MEMBER GOLDBERG: I just wanted to
3 follow-up on the question that I was asking
4 earlier. I think we heard a lot about the
5 disparities in numbers in the Marine Corps. And
6 I was -- and maybe the not so significant
7 disparities in the Coast Guard, and wondering for
8 the Army and the Navy, what is your perspective
9 on those disparities and their on-the-ground
10 impact. Meaning, what does it actually mean?
11 Like are you -- do you then detail others to
12 provide the representation or are people not --
13 are the numbers just insufficient to provide
14 sufficient representation?

15 COL MCGARRY: Yes, ma'am. So to
16 start, I don't think in the Army that we can say
17 that we are insufficient in numbers to provide
18 representation as a threshold matter. We do have
19 -- we have a concern. And it's not just a
20 comparison. I think it's a wrong metric to
21 compare a services TDS organization with just
22 OSTC because it's really broader than that. OSTC

1 only addresses covered defenses. TDS, I think
2 for all of us, addresses everything. There is no
3 special -- there is no counterpart of OSTC. It's
4 Trial Defense Services.

5 CHAIR SMITH: But would you want a
6 counterpart? I mean, it seems to me those types
7 of offenses might warrant having people who are
8 really seasoned and expert in those areas.

9 COL MCGARRY: I think we are able to -
10 - and what I'm hoping we are able to do is we're
11 continuing to bring up the quality of advocacy
12 across the board because we are able to have
13 people develop experience alongside for the Army
14 to be our complex litigators. We have eight
15 contemplated along with our own paralegal
16 counterpart.

17 And so those complex litigators in the
18 Army at the O-4 and O-5 level are -- there are
19 some similarities to what the Army did in 2009
20 with the Special Victim Prosecutor Program where
21 not only would you find them as being forward to
22 the bar, actually handling cases, but they are

1 also involved in training and developing counsel
2 and assessing who is ready to go first chair, who
3 needs to be second chair, who needs to have that
4 experienced attorney sitting behind them, behind
5 the bar, and who is experienced enough to just
6 have their cell phone.

7 And so we have the ability -- because
8 within USA TDS and I think the service TDS's,
9 because we don't differentiate between covered
10 and non-covered offenses, one of the benefits of
11 that, I think, is we develop expertise across the
12 board.

13 In terms of actual, like, months of
14 experience, you would ask -- our branch within
15 the Army, the Army JAG Corps is very good, I
16 think, about considering that. This past
17 assignment cycle, those people we had in service
18 last summer, we had 101 O-3 level defense
19 counsel. Of those, 42 had never had any military
20 justice experience. That was an unpleasant
21 surprise when we looked at that.

22 Since then in the current assignment,

1 our corps is committed to addressing that so we
2 don't have that experience shortfall. But it's
3 something that is, I think, for everybody
4 continues to be a watch bed. And it's not just
5 the numbers, but it's months of experience in
6 this functional area. I hope that answer is
7 closer to your question.

8 CHAIR SMITH: Well, then -- oh, sorry.

9 MEMBER ANDERSON: Marcia Anderson
10 again. So given that information, are the
11 caseloads balanced for these individuals so if
12 you're a rookie you come in. There are some -- I
13 hope there's a notion that they can't take the
14 same caseload as an experienced or seasoned
15 counsel?

16 COL MCGARRY: We do have caseload
17 balancing challenges, especially when you look at
18 it's not just USA TDS as a whole. OSTC, only
19 with their covered offenses, we're also covering
20 everything else plus the administrative actions.
21 It's that mark of going to be forward of the bar.
22 So there is balancing. We do a lot of that

1 detailing at the regional defense counsel level,
2 and we are expecting our complex litigators to
3 help with that. And then we also have the
4 ability to go within regions to balance as
5 necessary.

6 So I think the short answer to your
7 question is we are able to manage it, but it is
8 definitely a consideration.

9 CHAIR SMITH: I want to be sure I
10 heard you right. Did you say eight complex
11 litigators? I heard the wrong number.

12 COL MCGARRY: Yes, ma'am.

13 CHAIR SMITH: Eight for the whole
14 Army?

15 COL MCGARRY: Yes. We don't have them
16 all now, but by FY25. These are -- there are
17 specific billets that we are titling complex
18 litigators.

19 CHAIR SMITH: Mm-hmm.

20 COL MCGARRY: We have people -- in
21 fact the DCAP chief that works in my office now,
22 is Lieutenant Colonel Jeff Gilberg. He is about

1 to go over to work for the OSTC. He is not a
2 complex litigator, but he has 160 some months of
3 military justice. He is probably one of the most
4 experienced. Just because he's not a complex
5 litigator doesn't mean we don't have that
6 experience level resident across our forces if
7 that is what you were getting at.

8 MEMBER GOLDBERG: So what I heard, and
9 I, of course, want to hear from you, Captain
10 Holley, too. But what I heard you saying is that
11 you are -- that this is on your radar? You're
12 looking at what the shift of some attorneys to
13 OSTC means, but it's not -- you don't have --

14 COL MCGARRY: We don't have a crisis.

15 MEMBER GOLDBERG: -- a crisis. Or
16 you're watching, but not sort of at that moment
17 saying we desperately need more.

18 COL MCGARRY: I feel that's a fair
19 assessment, yes.

20 MEMBER GOLDBERG: Thank you.

21 CAPT HOLLEY: To answer kind of that
22 series of questions for the Navy, first of all,

1 as far as, you know, yes, those are complex
2 cases. We have trained for a long time to
3 covered defenses. So I'm probably more concerned
4 that we have the right training for the rest of
5 the cases than I am for covered cases because
6 that is what we primarily focus on because that's
7 what most of our cases are.

8 You know, there is some advantage to
9 right now the prosecutors kind of have two
10 different organizations, one that just does
11 covered offenses and one that does other cases.
12 We have to be able to do both right now because
13 we're one organization.

14 For right now, yes, our counsel are
15 not overworked. We have the right level of
16 experience to do the cases. You know, going
17 forward, you know, we don't have OSTC yet. So
18 this is a process that we're actively working
19 with our leadership on. But because there is
20 more senior litigation billets, that stretches
21 our senior litigators across three organizations
22 plus a judiciary and everything. One more

1 organization, we're stretching across one more
2 organization. So getting our fair share and what
3 our fair share is will be a challenge going
4 forward.

5 The primary way we manage that in the
6 Navy is for every O-4 and above position, we have
7 a very complex slating process where over six
8 months, all of our at flag officers, all of our
9 senior O-6's are in a room each month for two
10 days where we -- not just litigation billets but
11 all of our billets, we have a very active process
12 of making sure that we're putting the right
13 talent in the right places.

14 So this year was the first year that
15 we really focused on manning the OSTC as well as
16 what we've manned before. And we spent a lot of
17 time, and the flag officers, you know, all of the
18 flag officers, spent a lot of time really looking
19 individually at who we were putting in these jobs
20 and the balance between those organizations. So
21 it required us to be much more actively focused
22 on making sure that we had the right talent in

1 the right places.

2 And as I said in my opening, the
3 safety net for us is the DCAP organization
4 because it's a wealth of training, if we need
5 training. It's a wealth of reach back to
6 qualified individuals or, you know, senior
7 qualified individuals. And that's kind of the
8 way, you know, when we're trying to spread out
9 the town across a global organization, that's
10 kind of the safety net, the, you know, extra
11 resources that we can reach back to.

12 And in cases where we have a lot of
13 people conflicted out or we have trouble in the
14 DCAP area we could, in extremis, take one of
15 those attorneys actually, you know, assign them
16 to a case. So that's the way we're managing the
17 issues.

18 COL DANYLUK: So the Marine Corps DSO
19 does not need more defense counsel. We just need
20 more experienced defense counsel. I think you
21 can tell from the numbers, right, 71 percent.

22 It's a very, I would say, flat

1 organization where we have, for example, at Camp
2 Pendleton about 15 or so first tour litigators
3 and then they have one supervisory counsel.

4 And so for him to, like, second seat
5 every single case of all 15 of his counsel,
6 right, there's just not enough hours in the day
7 for something like that.

8 Because of the way the OSTC is
9 structured that has mandatory litigation
10 experience and, I mean, honestly just the
11 struggle that the Marine Corps has right now of
12 retaining O-3's and O-4's, we have just a gap
13 right now in that talent pool. But because there
14 is a requirement of a minimum amount of
15 litigation, anyone who has, for example, a first
16 tour in defense or defense and trial, their
17 second tour they're going to be moved over to an
18 OSTC billet.

19 So for training purposes, although we
20 train -- almost all of our training is with the
21 Navy and the Coast Guard. But for us the
22 internal training is very like one on one level

1 because it's almost like boot camp because we
2 have so many new and such high turnover that we
3 are always -- we always feel like we're having to
4 teach to the, you know, one on one level.

5 And then we do attend training with
6 the Navy for some intermediate level. And then
7 we use some civilian training for other
8 intermediate and ancillary training. But that's
9 where we see -- the OSTC is only going to be
10 training to the advanced level because they are
11 already experienced litigators.

12 And so our people will be training and
13 training and training on a treadmill in this 101
14 level and then hopefully being able to move up
15 into the intermediate and advanced level training
16 as well.

17 MEMBER CASSARA: Hi. I have a couple
18 of questions. I'm sorry, ma'am, how do you
19 pronounce your last name?

20 COL DANYLUK: Oh, Danyluk, like down
21 on your luck.

22 MEMBER CASSARA: Thank you. Are you

1 the only one of the five who is not a special
2 stovepipe organization so to speak? I know TDS
3 is from my years in. So is the Defense Services
4 completely stovepiped from the SJA?

5 CAPT HOLLEY: Yes, yes. We are a
6 completely --

7 MEMBER CASSARA: Okay.

8 CAPT HOLLEY: -- different
9 organization.

10 MEMBER CASSARA: Colonel Danyluk, I
11 believe it's the same for you all, ma'am?

12 COLONEL DANYLUK: I think, we're
13 probably in the best spot because of the Navy.

14 MEMBER CASSARA: Yeah, because you're
15 with the Navy. But, ma'am, you are not. You
16 still report to the SJA of the commandant?

17 COL DANYLUK: So they are
18 administratively assigned to a local command for
19 accountability purposes, fitness reports -- not
20 fitness reports, but PFTs and administrative
21 issues. Their fitness reports are up to me and
22 then the staff judge advocate to the commandant

1 is the reviewing officer on the fitness reports,
2 for example, my regional defense counsel.

3 MEMBER CASSARA: I can certainly
4 understand your concern. We've heard from the
5 OSTC that the tour lengths will be expanded for
6 people sort of being plucked out of the JAG Corps
7 for lack of a better term to go to an OSTC
8 position.

9 Will TDS tours, ADC tours, et cetera,
10 still be the same or will they be, you know, made
11 longer? I'm trying to figure -- I don't know
12 what the right verb is. But lengthen, there you
13 go. I'm saying made longer, you know. Will they
14 be lengthened to correspond with -- because my
15 concern is like the colonel was saying, she sent
16 somebody to a training and then that's great.
17 We've spent all this money from the defense pot
18 to train somebody and now they are a senior trial
19 counsel. Great. That doesn't help the accused
20 very much.

21 COL MCGARRY: Sir, your point is very
22 well taken. And I know later on one of the

1 things that I think you were going to ask is,
2 what is the one thing that you want? And that's
3 part of my one thing.

4 MEMBER CASSARA: Okay.

5 COL MCGARRY: And I don't think I'm
6 alone in that. It's just a little greater length
7 for TDS tours. And we would like it to go back
8 to making something analogous to what we did with
9 SUPs when we first started. It was a three year.

10 And not immovable and without
11 flexibility for situation requirements. But as a
12 general mark on the wall, we would like it to be
13 three years because now with the two year tour
14 when we take in what USA TDS through DCAP
15 provides for training are DC101, 102, 10-3 and
16 then our basic trial advocacy and the
17 intermediate trial advocacy course and then any
18 of the other, we'll call it elective classes
19 because they are not mandatory for us, that can
20 be left with somebody 18 months in the job.

21 And then for priority one or court-
22 martial clients, as you know, we have problems

1 with assigning people towards the end of their
2 tour because you develop that attorney/client
3 relationship and so you can't really rely on
4 somebody who is getting ready to PCS to do those
5 what we call priority 1 cases. And so you don't
6 get the bang for the buck.

7 And it's even more pronounced with our
8 complex litigation program. Some of that
9 specialized training, especially if it's not
10 provided by DoD, it's extremely expensive. And
11 we have -- there's the person on my right right
12 now who has just gone through all of that and now
13 is being moved a little bit early to the
14 government.

15 So there is frustration is maybe not
16 the right word, but it's a consideration. And so
17 one of the things we continue to work with our
18 assignment process is to lengthen probably a
19 little more stability --

20 MEMBER CASSARA: You're nicer than me.
21 I would have been much harsher than just
22 frustration, but I appreciate it. I would like

1 to hear from the other panel members as to the
2 same issue.

3 CAPT HOLLEY: Yes. You know, I mean,
4 the language of the FY22 NDA was pretty specific
5 about the OSTC and had kind of more general
6 language when it came to the defense. But
7 generally it still required, you know, highly
8 trained litigators to be on the defense side.

9 You know, the Navy has been developing
10 their OSTC structure and the regulations going on
11 with this. Now that that's established, we're
12 looking very hard at what kinds of things we may
13 need to mirror on the defense side.

14 And one of the things I'm looking at
15 is their instruction on who can be in the OSTC
16 and at what level and what training and
17 experience they need. And the question I'm going
18 to proposed to the Navy JAG Corps is does that
19 instruction need to be expanded to also include
20 defense counsel?

21 And we need to balance that to make
22 sure that we can actually train and fill billets

1 in accordance with the instruction. But if one -
2 - if in order to put a person in a billet, they
3 have to -- you know, the JAG has to have a
4 written waiver to instruction, then I think on
5 the defense side, he should also have to do a
6 written waiver to some standard.

7 So we're going to look at -- I mean,
8 I'm going to request that the JAG Corps look at
9 having -- have that instruction not just cover
10 OSTC but cover a certain portion of the defense
11 enterprise as well.

12 COL DANYLUK: Our Marines are similar
13 to the Army where they rotate out generally at
14 the 18 month to 24 month period because they are
15 assigned to the legal service support team.

16 There is a move afoot to change that
17 not this summer but perhaps next summer to have
18 orders for two years to kind of the stovepipe
19 that you were talking about, like two years to
20 the defense, two years to a Trial Service Office,
21 two years to a VLC Office.

22 That's not what we do now. Right now

1 it's three years to Camp Lejeune. And you'll do
2 a year in legal assistance and a year in defense
3 and a year in the VLC and Navy or something like
4 that. It impacts the defense in particularly
5 which I'm sure you already recognize because
6 learning to do your job takes a little bit of
7 time.

8 And then they are required to not have
9 any cases when they leave the Defense Service
10 Organization. So, you know, you can't transfer
11 into a VLC billet or a trial counsel billet if
12 you're carrying cases. So the Marine Corps
13 requires that they be -- you know, have wrapped
14 up all their cases before they leave. So in
15 order to do that, they have to cut them off about
16 six months before they rotate out.

17 So I know you're doing the math in
18 your head, but there's a very small window for us
19 to get what we even would consider like the most
20 experienced litigator in the office except for
21 the senior defense litigator to be on these
22 covered defense cases sort of at the 6 month, 10

1 month and then cut off by the 14 month mark.

2 COL LANDRY: So historically, although
3 we haven't -- it's not something that is in
4 writing and thus requiring a waiver. Senior
5 defense counsel assignments, the standard in the
6 Air Force has been three years. The area defense
7 counsel assignment standard is generally two
8 years.

9 With the initial stand-up of OSTC, I
10 have to be candid with the Panel, as seen and
11 discussed with our assignments division, my
12 concerns that individuals were pulled from those
13 two jobs sooner than those thresholds.

14 In my discussions and looking through
15 the new CLDP that the Air Force is utilizing, the
16 Continuous Litigation Development Program that I
17 mentioned earlier, I see that that is not the
18 goal. But if I'm still in the shop in two years,
19 I will have more to report to you when I come
20 back and talk to you then.

21 LCDR SAVIANO: For the Coast Guard,
22 what we're trying to do is send the Navy second

1 tour, at the very least second tour folks who can
2 fill those defense counsel roles and if possible
3 those with trial counsel experience, that way
4 they're not getting immediate commissioned
5 lawyers with not even any Coast Guard experience.

6 I definitely think longer tours would
7 be helpful. Right now we currently have our
8 folks doing two years tours with our MOU stating
9 up to three years. And we do have a person this
10 year who is intending on staying for that third
11 year, which I think is extremely helpful in the
12 long run.

13 And that's part of the reason why
14 we're expanding to include those O-4 billets.
15 That way we're not having the Navy train up our
16 O-3's with just a one tour defense opportunity
17 and that be their only opportunity until they get
18 to my level. But they are able to then go back
19 and give back at the O-4 level, which I think
20 will help the defense bar across the board.

21 But I did want to note one thing. The
22 Coast Guard is a lot like the Marine Corps in

1 that our JAGs are line officers. So it does come
2 at the expense of promotion concerns. So I know
3 one thing that we tell our folks, especially our
4 junior folks is, generally speaking the shorter
5 your billets, the better for promotion sake,
6 especially if you're getting looked at a lot
7 earlier. So it's not always in the individual
8 JAG's best interest to do a longer billet.

9 MEMBER CASSARA: Thank you. I have
10 one last question. When a lawyer tells you they
11 only have one question, they're usually lying.
12 But I think I have only one more question.

13 We've talked about the subject matter
14 experts, who are the very experienced litigators.
15 And, sir, I know the two that work for you very
16 well. They are not detailed, am I correct?

17 COL MCGARRY: Are you talking about
18 our civilian --

19 MEMBER CASSARA: Right.

20 COL MCGARRY: -- HQEs, sir?

21 MEMBER CASSARA: Right.

22 COL MCGARRY: They are not detailed.

1 MEMBER CASSARA: Okay.

2 COL MCGARRY: They provide the value-
3 added with their abilities at the --

4 (Simultaneous speaking.)

5 MEMBER CASSARA: I mean, this may seem
6 like an off the wall question, but if you've got
7 two relatively junior, we'll call them, defense
8 counsel and then the subject matter expert or a
9 much more senior counsel sitting behind the bar,
10 my understanding would be that they are not
11 covered by privilege.

12 So the concern would be, from my
13 perspective at least, how much they can really
14 participate in the defense. Does that make
15 sense?

16 COL MCGARRY: It does. And I'm just
17 pausing. I don't think we've seen that come up
18 as an issue, anybody tried to pierce privilege
19 where it doesn't exist based on communications
20 within the TDS enterprise. I don't know if
21 anybody else has --

22 CAPT HOLLEY: We haven't had that

1 issue come up. And I think we accept some risk
2 there. But our subject matter experts get pretty
3 involved in the case and as based like a
4 supervisory counsel. And they are very helpful
5 in that role.

6 COL DANYLUK: Yeah. We have two
7 attorney advisors now. We are adding three more
8 attorney advisors hopefully over the next year,
9 which is fantastic for the Marine Corps, like,
10 finally we are getting something. That's great.

11 And ours are intimately involved in
12 every single complex litigation case all hours of
13 the day across, you know, 13 time zones all the
14 way to Okinawa. So we have been very, very
15 pleased with our attorney advisor program.

16 COL LANDRY: We have one right now at
17 the GS-15 level and are looking to potentially
18 add either another O-4/O-5 or alternately a GS-13
19 or 14 that would work subordinate to that
20 individual.

21 Similarly, our current GS-15 does get
22 intimately involved in cases and is a great

1 source of continuity. And I would not likely
2 give up the argument that information conveyed to
3 him may in fact be privileged.

4 LCDR SAVIANO: We follow with the
5 Navy.

6 CAPT HOLLEY: And I should mention, we
7 have one right now. And we would love to have
8 two.

9 MEMBER CASSARA: I'll keep my eyes
10 out, sir. Thank you all very much for your
11 answers.

12 MEMBER SCHWENK: How do you evaluate
13 how many defense counsel you need? Do you use
14 caseload? Do you use a combination of other
15 factors? How do you -- you know, if I were the
16 Judge Advocate General and said to you, how are
17 you doing for people, you know? And then you
18 said I need 6 more or 12 more or something, I
19 know you said based on what? What's the basis?

20 COL LANDRY: That's a very good
21 question, sir. I'll jump in if it's okay with my
22 colleagues because I did this shortly after

1 getting into the job.

2 MEMBER SCHWENK: That's my first good
3 question since I've been on the deck. It was
4 bound to happen.

5 COL LANDRY: Well hopefully, I can
6 grace it with a good answer. Not to say that
7 this is the only way, of course, but it was a
8 combination of caseloads and current cases being
9 tracked and monitored because as you all know,
10 many times cases at the eleventh hour through
11 victim non-participation or alternate disposition
12 go away, but that attorney has put in almost as
13 much effort into that particular case as one that
14 goes forward with the litigated trial.

15 So that was my number one criteria
16 that I looked at. And what it showed is that
17 with my current 18 senior defense counsel, they
18 take anywhere from an average of 8 to 12 cases
19 through a litigated, at least partially litigated
20 court-martial every year so that's about where
21 they are at. And they are probably at any given
22 time tracking it in the weeds on about five or

1 six more than that.

2 Given that and given the secondary
3 factor that I look at is how much time, because
4 we are -- the Air Force is a whole lot of small
5 towns, essentially, organized into our various
6 installations that have anywhere from 3 to 6,000
7 airmen at each, how much time those senior
8 defense counsel are spending at home versus on
9 the road and how sustainable that is over a three
10 year tour.

11 And then just with the third criteria
12 being anecdotally what I'm hearing back from my
13 subordinates in terms of their ability to provide
14 effective defense to all of their clients while
15 still having dwell time, if you will, at home to
16 satisfy their personal needs. I don't expect
17 them all to be single and dedicated 100 percent
18 to work.

19 And with that, I would give a similar
20 answer. I believe Colonel McGarry earlier or
21 perhaps Captain Holley that I think at the senior
22 defense counsel level, the Air Force right now

1 with the projected additions of two new SDC's is
2 in a good place to provide those experienced
3 litigators, defenders that are on par with the
4 Office of Special Trial Counsel.

5 My bigger concern, as I said before,
6 is continuing to maintain that capability at the
7 area defense counsel level, although we're not at
8 any type of crisis mode or even approaching that
9 yet. That is where my attention is going
10 forward.

11 MEMBER SCHWENK: So when you look at
12 area defense counsel, how do you -- what's your
13 criteria to use to say, we're not near crisis
14 where I'm concerned. I'm not concerned.
15 Everything is great.

16 COL LANDRY: Put most simply, sir,
17 it's the ability of that young airman or
18 guardian, as I mentioned earlier, to walk through
19 the door on what might be the worst day of his
20 life when he's accused of a crime and have access
21 immediately to a defense counsel or a defense
22 paralegal to sit down with and consult with and

1 then representation.

2 That's a very loose standard. And I
3 will admit that we are better at measuring at the
4 SDC level, that senior counsel level, than at the
5 base counsel level because of other factors that
6 come in.

7 If there is an aggressive prosecutor
8 at Ellsworth Air Force Base, for example, and
9 that area defense counsel gets busier faster than
10 his or her colleagues at neighboring bases is
11 something that I need to figure out a better way
12 to monitor and then communicate, use that to
13 communicate to my leadership whether we need more
14 people and how we can intelligently use those
15 people.

16 CAPT HOLLEY: So for the Navy, I
17 actually track caseloads in the different areas
18 so I kind of know, you know, where counsel have a
19 lot of cases and where they have fewer cases.
20 You know, and it's also just not court-martial
21 cases.

22 So we do court-martial cases. We do

1 boards of inquiry, which are for officer
2 separation cases. We do admin boards and then we
3 do what is called PERSREP, which is basically
4 just someone coming into our office and saying,
5 hey, they're taking me to Captain's Mast, Article
6 15, and I need advice on it.

7 So in a location where we're just,
8 like Lemoore, we have one defense counsel there.
9 They may only have a couple of courts-martial,
10 but they are the single point of contact for all
11 PERSREPs. They are the single point of contact
12 generally for most admin boards. So it's a
13 little hard to count that way.

14 But generally, you know, a defense
15 counsel, we try not to give a defense counsel
16 more than 10 clients at a time, court-martial
17 clients. They can have more administrative board
18 clients than that.

19 But the key is to have flexibility
20 because, you know, we don't have very many
21 counsel anywhere, really. And so if we have a
22 big, you know, drug ring or something pop up in a

1 certain location and all of a sudden we've
2 assigned all of our counsel, to be able to bring
3 in counsel from other places, you know, to take
4 those cases is key. And that's why I go back to
5 DCAP being a great resource for support.

6 And then just the -- and also for
7 independent defense funding, you know, we're
8 looking at that just to be able to move counsel
9 around to cover, you know, as caseloads shift
10 between our AORs to kind of be able to have funds
11 to move the counsel to where the cases are to
12 make it, you know, kind of balance out.

13 COL MCGARRY: I think we're very
14 similar in the Army. You know, we look -- as an
15 initial measure, we look at docket lengths for
16 boards being scheduled. We also look at
17 complexity of individual cases because we all
18 know that they're not all the same. We also look
19 at individual capability, because not all counsel
20 are the same.

21 And then also the subjective SDC and
22 RDC assessment of, I think of like the local

1 misery index. How much are people able to have a
2 balance at work and still provide for their
3 clients, understanding this is very personal work
4 that we do. But there is a large subjective
5 element to it.

6 COL DANYLUK: I'm not sure ours is any
7 different. I think it's sort of a combination
8 from Colonel Landry's and probably Colonel
9 McGarry's. I don't think that any of my counsel
10 have too many cases. Probably no one has more
11 than 10 cases individually, including admin
12 boards and their court-martial cases.

13 What we are struggling with actually
14 is more gainfully employing people that are in
15 remote locations that don't have any cases. So
16 in Yuma, Arizona, I have two defense counsel, and
17 I think they have had one contested court-martial
18 in the last year.

19 And so even though on paper you'll
20 see, you know, two years from now when they're
21 looking to rotate into another billet, you know,
22 two years as a defense counsel although zero

1 experience inside of a courtroom.

2 So we're trying to do more cross-
3 regional detailing, perhaps even like bringing
4 the counsel out of Yuma, Arizona, and putting
5 them in Miramar, but still supporting the
6 commands in Yuma. We want to make sure the
7 commanders understand that we're still there to
8 support all of their Marines, similarly at Cherry
9 Point.

10 We just have places that have a far
11 lower caseload. And so our efforts are in cross-
12 regional and globally detailing the cases.

13 CHAIR SMITH: I think we need to move
14 on to another subject.

15 MEMBER SCHWENK: Yes, I have one.

16 CHAIR SMITH: Okay.

17 MEMBER SCHWENK: VIS, victim impact
18 statements, we made some tentative
19 recommendations and our perspective, which in
20 part was because the three judges on the DAC-IPAD
21 were all sort of surprised at our system because
22 it's not anywhere near what they are used to

1 where the victim is allowed to just say whatever
2 the victim wants and then the judge considers
3 that which the judge determines is relevant and
4 doesn't consider the rest and life goes on. So
5 our more complicated process was a surprise to
6 them, and they wondered why we needed it.

7 And so we made some tentative
8 recommendations to try to open -- make it more
9 like the civilian system. But in doing that, we
10 talked to a couple of civilian defense counsel,
11 and we wanted to give you all a chance to talk to
12 us before the final report goes out.

13 And just what do you think about
14 problems or you don't have problems, you do have
15 problems? If you do, what are they with victim
16 impact statements?

17 COL MCGARRY: I think from just the
18 Army perspective, I don't think it's unique to
19 the Army, I think concern might not be the right
20 word. I think to the extent that we have victim
21 impact statements for the wide range of criminal
22 activity, I would say whatever rule that we have

1 we would want to be the same.

2 And I think if we're pulling out a
3 particular class of offense and changing the
4 rules and creating a separate class of witness,
5 that is potentially problematic, at least from
6 the appearance of fairness. And so that would be
7 my primary concern.

8 And then the other issue, again, it's
9 less of a concern when we're going to judge alone
10 sentencing. I think one of the recommendations
11 was related to victims suggesting a sentence.
12 And I would just offer the perspective that is, I
13 think, probably the single most biased person in
14 the courtroom and has probably the least amount
15 of experience in developing sentences, balancing
16 justice over discipline. And I don't think we do
17 that with any other offense. And so those would
18 be my concerns, just equal application across all
19 victims.

20 CAPT HOLLEY: Yeah, I mean, I think
21 the -- you know, the main thing is just -- we
22 probably -- you know, I guess it's a change to

1 some degree in our system. And so I think just
2 making sure that whatever is presented in the
3 victim impact statement, if it gets -- that we
4 are able to properly respond to information. And
5 I think the idea is that if we have judge alone
6 sentencing, it won't have the impact that it will
7 with -- you know, if we have Panel members.

8 But nevertheless, I think as defense
9 counsel, we feel like we need to respond to
10 anything that is out there, especially if we
11 think it is completely unjustified. So just kind
12 of figuring out the right balance of, you know,
13 do we object during the statement? I'm assuming
14 not.

15 But is that -- if we're not looking at
16 the statement beforehand, do we object -- you
17 know, I'm not exactly sure what is envisioned.
18 Do we object during the statement if we think
19 something is inappropriate or do we just address
20 it afterwards?

21 So part of -- I'm not exactly sure
22 where this process is leading so it's a little

1 bit hard to give a clear answer as to, you know,
2 what we think.

3 CHAIR SMITH: Can I just say, I think
4 the judges, we all kind of have the same sense of
5 how it works, at least in our courtrooms, is --

6 CAPT HOLLEY: Mm-hmm.

7 CHAIR SMITH: -- the victim gets up,
8 says this affected me in this way and my life is
9 never going to be the same, et cetera, et cetera,
10 and he should go to jail forever. And they've
11 said their piece. And the judge says thank you
12 very much and that's that.

13 And usually defense counsel doesn't
14 object because everybody knows the judge is going
15 to make a determination based on what the person
16 did, what the guidelines are, et cetera, et
17 cetera, and the victim got to say what the victim
18 wanted to say but that's not really part of our
19 equation in terms of a sentence.

20 CAPT HOLLEY: Right. And we just
21 haven't had --

22 CHAIR SMITH: Mm-hmm.

1 CAPT HOLLEY: -- that. So it's a
2 little hard to envision exactly how that's going
3 to impact our practice.

4 MEMBER SCHWENK: Yeah, thank you both
5 for reminding me that I should have clarified my
6 statement by saying our recommendations were for
7 judge alone sentencing, you know, so that was the
8 basis for making any recommendations.

9 COL DANYLUK: I would like some clear
10 guidance for the litigators in the courtroom
11 though as to how they can argue this victim
12 impact statement because they don't have the
13 experience that the people on the Panel have
14 watching other people, you know, for years and
15 years before they have one of these cases.

16 If we're going to let a victim talk
17 about the sentence, for example, and then, you
18 know, have a trial counsel that says, you know,
19 the victim is demanding a sentence of, you know,
20 execution or whatever, you know, I would really
21 like to see whether that's at the service level
22 or through the rules, some very clear guidance on

1 exactly what the purpose is and how it is
2 supposed to be used in a court-martial process.

3 I have a concern about actually on the
4 victim's side about setting the expectations of
5 the victims. If we tell them that they can give
6 what they believe is the appropriate sentence in
7 a case without really having an understanding of
8 everything that goes into creating the
9 appropriate sentence and the guidelines and all
10 the factors that would be involved where we are
11 setting expectations where they come in and ask
12 for a particular sentence and then the sentence
13 is somehow far less than that and now they are
14 disappointed in the system.

15 So they, you know, were pleased with
16 the system and there is a conviction in the
17 system, but now they are disappointed that, you
18 know, they feel like the judge didn't hear them
19 or something like that.

20 CHAIR SMITH: I think usually, as a
21 former prosecutor in the civil context, you
22 prepare your victim. You know, you say, this is

1 your opportunity to tell the judge what you want
2 the judge to know, but let me explain to you
3 these are the guidelines. This is likely what's
4 going to occur. I know that you want him to
5 receive the maximum sentence. It's probably not
6 going to happen. He's probably going to get six
7 months in jail, you know. So that when it
8 happens the victim may be disappointed, but at
9 the same time it's been explained to them.

10 And I recognize it would be a
11 completely different system than what you are
12 used to. But generally speaking, right, Ms.
13 Bashford, the victim comes in, says their piece
14 and everyone says thank you and that's that. And
15 nobody objects, and the judge does what the judge
16 is going to do.

17 MEMBER GARVIN: And if I may, as
18 victim counsel in the civilian world, which is
19 what I do, I manage my client's expectations
20 quite a bit. I talk to them about the
21 guidelines. I talk to them about process. I
22 talk to them about the statement. And so I

1 imagine SVCs and VLCs would be doing that, not
2 just trial counsel and talking to them.

3 And I would say, this also bridges to
4 another part of the questions we have for you,
5 which is access to information for the SVCs and
6 VLCs. Because to moderate expectations sometimes
7 requires knowing what is happening in a case so
8 you can moderate expectations. And I know we're
9 not there yet, but I do think these two topics
10 merge a little bit and bridge.

11 So for me, as victim's counsel, to
12 talk to my client about what a victim impact
13 statement is. And I want to be very clear,
14 right, a VIS is very different than victim impact
15 evidence. Victim impact statements are not
16 evidentiary, right? And so there's a difference.
17 When I'm called in litigation or aggravation in
18 the civilian world as a victim that's different
19 then when I give a victim impact statement,
20 right?

21 So I can talk to them what a VIS is,
22 but sometimes to manage expectations I might need

1 to know a lot about the case. And so that's
2 another series of questions that we have for you
3 all, which is access to information for the VLC
4 and SCC.

5 So I'm putting a pin in that because I
6 don't think the two of you have had a chance to
7 answer the first question about VIS yet. But I
8 just want to flag that it does bridge, as I
9 counsel my clients.

10 COL DANYLUK: Thank you.

11 COL LANDRY: In a judge alone context
12 with sentencing guidelines soon to come, I have a
13 few concerns as we discussed.

14 I do concur with the judgment of my
15 colleagues that this may just be the world that I
16 grew up in. It's very, very odd to me to think
17 that a victim could come in and make a specific
18 sentence recommendation. I do understand that
19 some civilian jurisdictions, apparently yours,
20 ma'am -- interesting.

21 Having been a military trial judge, I
22 know Colonel Danyluk did it twice, I had no

1 problems disregarding things that I should not
2 consider under the law that were raised in an
3 accused unsworn or a victim's unsworn.

4 So my concern level I would say
5 overall is low. As a policy matter, it strikes
6 me as very unusual that someone should be allowed
7 to make a specific recommendation.

8 LCDR SAVIANO: I did have a little
9 kind of initial concern with the "or indirectly
10 relating to," just because that can open
11 Pandora's box, possibly.

12 And then the other point I wanted to
13 note was that, just kind of wrapping up with one
14 of Captain Holley's points, was if defense
15 counsel aren't looking at the statement
16 beforehand, when are they objecting? Are we
17 waiting until the victim finishes, or -- I mean,
18 I think, generally speaking, a defense counsel
19 would like to avoid objecting in the middle of a
20 statement, a victim would like to get the
21 statement across. Defense counsel has an
22 obligation if there's something objectionable.

1 So maybe allowing defense counsel, trial counsel
2 to review that statement in advance still has
3 some benefit.

4 MEMBER SCHWENK: Once the transition
5 to the newest assignment to the DAC-IPAD, and
6 we're relying on you to give us the answers so
7 that we can go on. And that newest assignment is
8 the one about victim counsel access to a
9 statement made by the victim, medical records,
10 etcetera. And we're supposed to assess that, and
11 so anyway, some information was provided to you,
12 and we are interested in your thoughts.

13 MEMBER BASHFORD: General Schwenk
14 before we get to that, the etcetera that you
15 added in there, does the NDAA say it's limited to
16 recorded statements, medical records of the
17 victim, and forensic examinations? Is that what
18 the NDA says, or is it etcetera?

19 COL LANDRY: So, the current process
20 in the Air Force is that release authority is at
21 the staff judge advocate level, the installation
22 staff judge advocate level, usually the special

1 court-martial convening authority's advisor, who
2 is directed to follow a FOIA like process, and
3 take into account other, secondary effects, as
4 I'm sure we're going to talk about in a moment,
5 of the release of materials to an alleged
6 victims, or a victim's counsel.

7 Obviously, those, by and large, before
8 I get there, I believe that within the Air Force,
9 and I would defer to any victim's counsel who
10 later testifies in front of you, I believe
11 tomorrow, that we do share a significant of
12 information about trials with victim's counsel
13 for the purpose of allowing those counsel to
14 advise their clients in the pre-trial phase of
15 courts-martial.

16 Occasionally that results in cross
17 examination questions, additional questions to
18 alleged victims when they testify as to what
19 they've reviewed, what they've had the
20 opportunity to review, and to a much, much lesser
21 extent, obviously given privilege, what specific
22 knowledge has been communicated to them.

1 While having seen it work in practice,
2 I do not feel that just the providing of
3 information in, and of itself will result in any
4 type of injustice to the accused. I do believe
5 that any provision that allows for that to happen
6 in some type of controlled setting, or under
7 specific criteria, which I believe to be
8 necessary, should also include a notification
9 requirement to defense counsel.

10 As to what witnesses, what information
11 specifically was provided to what witnesses. For
12 example, the entire report of investigation was
13 provided to the alleged victim for purposes of
14 fully exercising due process, and confrontation
15 rights at trial.

16 COL DANYLUK: I don't think that my
17 answer is much different from Colonel Landry, and
18 I don't want to prolong it for you. Our concerns
19 I think are the same, they're not a party to the
20 case, and so in the discovery process, there are
21 certain things that they are entitled to under
22 the rules. I know that in the Marine Corps VLC,

1 they're very interested in being served copies of
2 every motion.

3 The defense's motion to compel a
4 witness, they believe that they should receive a
5 copy of that, and believe that they should have
6 an opportunity to voice some sort of objection to
7 a witness production motion, for example, or
8 something like that. I think our concerns are
9 the same about the information that actually
10 documents that might be provided to the victim.

11 We should be on notice of what it is
12 they receive, there should probably be a court
13 order about whether, or not they can be actually
14 provided, or just reviewed by the alleged victims
15 in the case. Because if the purpose of it is for
16 VLC to be able to inform their client about the
17 shortcomings of the case for example, I'm not
18 sure that the victim needs to have a copy of
19 every witness statement that's part of the
20 investigation.

21 CAPT HOLLEY: Yeah, we have the same
22 kind of general concerns there. Besides being a

1 victim, they're also a critical witness, and so
2 just making sure that whatever things are in
3 place to make sure that witness testimony is not
4 improperly affected should be in place for all
5 the witnesses. And I think mainly that comes
6 down to us understanding what information they
7 were provided, and when they were provided.

8 And if that raises a question that
9 needs to be addressed in cross examination, that
10 we have the ability to address it in cross
11 examination.

12 COL MCGARRY: And I share the same
13 perspective as all my colleagues here.

14 MEMBER GOLDBERG: Thank you very much.
15 I know we had heard, or I should speak for
16 myself, I heard in speaking with some victim's
17 counsel when I was in training with the Air
18 Force, and Space Force, that their experience was
19 actually quite inconsistent in terms of what they
20 received, and dependent on the relationship they
21 had with trial counsel, and the sort of
22 understanding.

1 And some of the victim's counsel would
2 talk about having to go out, and educate every
3 new trial counsel in terms of these issues. So,
4 if I'm hearing you correctly, it sounds like you
5 also agree that some clarity is important for
6 everybody, that that would probably assist. And
7 that to the extent you have other concerns if the
8 information is just sort of -- if victim's
9 counsel becomes fully informed.

10 Then you will want to think about what
11 else you might need to do, if anything, to
12 address whatever issues arise. I think some of
13 the victim's counsel that I heard from also spoke
14 about the value to them in receiving full
15 information, even if there was, and some did
16 understand that, there would be information that
17 they wouldn't pass along to the client.

18 And so if to the extent you have views
19 about a distinction between what the victim's
20 counsel receives, versus what the victim
21 receives, which I know may be complicated, but if
22 you have views on that, it would be helpful to

1 hear those as well.

2 COL LANDRY: From a policy perspective
3 ma'am, it strikes me that that would be very
4 tough to write into the law, whether at the rule
5 for court-martial level, or service regulation
6 level. I know I would be very resistant to
7 anything that would interfere with my defense
8 counsel's ability to communicate fully with their
9 clients.

10 I really do think at the end of the
11 day it is something where a good victim's counsel
12 is going to know that by over sharing, he, or she
13 is subjecting the client to more difficulty, and
14 potentially jeopardizing the effective
15 prosecution of the case.

16 MEMBER GOLDBERG: Any of the other
17 services feel the same?

18 COL DANYLUK: Same, as a former
19 prosecutor, and I know there are prosecutors on
20 the panel, my concern would be exposing this
21 critical witness to the cross examination that --
22 but you've already looked at every single

1 witnesses' statement, and now somehow, if over
2 time their statement has changed at all, it would
3 be attributed to the idea that they're trying to
4 conform their testimony to the testimony of the
5 witnesses.

6 CAPT HOLLEY: Yeah, so, again, just
7 understanding what's provided, when it's
8 provided, just so we can make an analysis of how
9 that may affect the testimony.

10 MEMBER BASHFORD: In advance of
11 tomorrow -- it very well may be in here -- can we
12 have a copy of that section of the NDAA? Because
13 it seems like it was limited to victim medical
14 report, SAFE exam, victim's statement. But
15 people are talking about the ROI being provided,
16 so that comes back to the etcetera.

17 MEMBER SCHWENK: Tab 3B at the very
18 end, the last page of that.

19 MEMBER MARKOWITZ: And I guess that's
20 my question as I'm listening to all of this, and
21 this is probably a reflection of my own
22 background. But I guess I'm grappling with the

1 concern about a victim in a case having access to
2 their own medical records, and where you see, for
3 instance, somebody -- how this would impact the
4 defense at trial, if they had access to the
5 DD2911 for instance, or something like that.

6 And if you can just -- and there may
7 legitimately be concerns about that. But if you
8 could walk us through what those issues might be,
9 or how that would impact strategy decisions, or
10 something of that nature, that would be helpful.

11 COL DANYLUK: I'm not sure generally
12 they're medical records, or anything. They have
13 access to their medical records already. I think
14 probably the concern is more towards a SANE exam,
15 where they've given a narrative to the nurse --

16 MEMBER MARKOWITZ: Yeah, I'm sorry,
17 that's what I'm talking about. When I talk about
18 -- when I think about the medical forensic exam,
19 for me that is a medical record, the entirety of
20 that is a medical record. So, I apologize, I'm
21 thinking about all of that, the DD2911, the
22 entirety of that as the medical record. The

1 SAMPI record is the medical record for me, in my
2 brain, so that's what I mean.

3 COL DANYLUK: So, I think with the
4 SANE exam, with the narrative that's provided by
5 them, it's a statement by that person. I don't
6 know that they can't see it, I don't know that I
7 have an objection to them seeing it. They'll
8 certainly be asked about it, I expect, on cross
9 examination perhaps. The defense would just like
10 to know what it is that they're getting copies
11 of.

12 MEMBER SCHWENK: Yeah, perhaps I
13 should have, when we started on this, read the
14 three things that Congress has asked us to look
15 at. The information described in this sub
16 section is the following. One, any recorded
17 statements of the victim to investigators. Two,
18 the record of any forensic examination of the
19 person, or property of the victim.

20 Including the record of any sexual
21 assault forensics exam of the victim that is in
22 possession of investigators, or the government.

1 And three, any medical record of the victim, I
2 guess any other medical record of the victim that
3 is in the possession of investigators, or the
4 government, those are the three things that we're
5 supposed to look at.

6 COL DANYLUK: I think I'm projecting
7 what I'm anticipating you'll hear from VLCs at
8 another opportunity, which is that they would
9 like much broader discovery than that.

10 MEMBER TOKASH: Can I ask a question -
11 - this is Megan Tokash -- for context. So, I
12 left active duty in 2014 when this program was
13 starting. So, my brain is in the federal
14 district court space, which when a victim is
15 represented by counsel, which is very rare, but
16 it does happen, and normally I try to connect
17 victims to counsel, where my job as prosecutor
18 stops and theirs begins.

19 But the victim has a right to be heard
20 in very select matters. So, detention and
21 release, plea, sentencing, and parole, which I
22 know the military does not have parole. So, can

1 you help us understand? I think it might be
2 helpful for the context in which victims have
3 standing in the military, and when they would
4 need this information.

5 Does that make sense? So, for example
6 I'm not going to give the victim's counsel my
7 whole prosecution file just at the beginning of a
8 case because they happen to represent a sex
9 trafficking victim in one of my federal district
10 court cases. But if I know that we're going to
11 have a contentious detention hearing, and the
12 victim's counsel is going to speak to the court
13 on the matter of detention, or release, I then
14 have an obligation as the government counsel to
15 turn relevant portions of my file over to the
16 victim's counsel.

17 Such that they can prepare to argue
18 for detention before the district court judge.
19 Does that make sense? So, I'm trying to
20 understand what is the context here, so that we
21 can appropriately craft our report to make
22 recommendations.

1 COL LANDRY: So, Article 6B UCMJ was
2 based off of the Federal Crime Victim's Rights
3 Act that you're familiar with, and I believe
4 you're referencing. In addition to what falls
5 under Article 6B, and Air Force victim's counsel
6 have been aggressive in arguing for an expanded
7 interpretation of Article 6B to give standing on
8 additional issues.

9 But what is most commonly recognized
10 in Air Force court rooms is an independent right
11 to be heard under Military Rule of Evidence 412,
12 essentially identical to Federal Rule of Evidence
13 412, rape shield materials. Military Rule of
14 Evidence 513, psychotherapist patient privilege
15 issues. And to a lesser extent, other discovery
16 related issues that have a unique impact on the
17 alleged victim's privacy as articulated either
18 personally, or through counsel.

19 Finally, under Air Force regulations,
20 an alleged victim has the right to provide
21 information, or provide a recommendation on
22 disposition of cases, and that's where we see in

1 the pre-trial stage, going beyond what's included
2 in the NDAA victim's counsel requesting access to
3 case files, or information beyond what might be
4 necessary to make those narrow arguments.

5 CHAIR SMITH: We have a few minutes
6 left. Do we want to move on, and discuss, is it
7 Article 25? I'm going to get it wrong, is that
8 right? Article 25? Anybody have any questions
9 on that issue? Shifting gears.

10 MEMBER BASHFORD: I guess just one
11 preliminary question. Have you been satisfied
12 with the composition of the panels that your
13 clients have been in front of under the current
14 system?

15 COL MCGARRY: I think the answer is
16 yes, I don't think we have had -- I'm sorry, the
17 answer, from I think, the Army perspective, is
18 yes. I think we've had fairly good results with
19 our panels. Sometimes with standing panels, a
20 defense counsel might look at a number of
21 previous decisions, and that might factor into
22 the decision for forum selection.

1 But as we looked at Army defense
2 attorneys, and we talked about this, I have not
3 seen any particular issue where defense counsel
4 are up in arms about the selection process.

5 CAPT HOLLEY: Yeah, I mean generally
6 we have very good panels in the military, because
7 we're drawing from a group of professionals, and
8 so we have good members. So, we do definitely
9 benefit from that. I think the two things that
10 probably clients are concerned about, is
11 sometimes our panels tend to be very senior, even
12 when the accused is junior.

13 And they certainly wouldn't mind
14 seeing some more junior people on their panels.
15 There's nothing that prohibits that right now,
16 but it seems like generally our panels are more
17 senior. And then in some cases, the diversity of
18 the panel could be a concern.

19 CHAIR SMITH: I was going to ask the
20 question if you took off your captain hat, or
21 your colonel hat, and you were in -- I don't know
22 if it's enlisted, or lower level person, and a

1 minority, or a woman, what would your answer be
2 to the question about whether you're satisfied
3 with the panels?

4 I think that if you were to poll
5 people who have been charged in the military who
6 are a minority, or I don't know how many women
7 are charged, they might feel differently, their
8 answer might be different. Even though,
9 recognizing that you're getting people with good
10 judicial temperament, and education level,
11 etcetera, etcetera.

12 The bottom line is when you're a black
13 person who is charged, or a Hispanic person who
14 is charged, and you look out, and you're not
15 seeing anyone who looks like you, that would be
16 pretty disconcerting. So, if you had a different
17 hat on, what would your response be?

18 COL MCGARRY: I think your point ma'am
19 is very valid. I think from our perspective,
20 when we look at disparity in our system, it seems
21 that most of it occurs before referral, and
22 trial. The greatest level of disparate results.

1 And I think when we've gone to look at the trial
2 conviction rates, we don't seem to see the same
3 level of disparity.

4 I know when we talked earlier this
5 morning, I think regardless of the number, I
6 think that the consideration of what people might
7 see as they go into a proceeding that is clearly
8 very important to them is significant. And I
9 think that we talked about reference to that
10 there's a potential if we were looking to make a
11 change, or were looking to address that
12 particular issue, one of the things that you
13 might consider is what we have in place with
14 administrative proceedings now.

15 Where there is the opportunity, much
16 like a forum selection that an accused gets to
17 make, you might be able to make a selection to
18 develop that a little bit further to incorporate
19 other -- whether it's a military occupation,
20 specialty, a functional characteristic of an
21 accused, or something like race, or gender, or
22 something else.

1 So, there might be room for that. But
2 again, I think the issues that I have seen in
3 terms of disparate results, and disparate impact,
4 that occurs primarily before referral.

5 CHAIR SMITH: So, you're saying at the
6 charging level, more of the impact is who's being
7 charged, as opposed to what occurs once they're
8 charged?

9 COL MCGARRY: I think that's what we
10 have seen.

11 CHAIR SMITH: But what about the issue
12 of we've had several minority officers, almost
13 only I would say, who have come in, and offered
14 comments, who have been convicted, and to a
15 person they have each said that they had an all-
16 white male panel, or close to that. I don't -- I
17 could be getting it wrong, but that's been kind
18 of what we heard from officers.

19 And I don't know how to address that
20 issue, but it seems to be an issue.

21 COL MCGARRY: I don't dispute that
22 people would feel that way. I think that we have

1 -- there's a lot of work that has been done on
2 the topic of implicit bias, I think that is a
3 real thing, it's not limited to just those
4 characteristics, it's just a human condition.
5 And so, I think if you were going to -- I'm
6 speculating wildly now, that's why I like -- if
7 you're going to do something to address that, I
8 like incorporating into maybe a broader long
9 selection.

10 CHAIR SMITH: A broader -- I'm sorry.

11 COL MCGARRY: A broader form of forum
12 selection. So, as you're choosing first do I
13 want to go judge alone, do I want to go with a
14 jury panel, and then if I go with a jury panel,
15 do I want to do officer, and enlisted, and then
16 further, if I'm in a particular category, do I
17 want it to be more representative, I'm going to
18 include members of whatever demographic.

19 But I have not -- I don't have any
20 study to point to on that.

21 MEMBER CASSARA: So, sir, I don't want
22 to beat up on you, and I'll let some others

1 speak, but I can tell you that I tried cases for
2 25 years in the military, either on active duty,
3 or as a civilian. I quit trying cases about five
4 years ago, and limit my practice to appellate
5 work now. The very first case I ever tried, I
6 was a prosecutor, young African American male,
7 E4.

8 And I cannot forget this, walked into
9 a courtroom, there were ten panel members that
10 were all senior officers, and senior enlisted,
11 and they were all-white and they were all-male,
12 and, of course, so was he. The last case I tried
13 in the military, that was when I was on Army
14 active duty, the last case I tried in the
15 military was an Air Force case.

16 Young African American male, there
17 were nine panel members, one of whom was African
18 American, and was struck from the panel, and a
19 Batson challenge was unsuccessful. Bottom line
20 is that in both of those cases, my panels were
21 consisting of entirely white with an African
22 American accused.

1 I will say my own prejudice in this
2 matter, I'm the counsel who argued U.S. vs
3 Anderson in front of CAAF with regards to the
4 issue of unanimous verdicts. Taking all of those
5 together, I would think that from a defense
6 perspective, there's a lot more concern than
7 maybe we're giving credence to, when you're
8 talking to the lawyers on the front who are
9 trying these cases on a daily basis.

10 And certainly when you're talking to
11 the accused. I've advocated for years, and I'm
12 taking off my DAC-IPAD hat, and putting on my
13 defense counsel hat, but I've advocated for
14 years, why can't we just have random panel
15 selection? You first 20 people show up at jury
16 duty tomorrow, that's what Judge Smith does every
17 day. I think the problem is bigger than that
18 quite candidly.

19 MEMBER MARKOWITZ: I will just say, in
20 support of what Mr. Cassara said, in the last 15
21 years that I've been doing work as an expert
22 across all of the services, my experience is as

1 officer panels go, they are overwhelmingly white,
2 and male when it comes to the officer panels
3 specifically.

4 COL LANDRY: And just to -- I don't
5 think anyone on this panel would deny that our
6 officer corps is overwhelmingly white, and male.
7 So therefore, by, and large, I don't know that
8 going to a pure randomization would resolve the
9 issue as that would be the composition of most of
10 your panels regardless if it was purely random
11 selection.

12 And I won't speak for my colleagues, I
13 will say that in talking to my subordinates, and
14 based on personal experience, yes, that is a
15 concern, and a valid concern of our clients. I
16 will say from personal experience, and review of
17 cases our panel members are good in the military.
18 We have good panels, and they take their charge
19 seriously.

20 And I believe that you see that in the
21 fact that they are not shy in rendering an
22 acquittal when the evidence, and the government

1 does not meet its burden. So, I would
2 respectfully suggest that maybe we're talking
3 about two different things here. Because the
4 perception of the client, and the client's
5 family, who might be sitting in the back of the
6 courtroom is very important.

7 And I'd be lying to you if I told you
8 I knew how to fix that with some easy regulation,
9 or statutory change.

10 MEMBER GOLDBERG: This maybe picks up
11 on the discussion here, and if you step back from
12 defense counsel, and think about this from the
13 perspective of investment in a military justice
14 system that is trusted by complainants, or
15 victims, and trusted by sort of all parties, is
16 it your sense that if the panels were more
17 consistently diverse in terms of the presence of
18 people color on the panels, or black, and Latino
19 soldiers, or service members on a panel, and some
20 women on the panel, that might engender more
21 trust in the system?

22 COL MCGARRY: Yes, I think it would.

1 MEMBER GOLDBERG: Or I guess maybe I
2 should ask does anybody disagree with that?

3 COL DANYLUK: I suspect the answer to
4 that is probably an easy yes to the accused who's
5 of color, or a female, to see themselves
6 represented by the panel. I think that they
7 would -- I think to Colonel Landry's point,
8 that's different than whether, or not they're
9 better at making a decision in the case.

10 The panels seem to be good, I would
11 like more diversity in rank, and of course
12 gender, and race, ethnicity, everything as well,
13 and we have very senior panels almost all the
14 time, and almost always -- I don't know if it's
15 always white males in the Marine Corps, I think
16 that we have some diversity in our panels.

17 Okay, I thought you were like no.
18 That's been my experience, especially when we
19 have enlisted staff NCOs on the panel as well,
20 there's a mix. But I do think that the panels
21 take their job very seriously, and do the best
22 job they can in following the instructions, and

1 the evidence.

2 MEMBER GOLDBERG: Yeah, and
3 understood, and just to be clear about my
4 question, because I think you made the point that
5 the panelists are doing the best job they can,
6 they're trained to do it, and there may be an
7 issue separate from that, which is what does it
8 feel like from the perception of all of the
9 service members who may have contacted the system
10 to be part of the system.

11 I think you made a point earlier that
12 may be worth, I think all of you agreed on this,
13 and it may be worth just stating it in front of
14 the full Committee about the percentage of
15 enlisted that members that you thought might be a
16 good change for us to be aware of to think about.

17 COL DANYLUK: I think we'd like to see
18 in the Marine Corps 50 percent enlisted if the
19 accused requests enlisted representation. And I
20 think that's in part because of the change to the
21 panel now, which is eight, and four, previously
22 it could have been three, five, or any number

1 bigger than that. So, doing the math on a third
2 of four, at least from my mathematical mind is
3 actually really hard to do.

4 But if it's half, that makes it easy
5 for everybody in the room.

6 COL LANDRY: To the extent there is
7 any type of -- that might be described as an easy
8 fix to help address the issue of a lack of
9 demographic diversity on our panels, I believe
10 that is the closest thing we have to it. Because
11 the enlisted force is certainly more diverse than
12 the officer corps, particularly the senior
13 officer corps.

14 CHAIR SMITH: Well, I think there is -
15 - in the military it seems like there is a lot of
16 weight put on this idea that in order to be a
17 good juror you have to be educated, you have to
18 be of a certain age, a certain position. But in
19 my experience, and other people can chime in,
20 once people get on the jury, whether they're --
21 no matter their education level, no matter their
22 age, for the most part, I'm generalizing,

1 sometimes you get the juror who just is not up to
2 the task.

3 But for the most part they understand
4 the importance of what they're doing, and they
5 take that job very seriously, and it doesn't
6 matter if they have a high school diploma, or a
7 graduate degree, if they're 25 versus 55. They
8 understand the seriousness of what they're doing
9 in my experience. And I don't know, anyone else
10 can chime in.

11 But I think you're used to operating
12 in this system where age, education, experience,
13 judicial temperament are the end all be all. But
14 the reality is that there are plenty of people
15 who do a great job on jury duty who don't have
16 all those, don't meet all those qualifications in
17 my experience.

18 COL MCGARRY: I think your point has
19 even more weight now than if we're looking at
20 judge alone sentencing. Because you look at the
21 balance between, it's a justice system, it's a
22 good order discipline system, I think maybe those

1 concerns that we had maybe relate more to the
2 good order, and discipline, which important for
3 both, but maybe is weighted more with the
4 sentencing piece.

5 And maybe it's not the same level of
6 concern as it is finding someone guilty.

7 COL BOVARNICK: I think that's it
8 ma'am, if you have.

9 CHAIR SMITH: All right, thank you so
10 much. You were wonderful. Thank you.

11 MEMBER CASSARA: We'll take a 15-
12 minute break.

13 (Whereupon, the above-entitled matter
14 went off the record at 3:36 p.m. and resumed at
15 3:51 p.m.)

16 COL BOVARNICK: Okay, we're going to
17 get started with the public comment session. I
18 want to remind the members that in your read
19 ahead materials, and also posted on the website,
20 tab five of the read ahead materials, you got a
21 four page letter from Mr. Lopez, and also a
22 number of documents from Mr. Burris that are

1 posted on a link to the website.

2 In person today we have two gentlemen
3 here seated at the front. Mr. Damien Yeats, who
4 will give a five minute present his public
5 comments, followed by Mr. Micah Carroll, also
6 here at the table in person for five minutes. And
7 then virtually we have Mr. Garlan Burris, who is
8 the father of Mr. Eric Burris, who submitted the
9 comments that are posted online.

10 So, with that we'll start with Mr.
11 Yeats. Sir, you have five minutes please, for
12 your comments.

13 MR. YEATS: Good afternoon Madam
14 Chairman, panel, thank you for having me here
15 today. I have read, and still believe the only
16 thing necessary for evil is to do nothing. My
17 name is Damien M. Yeats, and my conviction in the
18 United States Air Force was less than stellar.
19 It is said that there is no perfect victim, and
20 so I am not perfect.

21 My married female co-worker, and I
22 flirted often, and I can admit that I was

1 flattered by the attention. I was a body builder
2 at the time, and worked hard to look a certain
3 way. She told me many times that body builders
4 were her type, and that her husband was jealous
5 because he caught her looking at pictures of me
6 online.

7 She had sent me a Facebook friend
8 request only to have her husband force her to
9 unfriend me. She would later re-add me as a
10 friend, which I told her I was hesitant to accept
11 her, only for her to inform me that her, and her
12 husband were on a break. We exchanged dozens of
13 suggestive text messages, and this back, and
14 forth escalated to the point where she, and I had
15 made plans for her to stay at my home.

16 I suggested we not tell many people
17 she was staying at my place, as it might raise
18 some eyebrows. She agreed, and said if her
19 husband asked, she would tell him she was staying
20 with someone else. We were together for five
21 days in which the affair happened. Her husband
22 found out that we were together, and he got

1 angry.

2 So angry that she then made the claim
3 that I had assaulted her. She told her husband
4 that I had set her up, and that I was not even
5 supposed to be there. She asked him to just let
6 it go, but he said that if she were truly
7 assaulted, then she must press charges, or she
8 would tell her father what had happened. She
9 decided to file charges against me.

10 Her claim was that she was too drunk
11 to consent. I voluntarily, against the wishes of
12 my attorney, gave a three hour interview to OSI
13 investigators to share what had taken place.
14 During both the investigation, and the Article
15 32, her claims against me were refuted by her own
16 text messages, and direct messages on Facebook.

17 After the Article 32 judge determined
18 that probable cause for the charge had not been
19 met, he expanded his investigation to see if they
20 could charge another charge against me. In his
21 summary, he stated that my accuser gave false, or
22 misleading statements, and she gave it multiple

1 times. He noted the overly sexual atmosphere in
2 the messages between me, and my accuser.

3 Lastly, he considered my written, and
4 oral statements to OSI, which he deemed to be
5 just as credible, if not more credible than my
6 accuser. He recommended my case not go forward
7 to court-martial. His recommendation was
8 endorsed by my commanding officer, in writing by
9 the one star general in my chain of command, in
10 writing by the two star general in my chain of
11 command, including a staff judge advocate.

12 And finally the four star general in
13 my chain of command who wrote that the two star
14 general had acted appropriately. The four star
15 then returned the charges to my two star for his
16 dismissal. My charges were dismissed without
17 prejudice. A number of months later the four
18 star general changed her mind without receiving
19 any new evidence, and decided to resurrect my
20 case.

21 Remember, this was after she had
22 originally concurred with the findings of the

1 lower generals. Who, or what could change the
2 mind of a four star general? That was less than
3 stellar. Could this be unlawful command
4 influence? I can't be certain. My trial was
5 administered by a new command. The officer who
6 charged me a second time, an O6, was stationed at
7 a completely separate base from me.

8 And my commanding officer was led to
9 believe that he had to endorse the charge sheet,
10 despite his doubts about the case against me.
11 Even though my commander testified on stand that
12 he was simply a mouthpiece for what the O6
13 wanted, and that a JAG had told him it didn't
14 matter what he put on the charge sheet, that I
15 was going to court-martial regardless, the court
16 decided that this was not unlawful command
17 influence.

18 And that my CO acted on his own
19 behalf. This was also less than stellar. We
20 discovered hundreds of emails exchanged between
21 an SJA, convening authorities, and Air Force
22 trial judges. We only got access to a select few

1 emails, and in one email the SJA wrote the head
2 trial judge of the U.S. Air Force, and asked for
3 help for finding a new judge in my case.

4 The SJA wrote in the email that the
5 reason for requesting the new judge was that my
6 first Article 32 hearing was less than stellar.
7 My first Article 32 judge argued in front of the
8 federal courts, and won victories for detainees
9 at Guantanamo Bay. He had multiple guest
10 speaking appearances at Harvard, and other ivy
11 league schools.

12 And was quoted constantly by national
13 media such as the New York Times, and Wall Street
14 Journal. He simply suggested that my case not go
15 to court-martial based on the evidence. What
16 could he have done that was less than stellar?
17 After my second Article 32 recommended a court-
18 martial, I was told by my defense counsel to
19 choose a judge alone, because I would more than
20 likely face an all-white panel.

21 The panel would simply see a big black
22 man, and a tiny white woman. This realization

1 was less than stellar. The head trial judge
2 chose his deputy to preside over my case, I was
3 not allowed to present any of my OSI interview,
4 it was all deemed hearsay, or 412. I was told
5 that a judge would see the merit in my argument,
6 and evidence.

7 Yet the head trial judge deputy found
8 me guilty, and I was sentenced to three years in
9 prison, given a punitive discharge, and forced to
10 register as a sex offender, this is also less
11 than stellar. I am currently unemployed in the
12 state of Ohio where I live. They sent notices to
13 all my neighbors saying that I was convicted of
14 rape with force.

15 That is not a charge that the Air
16 Force had given me. I don't speak to my
17 neighbors. I can't help my disabled mother, I
18 can't even choose to live where I want because of
19 lack of money, and the fact that I'm a registered
20 sex offender. My daughters have spent years
21 without a father who could not 100 percent be
22 there. That is also less than stellar.

1 My hope is that you recommend the
2 military create a conviction integrity unit to
3 reverse these convictions, and restore what has
4 been taken from us. I, and many men like me have
5 been suicidal. And the only hope that the
6 American people learn from our stories, that they
7 can advise their children about life in the
8 military.

9 And if your panel can help us, that
10 would be something that is more than stellar.
11 Thank you for your time.

12 CHAIR SMITH: Thank you. Thank you,
13 sir.

14 MR. CARROLL: Good afternoon. I
15 believe that if the United States military cannot
16 be honest, and just, then how can people trust
17 them with their children? Would any of you
18 encourage a friend, or family member to join the
19 military if you knew that they could be falsely
20 accused, and wrongly convicted? My name is Micah
21 Carroll, and I was falsely accused, and wrongly
22 convicted in the United States Air Force.

1 While deployed to Afghanistan, I had a
2 feeling that my wife was having an affair. I
3 asked permission from my commander to return home
4 early, as I could not safely focus on the
5 mission, as my thoughts were on the worst case
6 scenarios with my family. He allowed me to
7 return home several weeks early.

8 And once I arrived home, my three
9 children informed me that a man had been staying
10 over at my house, hanging out with them, and
11 teaching them to throw the football while I was
12 gone. I confronted my wife, and she initially
13 denied the accusation. After about a week of
14 arguing with my wife, she finally confessed.
15 Then she left me, and the kids to be with the man
16 she had been having an affair with, another
17 active duty service member.

18 She returned a week later, and told me
19 she wanted to be with me, start over, and repair
20 the marriage. So, we moved into a new house to
21 symbolize a new start, but I still suspected her
22 of cheating on me, so I ordered a still picture

1 nanny cam to find out if my suspicions were
2 valid. The picture that I captured showed my
3 fully clothed wife straddling a fully clothed man
4 while laying in our marital bed.

5 Again, I tried to make our marriage
6 work, but she left me, and married the active
7 duty service man photographed in our bedroom. He
8 also left his wife. My wife's affair became an
9 issue during our child custody hearing, where I
10 mentioned her affairs, and the picture as proof.
11 My wife then went to the military, and I was
12 accused, and charged with taking an indecent
13 recording for sexual gratification.

14 Basically I was accused of being a
15 peeping tom. The law used to catch people taking
16 up skirt photos, and bathroom pictures was used
17 against me. Even though I presented proof in the
18 form of text messages, that my wife had admitted
19 to multiple affairs, and even though the judge,
20 and prosecutors were aware of her affairs because
21 she testified to it without the panel present I
22 was not allowed to present evidence to the panel

1 that I was taking the pictures to see if she was
2 having an affair.

3 Even though my wife admitted to what
4 they had done, her lover perjured himself on the
5 stand, again, without the panel present. Neither
6 he, nor my wife received any military discipline.
7 My accuser is now considered a victim, and I am
8 considered a monster. There are organizations,
9 and attorneys that support her, and there are
10 none to support me.

11 I hear words like always believe the
12 victim. Well, I am the victim, and the military
13 helped make it so. I was sent to prison, given a
14 punitive discharge, and forced to register as a
15 sex offender. I have struggled to find work, and
16 I've not seen my three kids from my first wife
17 for almost a decade. Those same kids have asked
18 multiple times to live with me.

19 And I don't get those years back.
20 With my current wife, and child, I am not allowed
21 at her school. There will be no Girl Scout
22 meetings in my future with this conviction. No

1 science fairs, no amusement parks, no
2 graduations, no meeting with their friends, no
3 birthday parties, no sporting events.

4 I live in constant fear of random
5 violence, because in this country a sex offender
6 is killed each month, and people don't really
7 care. There are so many things that I am denied,
8 that it would take much longer than five minutes
9 to share them with you. How many other former
10 military men were treated just like me, and how
11 would you feel if you were forced unjustly to
12 become a sex offender?

13 In the strongest words possible, I
14 recommend that the military create a conviction
15 integrity unit, and review, and reverse these
16 convictions. I recommend that an independent
17 body review the court-martial rules, and changes
18 to determine if they are truly designed for
19 equal, and fair justice. If the military wants
20 to encourage trust again in this system, they
21 must fix what they did in the past, and the
22 process going forward. Thank you.

1 CHAIR SMITH: Thank you. Any
2 questions for -- I heard Mr. Carroll, correct?

3 MR. CARROLL: Yes.

4 CHAIR SMITH: Okay, any questions?

5 MEMBER BASHFORD: I just have one for
6 clarification. Is what you were convicted of
7 unlawful surveillance essentially?

8 MR. CARROLL: Indecent recording is
9 what it was called.

10 MEMBER BASHFORD: Okay, thank you.

11 MR. CARROLL: Under Article 120
12 Charlie.

13 MEMBER BASHFORD: Thank you.

14 COL BOVARNICK: We have Mr. Burris who
15 is appearing virtually on the screens in front of
16 the members here. Go ahead sir.

17 MR. BURRIS: I am Garlan Burris, the
18 father of Major Erik James Burris, U.S. Army. My
19 son's file was judicial malpractice on a grand
20 scale. This case is the ultimate example of how
21 command influence can interfere with justice.
22 (Telephonic interference.)

1 This followed the prosecution's
2 dismissal of a nurse practitioner O-6 who had
3 treated sexual assault victims after she stated
4 that sometimes victims lie. Okay, so this trial
5 was ultimately a question on isolating a
6 courtroom from the stark reality of an Article 32
7 hearing and report.

8 Lieutenant Colonel Jessica Halling
9 carried out an exhaustive investigation of the
10 case, and her report clearly found that his case
11 should not go to trial. She didn't know that her
12 investigation was supposed to be superficial, and
13 her report limited to a couple of pages.

14 I have provided you with an email
15 between William Cassara and Rick Davis stating
16 that Lieutenant Colonel Halling was supposed to
17 be reprimanded for being too thorough.

18 The military was angry at my son for
19 disagreeing in testimony in another case with the
20 Army's policy concerning sexual abuse. He
21
22

1 believed that the policy discriminated against
2 all men and allowed women who make false charges
3 without any evidence.

4 Major Rebecca DiMurro, prosecutor on
5 both Article 32 hearings and court-martial had to
6 know that my son was innocent, but was
7 undoubtedly forced by her seniors to carry on.
8 Despite her knowledge of the 32 findings, she
9 could control, with the court's approval, what
10 would be allowed to enter that trial.

11 Major Gregory Malson, lead defense
12 attorney at the Article 32 hearing, retired
13 before the case went to trial. This must have
14 been very comforting to the prosecution, since he
15 was an outstanding attorney.

16 Excuse me. My son's first wife, and
17 her father, were to become the accuser's greatest
18 assets. Her father, a retired lieutenant
19 colonel, had deep connections still in the
20 military to affect this trial. His daughter,
21 upon hearing that the accuser had left my son,
22

1 texted her father asking him: who do we know at
2 Bragg? She and his accuser had formed a mutual,
3 self-serving relationship that would be used
4 throughout this ordeal.

5 The accuser and first wife would
6 search for and share anything that they could to
7 discredit my son. The accuser coined the phrase
8 B is the key to E (phonetic). This meant that
9 his oldest daughter was going to be used against
10 him if they could find a way. Well, they found a
11 way. Through my son's love of tickle torture
12 (telephonic interference) through tickle torture,
13 that his daughter loved to play as well.

14 His first wife always had a
15 contentious relationship with my son concerning
16 child visitation rights that had been court
17 ordered. The accuser went to live with my son in
18 North Carolina to try to get evidence of abuse
19 after she had found out that she was expecting
20 their second child. This child would complete
21 the requirements for her to inherit his estate,
22 which was to be married, and have two children.

1 She would not divorce my son until May
2 11th, 2015, approximately four months after the
3 trial. Excuse me, I have to -- she would not
4 divorce my son until May 11th, 2015, to ensure
5 that she could reap the many benefits that the
6 Army readily paid her, including my son's
7 forfeiture of pay if he refused to sign.

8 His accuser and her family have
9 numerous bankruptcies and foreclosures, and
10 should be considered to be, as her first husband
11 said, a nest of grifters. In addition to our
12 son's case, you might ask Major Clarence Anderson
13 or Lieutenant Commander Arvis Owens about being
14 discriminated against by sexist policies in our
15 military.

16 Since the conviction, the appellate
17 process, and now the civil actions have been no
18 less completely controlled by the I'm going to
19 call it, conspirators, since the first wife and
20 father, father-in-law, have had free range to
21 affect this case. They have positions at Texas
22 A&M, and work close to the ROTC program, and the

1 father for some time -- I can't identify the
2 exact time, but had some kind of effective -- of
3 the military -- just a minute.

4 They have positions at Texas A&M, and
5 were close with the ROTC program, and the father
6 was some kind of military contractor. All of
7 their actions -- I know it sounds like I'm a
8 wacko, but follow their actions to get the idea
9 on that, since they were never really part of my
10 son's case.

11 She says there has to be an asterisk
12 next to my son's name. Anyone wanting to concern
13 themselves with this case is warned away. Now my
14 son has started his ninth year behind bars. How
15 would you feel in this situation? As a proud
16 father of what I consider an American hero. How
17 am I supposed to feel?

18 JAG Corps has no business taking
19 jurisdiction of sexual abuse cases. With such an
20 easily manipulated system of justice, justice is
21 lost. What I would like for my son? Complete
22 vindication. And I made a little list here, and

1 I'll follow it with just something that you might
2 be able to agree with.

3 Firstly, reverse the conviction, give
4 him credit for all time, good and bad, an
5 honorable retirement as at least an O-5, which is
6 what he would have been anyway, which is
7 compensation for eight-plus years of
8 incarceration. The military pays -- the military
9 can pay for child support that has been building
10 over the past years. Pay off his student loans.
11 Or, and here's what I'm asking, or a new trial in
12 a neutral venue. As my son said, the founder of
13 the JAG Corps must be rolling in his grave.

14 And by the way, this statement is only
15 mine. It's not my son's. I tried to get my son
16 here, but he was not on your list of phone calls.
17 He's in Miramar brig. And I'm sorry if I
18 preached on, but actually I did pretty damn good.
19 Thank you very much.

20 CHAIR SMITH: Thank you, Mr. Burris.
21 It was difficult to hear what Mr. Burris was
22 saying, but his comments are available on the

1 DAC-IPAD website under the public comment
2 section.

3 MR. BURRIS: Hard to hear me? Okay.

4 CHAIR SMITH: Any questions? I don't
5 know if anyone has any questions. No? All
6 right, thank you sir.

7 MR. BURRIS: Okay, have a nice day.

8 MEMBER TOKASH: I'm Megan Tokash. I
9 am leading the Special Projects Subcommittee. No
10 leader though is any good as the constitution of
11 their team. And so I first want to recognize
12 Meghan Peters and Eleanor Vuono, who are our
13 attorney advisors, who have really helped us
14 tremendously over the past several months. and I
15 want to thank the subcommittee members, too, who
16 have done tremendous work in a very short amount
17 of time.

18 I wanted to provide the full Committee
19 with an update on three things. What we've
20 accomplished to date, our ultimate short term
21 goal, and then the way ahead between now, and
22 July 1st, 2023. So, a very short time period.

1 First, what we have accomplished.
2 Today the subcommittee voted on and passed two
3 recommendations, and Meghan Peters will detail
4 those recommendations right after my introductory
5 remarks.

6 I will highlight though, that the
7 first recommendation is to amend Article 32 so
8 that a no probable cause finding is an absolute
9 bar to prosecution. The second recommendation is
10 to create uniform prosecution standards for the
11 special trial counsel, and for convening
12 authorities in all other offenses that are not
13 listed covered offenses.

14 The next thing that we did over the
15 past several months is we drafted uniform
16 prosecution standards for inclusion in our stand
17 alone report that we hope to publish by the end
18 of March, or beginning of April. A very, very
19 forward leaning schedule, but we think that we
20 can do it. The next part is our goal, the reason
21 why we are leaning so far forward.

22 We want to be able to publish our

1 findings, and recommendation well in advance of
2 the July 1st, 2023 military department
3 requirements to establish standard operating
4 procedures for the offices of special trial
5 counsel. So, the last part is the way ahead.
6 Today, we will discuss recommendations one, and
7 two that the subcommittee passed today.

8 And if we believe we are ready,
9 because we have talked, and deliberated about
10 this for years to date, we could potentially vote
11 on recommendations one, and two. By the end of
12 this week, we hope to send out the draft appendix
13 2.1, and principles of military prosecution to
14 the full Committee, so that they can be
15 socialized to this concept, and have the
16 appropriate time to read, and digest.

17 March 9th, the subcommittee will hold
18 a virtual meeting, and we will continue to talk
19 about appendix 2.1, and vote on 2.1, and the
20 principles of military prosecution. Shortly
21 thereafter, on March 14th, we will have a full
22 DAC-IPAD meeting. Understanding that this

1 meeting was ear marked to talk about other
2 things, hopefully there is enough time where we
3 as a subcommittee can present to you our
4 rationale, and findings, and recommendation, and
5 vote on appendix 2.1, and the principles of
6 military prosecution.

7 This gives us a target of late March,
8 or early April to print, and publish our stand
9 alone report with plenty of time for the services
10 to edit, or adjust their standard operating
11 procedures to align with the DAC-IPAD
12 recommendations. The recommendations which align
13 with Article 36, that is the military to the
14 extent practicable should be able to align with
15 the federal standards of prosecution.

16 So, with that, I will turn the floor
17 over to Meghan Peters to give us some background,
18 and also talk about the staff's work in this
19 regard. Thank you.

20 MS. PETERS: Thank you, Meghan. I'm
21 going to walk you through a little bit of the
22 background and tell you how we, as a

1 subcommittee, arrived at the recommendations that
2 were voted on today. Some of this presentation
3 was geared towards a discussion of ideas. We
4 were pleasantly surprised to have quorum today
5 and were able to vote, so that moved things along
6 even faster than we anticipated, and we are happy
7 and ready to do so.

8 But, again, going back to where all of
9 this came from, the Special Project Subcommittee
10 has been studying the establishment of the
11 Offices of Special Trial Counsel and, as part of
12 the project, really wanted to focus on the case
13 selection procedures, the processes they're going
14 to follow to select these cases for trial, which,
15 again, the Secretary of Defense has directed each
16 service to develop those protocols by July of
17 this year.

18 And in beginning the subcommittee's
19 work, the subcommittee wanted to look at the DAC-
20 IPAD's own previous findings, especially from its
21 Investigative Case File Review project that was
22 published in 2020. And from that project, in

1 that report, the DAC-IPAD found that cases
2 lacking sufficient evidence to convict are
3 systematically referred to trial and that the
4 practice of referring weak cases to trial
5 contributes to the high acquittal rate that this
6 Committee has commented on in the past.

7 The next step in understanding how
8 that might come to occur is the pretrial
9 procedures in the UCMJ, the Committee found, do
10 permit the referral of weak cases to trial. So
11 we have the Article 32 preliminary hearing, the
12 Article 33 disposition guidance which has been in
13 effect since January 1 of 2019, so it post-dates
14 the Committee's original review, but we have been
15 studying its guidance and its potential effect on
16 the pretrial processing of cases. Appendix 2.1
17 on the Manual for Courts-Martial is how Article
18 33 disposition guidance is implemented. The
19 President had to direct the Secretary of Defense
20 to promulgate guidance for the exercise of
21 prosecutorial discretion by judge advocates and
22 commanders at various stages of a case to include

1 the point of referral. So we'll get to how that
2 feeds into our recommendations in just a moment.
3 And the other pretrial procedure that is at issue
4 here is Article 34, advice required before
5 referral to trial.

6 Now, I'm going to jump around here
7 because of the nature of the recommendations.
8 Essentially, when the subcommittee looked at
9 pretrial procedures, in the context of the
10 Offices of Special Trial Counsel, the question
11 became are the procedures and guidance in these
12 articles appropriate for cases prosecuted by
13 special trial counsel. For one thing, when you
14 look at the statute in the proposed implementing
15 rules, which this Committee has been reviewing
16 since they were published for public comment, the
17 special trial counsel has exclusive authority to
18 dispose of offenses involving, I'm sorry, charges
19 involving covered offenses. And the Article 32
20 probable cause determination is advisory, meaning
21 not binding, on the special trial counsel.

22 And the other factor at issue is that

1 the special trial counsel or convening authority
2 does not have to consider any of the disposition
3 guidance issued pursuant to Article 33. That is
4 advisory, as well. It's a should consider, not a
5 shall consider, as written. And what that means
6 is, the sub-bullet here is that the special trial
7 counsel does not have to consider or, I'm sorry,
8 they do not have to believe that there will be
9 sufficient admissible evidence to obtain and
10 sustain a conviction before selecting charges to
11 send to court-martial.

12 And, finally, Article 34 provides the
13 statutory floor for referral as a probable cause,
14 and that applies to all cases prosecuted by a
15 special trial counsel or referred by a convening
16 authority. So that is the framework for the
17 pretrial processing of cases when prosecuted by
18 the special trial counsel and the issues those
19 raised for the subcommittee.

20 And so what that led to is the
21 following concerns: There really is no check on
22 the exercise of prosecutorial discretion by

1 special trial counsel. They operate independent
2 of the chain of command, as designed, and they
3 operate independent of the staff judge advocate,
4 which means the traditional pathway for a case
5 involves the convening authority turning to the
6 independent SJA to get advice and to render a
7 probable cause determination that is binding on
8 the convening authority. In essence, the staff
9 judge advocate has a probable cause veto over the
10 convening authority's power to refer, and that is
11 not so in the case of a special trial counsel.
12 The special trial counsel makes its own
13 determination as to probable cause. And where
14 that decision will lie within the Office of
15 Special Trial Counsel remains to be seen, but it
16 is, nonetheless, an internal determination of
17 probable cause under Article 34 and that's all
18 that's really needed to refer.

19 The subcommittee then turned to what
20 tools and procedures are available to address
21 these concerns and amendments to Article 32 and
22 33 would be the place to start to provide those

1 independent or the necessary checks on the
2 prosecutorial decisions and to find a place to
3 enhance the disposition guidance for prosecutors.
4 And the other reason these existing articles and
5 the tools in Appendix 2.1 were advantageous
6 places to make amendments to the code in
7 furtherance of these goals is because this
8 Committee and the IRC before that has
9 overwhelmingly been concerned with uniformity. I
10 think the concern is are sexual assault offense
11 cases going to be prosecuted under one set of
12 standards and the other offenses under another.
13 And they're also concerned with uniformity in the
14 decision-making processes across the services.
15 So these recommendations that I'll read for you
16 were guided by a concern about promotion of
17 uniformity, as just discussed here.

18 So I'm going to go back just to guide
19 you through what the recommendations are in form.
20 Now, this slide four just, again, was where I was
21 going to talk to you about concerns, and now I
22 can talk to you about what the recommendations

1 are. I'm going to read them, because they're not
2 in front of you, verbatim; but I'll read them
3 now, and I think this slide just kind of provides
4 a guidepost to read along with.

5 MS. VUONO: Just that we'll get a hard
6 copy. These were just voted on this morning, so
7 we'll get hard copies to everybody.

8 MS. PETERS: Absolutely. So thank you
9 for bearing with us there.

10 So the first recommendation is to
11 create a binding no probable cause determination
12 by the preliminary hearing officer.
13 Recommendation 1A is to amend Article 32 to
14 provide that a preliminary hearing officer's
15 determination of no probable cause is an absolute
16 bar to referral of the affected specifications to
17 court-martial, subject only to reconsideration by
18 the preliminary hearing officer pursuant to
19 procedures in Recommendation 1B. Recommendation
20 1B provides that, to amend Article 32 and will
21 for Courts-Martial 40-5, to permit
22 reconsideration of a preliminary hearing

1 officer's no probable cause determination upon
2 the presentation of newly-discovered evidence or
3 evidence that, in the exercise of due diligence,
4 could not have been obtained before the original
5 hearing.

6 Now, the second recommendation, again,
7 that you will receive a copy is to create uniform
8 disposition standards. Recommendation 2 is to
9 require the referral authority, whether special
10 trial counsel or convening authority, to first
11 consider whether the admissible evidence will
12 probably be sufficient to obtain and sustain a
13 conviction before considering other disposition
14 guidance factors.

15 Now, in order to implement this
16 recommendation, there are three revisions to the
17 UCMJ and the manual that would achieve this goal.
18 Part one is to amend Article 33, the disposition
19 guidance, by striking the word non-binding in the
20 text of the article and by replacing should
21 consider with shall consider the disposition
22 guidance. Part two is to revise Appendix 2.1,

1 again, where Article 33 is implemented, and
2 that's where the disposition guidance factors are
3 located, to revise Appendix 2.1 by removing non-
4 binding from the title of Appendix 2.1 and revise
5 it to provide the referral authority shall
6 consider whether admissible evidence will
7 probably be sufficient to obtain and sustain a
8 conviction in a trial by court-martial before
9 considering other disposition guidance factors.
10 And, finally, the third revision is to revise
11 Appendix 2.1 to require uniform prosecution
12 standards for referral authorities, and that
13 refers to the incorporation of principles of
14 military prosecution into Appendix 2.1, which is,
15 again, a proposed revision we will submit to you
16 by the end of the week, if not next week.

17 So the two parts amend the statute,
18 amend the language up-front in the implementing
19 rule, and then build out Appendix 2.1 to include
20 principles of military prosecution. And this is
21 a change that takes the existing 2.1 guidance
22 from a list of 14 non-weighted, equally-

1 considered factors and prioritizing consideration
2 of the sufficiency of the evidence before other
3 factors are considered. Currently, the structure
4 of Appendix 2.1, again, just says you should
5 consider this list of 14 things and the
6 sufficiency of the evidence is just one of them.
7 And the services have no doubt acknowledged that
8 is one of the most important factors, but the
9 structure of the decision-making from the
10 existing 2.1 does not force them to consider that
11 first before looking at other issues in deciding
12 whether to send a case to a general court-
13 martial, which is akin to an indictment.

14 So a little bit, again, about the
15 process. We will finalize the prosecution
16 standards with the subcommittee. We'll provide
17 this to you in March and, as soon as possible,
18 ensure the Committee gets a full chance to
19 deliberate on the recommendations and the
20 findings. And the staff is going to provide for
21 the entire Committee along the way just a
22 reminder of the breadth of information that the

1 DAC-IPAD and the previous Policy Subcommittee
2 collected from June of 2018 until its suspension,
3 I guess, in 2021 because that is extensive. It
4 is the DAC-IPAD's information. We have heard
5 from all of the service stakeholders, we've
6 submitted numerous requests for information,
7 we've reviewed court-martial data, the staff has
8 reviewed thousands of Article 32 documents and
9 other pretrial documents, and we will prepare for
10 you just a reminder of all of the work the
11 Committee has done on this so that, when the
12 subcommittee pivoted to this offices of Special
13 Trial Counsel, this wealth of information was
14 already there to understand what framework the
15 special trial counsel will have to work in and
16 where the issues were to examine.

17 All right. Are there any questions
18 about the process or about the nature of the
19 recommendations from any of the members at this
20 stage? Yes, Ms. Bashford.

21 MEMBER BASHFORD: Am I correct in
22 these prosecutorial guidelines are intended to

1 apply to all crimes?

2 MS. PETERS: Yes, that's correct.

3 MEMBER BASHFORD: Not just OSTC?

4 MS. PETERS: Correct. It could be an
5 assessment made by the staff judge advocate
6 advising the convening authority if it was a
7 case. Right. If it was not involving a covered
8 offense. And the other reason it has to be
9 structured that way is that the special trial
10 counsel have authority over covered offense cases
11 and any offenses under the code if they are
12 related or known if they're related to the
13 covered offense case. So there's a lot that is
14 coming under the purview of the special trial
15 counsel.

16 MEMBER BASHFORD: But is this guidance
17 to be used only by OSTC or across every branch of
18 the service, robberies, burglaries, everything?

19 MS. PETERS: Yes. Let me be clear:
20 it's for all cases brought under the UCMJ.

21 MEMBER BASHFORD: Are we going outside
22 our lane a little bit on that?

1 MS. PETERS: The systemic problems and
2 the nature of the special trial counsel's
3 authorities would not make sense to create
4 standards for one class of offenses. I don't see
5 that there's an authorities issue with regard to
6 the DAC-IPAD; we've been given this task to look
7 at the investigation, prosecution, and defense of
8 sexual assault. But the special trial counsel
9 can prosecute all offenses under the code
10 pursuant to their authorities.

11 And in the past, what we have done, at
12 the very least, is make recommendations for
13 sexual assault cases and commended those powers
14 that be to consider their applicability to all
15 offenses. However, it is within this Committee's
16 purview to say that there is or is not a benefit
17 to a bifurcated system because if you just did
18 relegate your recommendations to sexual assault
19 offenses without saying more. That potentially
20 is the interpretation of your recommendations.
21 However, uniformity, consistency, reliability are
22 all the goals that this Committee has expressed a

1 desire to achieve. And so in furtherance of
2 that, I don't see any limitation on recommending
3 amendments to the UCMJ.

4 I'll also add that the previous DAC-
5 IPAD recommendation regarding Article 34 was not
6 offense-specific. It was to elevate the referral
7 standard.

8 So that's what I offer you for
9 consideration. I think you're well within your
10 authority to make this recommendation.

11 MEMBER SCHWENK: Yes. I guess I sort
12 of echo what Martha was saying. Back when we
13 were doing it before, there was no MJRP. And
14 their charter is all military justice, our
15 charter is sexual assault cases. So the IRC
16 attempted to slip a fast one past the ever-
17 knowledgeable DoD general counsel by saying study
18 32, 34, and give it to the DAC-IPAD, and it came
19 out give it to the MJRP because it was a holistic
20 total view, which I guess, maybe erroneously,
21 taught me to beware going beyond sexual assault
22 cases.

1 So I think, I mean, I'm comfortable
2 making the argument, subject to the DoD general
3 counsel's office telling us we're out of our
4 lane, that we could make prosecutorial standards
5 for the OSTC, even though it may, in a given
6 case, have non-sexual assault cases because,
7 basically, that's what it's there for, sexual
8 assault matters. But I'm not sure about saying
9 that it then applies to prosecutors who are not
10 part of OSTC who are doing courts-martial. I
11 don't know.

12 So I think this is a lot to take on
13 all at once obviously, so I'm hesitant on how far
14 to go. But I think we need to run it by the
15 general counsel's office to make sure we don't do
16 a lot of work and be out of our lane.

17 MS. PETERS: We can provide you with
18 those options and make sure that that
19 coordination happens. Absolutely.

20 MEMBER SCHWENK: Pardon me?

21 MS. PETERS: The staff will prepare
22 the options, prepare the recommendations with

1 those options in mind, and we'll tee up the
2 coordination to make sure we get the right buy-in
3 from OGC.

4 MEMBER SCHWENK: Okay.

5 MEMBER TOKASH: Just to piggy-back off
6 of General Schwenk's comment, could you present
7 an option where we could just package it over to
8 the Military Justice Review Panel for the rest of
9 the system?

10 MS. PETERS: Absolutely.

11 MEMBER TOKASH: So that way, I mean,
12 the work is done, so it would just be a matter
13 of, you know, whose lane is what.

14 MEMBER BASHFORD: I'm also, I mean, I
15 am troubled by the fact that there is no check on
16 the exercise of discretion by the OSTC. So if
17 what we what craft is limited to, given that
18 there is no check on their discretion, this is
19 what you must, our recommendation is you must do
20 this, that would make me feel much more
21 comfortable than saying to somebody in some
22 command prosecuting a burglary or a theft of

1 payroll this is what you must do.

2 CHAIR SMITH: There's an artful way to
3 do it, right? I mean, it's a this is what we
4 recommend because there is no check on it, there
5 must, at minimum be probable cause and an ability
6 or a thought that you could actually sustain a
7 conviction or obtain a conviction. And sometimes
8 in OSTC they'll have the underlying offense,
9 theft or whatever else, and, oh, by the way, it's
10 a good idea for the rest of the military but
11 we're not stepping out of our lane, we're just
12 saying this for our side of things.

13 MEMBER MARKOWITZ: What I do want to
14 make sure that we're really clear about is that
15 there are not two different prosecution
16 standards, though, between OSTC and the rest of
17 the UCMJ really, so we're really clear about
18 that, I assume, going forward.

19 MS. PETERS: We can convey that
20 message while artfully delivering the
21 recommendations as needed based on the purview
22 and the existing, again, structure and the

1 externalities, but that would be a part of it.

2 MEMBER SCHWENK: Is it true that the
3 prosecution standards are independent of changes
4 to the UCMJ or the rules for courts-martial? We
5 don't need changes there in order for the
6 prosecution standards, as they're written, to
7 take effect?

8 MS. VUONO: For 2.1, it can be made --

9 MEMBER SCHWENK: Well, I don't know.
10 For anything in the standards because, obviously,
11 there's not going to be sea change to the UCMJ
12 any time soon, you know. It won't be until the
13 end of this year at the earliest if somebody got
14 interested there. So if our prosecution
15 standards are contingent on changes to the UCMJ,
16 then the prosecution standards would have to be
17 delayed until the changes are implemented. And
18 the manual, I mean, I don't know where the
19 current manual changes are, but if they're gone
20 then the JSC would have to write up a new set of
21 changes and then send that through the process,
22 and we all know that takes a long time.

1 So I was wondering if we could at
2 least, I mean, we have to address the 32 and
3 whatever, okay. But the prosecution standards,
4 time-wise, I was wondering if there's a set of
5 standards that are not dependent on those kinds
6 of change that we think are sufficiently
7 worthwhile, helpful, and move the process forward
8 in a good way that we could, you know, do your
9 time line and get it out so that it could be
10 considered by the summer by the people that are
11 doing whatever they're doing about OSTCs.

12 MS. PETERS: Some changes in 2.1,
13 which is promulgated by the Secretary of Defense,
14 there will be conforming amendments based on the
15 draft executive order, but you don't need an
16 executive order per se. Article 33 says that
17 Appendix 2.1 is created by the Secretary of
18 Defense, the President shall direct the Secretary
19 of Defense to issue non-binding disposition
20 guidance, and that's what 2.1 is. So it is
21 something less than a statute or executive order
22 by my read of the statute.

1 However, to make anything required,
2 because Article 33 is permissive, Article 33
3 would have to be amended to require
4 consideration. Beyond that, Appendix 2.1 can say
5 a lot of things, but it can't require prosecutors
6 to do anything because of the language in Article
7 33.

8 MEMBER SCHWENK: So I don't know
9 what's in the prosecution standards, but I
10 imagine there's a whole lot of provisions that
11 are very helpful and are independent of this
12 issue about prosecution, the 2.1 rules. So I'm
13 just wondering if you all think about whether you
14 could separate it and move one forward on a fast
15 track and hold the others for --

16 MS. VUONO: You're raising an
17 important issue about process and practicability.
18 So you could obviously write prosecution
19 standards that were a standalone document. I
20 think the subcommittee was looking at
21 incorporating them into 2.1 because that's
22 something that everyone knows how to use and the

1 manual is a tool that is the standards that
2 everyone uses. So if it was just a memo to the
3 field, that might not ever make it anywhere if
4 it's not binding, if it's just, hey, you all
5 should follow these prosecution standards.

6 So I think the subcommittee was
7 looking at a tool, a vehicle, and found 2.1 as
8 the place that all prosecutors go to find their
9 disposition factors, and it marries up, the draft
10 that the subcommittee is looking at marries up
11 with the Justice Manual, which is one of the
12 required sort of sources of support in Article
13 33. So the idea was this was the vehicle to use
14 just given the way the system functions.

15 I don't know if that answers your
16 question, but you could certainly have a separate
17 standalone prosecution memo --

18 MEMBER SCHWENK: That's helpful. And
19 thank you. But it goes back to Meghan's thing.
20 We can't make it required if the law says --

21 MS. VUONO: Non-binding.

22 MEMBER SCHWENK: -- it's non-binding,

1 you know, so I don't know. But I do think we did
2 a ton of work before, but the new members, you
3 know, haven't been part of that. We even made a
4 recommendation on 34, which sort of tees the
5 whole thing up by saying to heck with the
6 probable cause standard, the bar is, you know, no
7 decision by a GCM convening authority to go to a
8 GCM until the SJA says there's sufficient
9 evidence to support and sustain or to obtain and
10 sustain a conviction. And we all voted on that,
11 and that's one of four recommendations that's out
12 there. So then you drive back from that through
13 33 to 32. We talked a lot. I don't think we
14 made a recommendation, but we talked a lot about
15 the 32 PHOs probable cause determination should
16 be binding, but I don't think we voted on it.
17 But now you're recommending that we do, so that's
18 worth taking up.

19 And then, you know, when you look at
20 32, as I remember it, it doesn't say a darn thing
21 about sufficient evidence to obtain and sustain a
22 conviction. But with our 34 recommendation being

1 that's the standard, then clearly, it would seem
2 to me, we would want to consider having the PHO
3 give the PHO's view of I've looked at all this
4 stuff and there isn't or there is, and that goes
5 back to the 2017 study that we did on penetrative
6 sex offenses where we found 80 cases or something
7 where the PHO said don't go, and it went, and 77
8 were acquittals and, of the other three, two were
9 reversed on an appeal for, here it is,
10 insufficient evidence, and one made it through,
11 you know, which actually sort of supports the
12 idea that you got a PHO for a reason. And so I'm
13 sort of drifting towards that being a good
14 recommendation from the subcommittee. But I'd
15 like, you know, we need to think about it. I
16 need to think about it because I'm slow and I
17 don't read well.

18 MEMBER GOLDBERG: Okay. Having not
19 been here for all of those conversations, I'll
20 just raise a quick question, which we don't need
21 to discuss right now, given the hour, but I'll
22 tell you what I'm wondering are two things. One,

1 why isn't there a check on the prosecutorial
2 discretion of STCs or others, I guess?

3 And the next question is, well, what's
4 the cost of putting this absolute bar in place?
5 I mean, I get it in terms of efficiency and
6 hearing that data is also really helpful. I
7 think the thing that came to my mind was, you
8 know, obviously, I don't know anything about why
9 there isn't and was there a concern that there
10 was maybe a tendency toward misreading of some of
11 the evidence or underweighting of some of the
12 evidence such that it would be important not to
13 have that person be the sort of bound by the rule
14 that's being proposed here. I'm not saying it's
15 a bad rule. It sounds very efficient and logical
16 and all of that. I just want to understand more,
17 not right now, what the costs are of this change
18 and whether there are also ways that somebody who
19 thinks the STC or the people who are making the
20 recommendation to the STC are sort of operating
21 in a biased fashion underweighting evidence that,
22 you know, what mechanisms are there for a check

1 on that, if any.

2 So sorry that was not so artfully put,
3 but, for 4:48 in the afternoon, maybe the point
4 got across that I'm wondering about these things.

5 MEMBER SCHWENK: That's okay. You
6 were following me so it was very hard to --

7 MS. PETERS: To provide the background
8 and the perspectives that address your points,
9 that's something that we've taken a note to do,
10 and we'll make sure that the full Committee
11 weighs in on those issues. They're important.

12 MS. VUONO: And to be clear, there
13 will be a supporting report with the
14 documentation, the history of the information and
15 the evidence that's been collected over the years
16 and the rationale for the recommendations to
17 accompany them. So it's really two parts: the
18 recommendations with the findings, as well as the
19 supporting report, which hasn't been written.

20 MEMBER GOLDBERG: And really the
21 question is, you know, any change, even when it's
22 a good one, can come with costs, and so I raise

1 the question, in part, to ask, if we know what
2 those costs are, are there some ways to mitigate
3 them in whatever we recommend?

4 MEMBER SCHWENK: Did you all ever
5 track down or come across why it is that it's
6 non-binding guidance? You know, why that's what
7 we have? Do we know whether DoD tried to make it
8 binding and Congress said no? Do we know whether
9 DoD prefers non-binding because, for example,
10 convening authorities can refer a case for any
11 reason or no reason? I learned that when I was a
12 lieutenant, which always seemed like a crazy
13 statement but that's what everybody said. You
14 know, so we're trying not to bind them anymore
15 than necessary in the exercise of their
16 discretion? Did you come across anything on
17 that?

18 MS. PETERS: We did collect service
19 perspectives on the value of Appendix 2.1 as
20 drafted and the ways in which it's helpful. But
21 as far as why that was, again, I think this was a
22 product of the Joint Service Committee and

1 everything that went into it. In the drafting of
2 it, I don't believe we, you know, we are going to
3 be, we were ever privy to that. I don't believe
4 we will get that information, but, Mr. Sullivan,
5 go ahead.

6 MR. SULLIVAN: Actually, the MJRP's
7 recommendation was to make it non-binding, so the
8 very entity that proposed what is now Article 33
9 proposed it as non-binding. This report is
10 literally 1,302 pages. It would take me a bit to
11 find that, but I will. I happen to know someone
12 who helped write it. She might know the answer -
13 -

14 MS. VUONO: I think we'll pull that
15 little section up as a reminder. I think that
16 was a product of an interagency process that went
17 forward to the Congress with multiple service
18 views.

19 MS. PETERS: One of the service's
20 points of feedback that was valuable is that
21 where you do it and how you do it is important in
22 this state and federal system. It is guidance.

1 The Justice Manual is internal agency guidance.
2 The prosecution standard isn't put down in
3 statute. The rules of criminal procedure don't
4 state the standard for filing a complaint even
5 necessarily.

6 So I think the approach of being less
7 prescriptive is widely accepted, and that could
8 be why non-binding guidance made sense. I don't
9 want to speculate as to what is in someone else's
10 mind, but, from a comparative law perspective, it
11 certainly makes sense. However, there are
12 structures within civilian prosecution offices
13 that somehow avoid referring a case on, sending a
14 case to trial on probable cause, so getting at
15 the right balance there seems to be the
16 Committee's goal, the sticky point in drafting
17 this.

18 MEMBER TOKASH: Just one other thing
19 because I know we're wrapping up here, but we
20 actually do need updated court-martial conviction
21 rate data, and I don't know what that will entail
22 for you all as a staff in terms of man and woman

1 power to get that for us. You know, but I think,
2 yes, we certainly need to get that data because
3 it's critical to our work and we would hope that
4 you have the support to do that. But if that's
5 something that you don't think is feasible, you
6 need to let us know that so we can then say,
7 like, we need this because I'm saying we need
8 this.

9 MEMBER BASHFORD: The Case Review
10 Subcommittee has five years' worth of general
11 court-martial versus penetrative court-martial
12 dispositions, and we'd be happy to share it with
13 policy.

14 MEMBER TOKASH: What's the years,
15 Martha?

16 MEMBER BASHFORD: Just over the past
17 five-year period, so it started with fiscal year
18 '18.

19 MEMBER TOKASH: Okay. Is there
20 something else that we --

21 MS. PETERS: Well, to carry over from
22 previous years, we had a court-martial

1 adjudication data of sorts. There's case
2 attrition from the point of preferral. With that
3 calculation, you can really look at multi-year
4 data. I can't speak to our abilities right now.
5 I mean, I could speak for myself and that would
6 be a tall order. We would need assistance, but,
7 beyond that, we would certainly need some time to
8 come up with good comparable case attrition data,
9 like the kind we worked with Dr. Spohn on.

10 MEMBER SCHWENK: I was talking to one
11 of the staff attorneys earlier today, and he was
12 claiming that he has nothing to do and he's
13 really bored. Chuck. So he could probably help
14 you find court-martial statistic data. You're
15 welcome.

16 MS. PETERS: Hearing no further
17 questions, I have one other issue separate and
18 apart from these recommendations we just dropped
19 on you all at 4:00 in the afternoon, and that is
20 that the Special Project Subcommittee is prepared
21 and willing to take on the victim access to
22 information topic. It has a due date of December

1 of this year, but, given the focus on the special
2 trial counsel's role in the investigations and in
3 prosecution, I think, our subcommittee is well
4 suited. The members have voiced a desire to take
5 on the task and develop that information, in
6 conjunction with the Committee, but develop
7 information to support the Committee's completion
8 of that task in the latest NDAA based on the
9 briefing you received from Captain Scott today.
10 That was a task in the latest NDAA and Special
11 Projects is ready and willing to help you all
12 complete that task. I believe that requires the
13 assent of the Committee and the Chair, however
14 you'd like to accomplish that.

15 Thank you very much. All right.
16 That's all we have.

17 MR. SULLIVAN: Ready to close? All
18 right. This meeting of the DAC-IPAD is now
19 closed.

20 (Whereupon, the above-entitled matter
21 went off the record at 4:56 p.m.)
22

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