

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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THURSDAY
MARCH 30, 2023

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The Advisory Committee convened via
Video Teleconference, at 12:30 p.m. EDT, Hon.
Karla N. Smith, Chair, presiding.

PRESENT

Hon. Karla N. Smith, Chair
Mr. William Cassara
Ms. Meg Garvin
Ms. Suzanne Goldberg
Hon. Paul Grimm
Ms. Jennifer Gentile Long
Dr. Jenifer Markowitz
Hon. Jennifer M. O'Connor
BGen(R) James Schwenk
Dr. Cassia Spohn
Ms. Meghan Tokash
Hon. Reggie Walton

ALSO PRESENT

Lt Col David Fox, Designated Federal Official

DAC-IPAD STAFF

Colonel Jeff A. Bovarnick, JAGC, U.S. Army,
Director

Ms. Julie K. Carson, Deputy Director

Ms. Stacy Boggess, Senior Paralegal

Ms. Theresa Gallagher, Staff Attorney

Ms. Nalini Gupta, Staff Attorney

Mr. Chuck Mason, Staff Attorney

Ms. Marguerite McKinney, Management & Program
Analyst

Ms. Meghan Peters, Staff Attorney

Ms. Terri Saunders, Staff Attorney

Ms. Kate Tagert, Staff Attorney

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Welcome and Introduction
to Public Meeting. 4

Discussion, Deliberations, and Voting
on Special Projects Subcommittee
Recommendations 2 and 3 for Adoption
and Approval by the DAC-IPAD15

Public Meeting Adjourned

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

2 12:30 p.m.

3 LT COL FOX: Good afternoon everyone.

4 Lieutenant Colonel David Fox, I'm today's
5 Designated Federal Officer. This March 30th,
6 2023 meeting of the DAC-IPAD is now open, and
7 with that I will turn it over to Chair Smith.
8 Ma'am, over to you.

9 CHAIR SMITH: Thank you, Lieutenant
10 Colonel Fox, and good afternoon everyone. I want
11 to welcome the members, and all attendees to the
12 28th public meeting of the Defense Advisory
13 Committee on Investigation, Prosecution, and
14 Defense of Sexual Assault in the Armed Forces, or
15 DAC-IPAD. Today's meeting is by video conference
16 via Zoom for members.

17 For everyone joining today, please
18 mute when not speaking. If we have technical
19 difficulties, we will break for ten minutes, move
20 to a teleconference line, and send the
21 instructions by email. The Secretary of the
22 Defense created the DAC-IPAD pursuant to the

1 National Defense Authorization Act for Fiscal
2 Year 2015.

3 The DAC-IPAD's statutory purpose is to
4 advise the Secretary of Defense on the
5 investigation, prosecution, and defense of
6 allegations of sexual assault and sexual
7 misconduct involving members of the armed forces.
8 Representatives from the Military Services,
9 criminal law divisions, who serve at the DAC-IPAD
10 serve as specific experts, and liaisons to their
11 Services have joined us today, welcome.

12 At today's meeting, we will discuss,
13 deliberate, and vote on recommendations two and
14 three from the Special Projects Subcommittee and
15 conclude the discussion the committee started at
16 our March 14th meeting. This meeting is being
17 recorded and transcribed, and the complete
18 written transcript will be posted on the DAC-IPAD
19 website at www.dacipad.whs.mil.

20 Written public comment may be
21 submitted at any time for committee
22 consideration. Please submit written comments to

1 whs.penatgon.em.mbx.dacipad@mail.mil. To assist
2 the court reporter, and avoid multiple people
3 speaking at the same time, committee members
4 should signal if they have a question or wish to
5 speak, by stating your name and waiting to be
6 acknowledged before proceeding.

7 Thank you to everyone for attending
8 today. For today's meeting, we will go right to
9 Ms. Tokash, the Special Projects Subcommittee
10 chair to start the meeting. Thank you.

11 MEMBER TOKASH: Thank you Chair Smith.
12 Could we please confirm for the record that we
13 have a quorum for today's meeting?

14 COL BOVARNICK: Yes, ma'am, a quorum
15 is confirmed.

16 MEMBER TOKASH: Thank you very much,
17 sir. At the March 14th public meeting of the
18 DAC-IPAD, the Special Projects Subcommittee
19 presented three recommendations addressing
20 improvement to the pre-trial procedures, and
21 uniform prosecution standards for the military.
22 These three recommendations were the result of

1 several years of gathering data, engaging with
2 stakeholders, and studying the pretrial
3 processing of military sexual assault cases.

4 In the end, the DAC-IPAD concluded
5 that serious problems persist in the screening,
6 charging, and referral phases of military sexual
7 assault prosecution. Over the last five years,
8 the DAC-IPAD heard from multiple stakeholders,
9 both inside and outside of the Department of
10 Defense, and reviewed thousands of court-martial
11 records in which an adult sexual offense was
12 charged.

13 The staff of the DAC-IPAD also
14 reviewed hundreds of preliminary hearing reports,
15 including the probable cause determination made
16 by such officers, and assessed outcomes of sexual
17 offenses prosecuted in the military. The DAC-
18 IPAD considered the history, and the case law
19 pertaining to Article 32, 33, and 34 of the UCMJ,
20 as well as the practice in federal district
21 courts in accordance with Article 36 of the UCMJ.

22 It is important to state up front

1 before today's meeting that the DAC-IPAD's study
2 of pretrial process, Article 32, and uniform
3 prosecution standards fall squarely within our
4 statutory mandate to advise the Secretary of
5 Defense, and inform the Congress on the
6 investigation, prosecution, and defense of
7 allegations of rape, forcible sodomy, sexual
8 assault, and other sexual misconduct involving
9 members of the armed forces.

10 And with most of the DAC-IPAD's work,
11 our collective expertise leads to the conclusion
12 that with the investigation, prosecution, and
13 defense of sexual misconduct will improve with
14 systemic changes that benefit the military
15 justice system as a whole regardless of the
16 specific charge. We are also concerned about
17 creating two separate systems of military
18 justice.

19 One for covered, and related offenses
20 that fall under the jurisdiction of the new
21 Office of the Special Trial Counsel. And another
22 for all the offenses which are still under the

1 authority of the military -- excuse me. Still
2 under the authority of military commanders. That
3 is why we, the members of the subcommittee, will
4 continue to engage with the Military Justice
5 Review Panel by sharing our work and providing
6 expert consultation, and recommendations that
7 will contribute to the entire military justice
8 system.

9 The DAC-IPAD's three recommendations
10 are particularly timely given the creation of the
11 Office of the Special Trial Counsel in Article 24
12 Alpha. The special trial counsel within those
13 offices will wield unprecedented prosecutorial
14 authority, akin to the traditional powers of
15 convening authorities for cases that involve
16 covered, and related offenses.

17 Considering data gathered from the
18 past several years, these cases will likely make
19 up the majority of those tried at general court-
20 martials going forward. Our three
21 recommendations respond directly to a request
22 from the DoD General Counsel that we make

1 recommendations for effective policy, and
2 procedures regarding the offices of the special
3 trial counsel.

4 We also recognize that the DAC-IPAD's
5 comprehensive study, and data collection on these
6 issues will help inform the Military Justice
7 Review Panel's consideration of these, and other
8 important issues. The DAC-IPAD has a unique
9 opportunity to make recommendations that will
10 promote confidence on behalf of the American
11 public that military prosecutors are guided by
12 structured decision making at preliminary hearing
13 determinations, and dispositions at referral.

14 It is the subcommittee's view that the
15 DAC-IPAD vote today will positively impact the
16 military justice system as a whole. As we
17 discussed, these are not radical proposals.
18 These three recommendations taken together
19 protect the accused from criminal liability of
20 unsupportable charges, and safeguard victim
21 expectations of court-martial outcomes.

22 They signal to the American public

1 that the military justice system has assimilated
2 modern prosecutorial standards for effective case
3 disposition. These three recommendations promote
4 the reason to exercise a prosecutorial authority,
5 and are on par with the standards for federal
6 civilian prosecutors referenced in Articles 33,
7 and 36 of the UCMJ.

8 Regarding today's agenda, at our March
9 14th public meeting, and in follow up emails, you
10 provided us with feedback, that is fellow
11 committee members, also asking insightful
12 questions, and suggested edits, and improvements
13 to the subcommittee's draft, and recommendation.
14 I want to call attention to the fact that we are
15 voting on the language of these recommendations
16 today.

17 Though we have a completed draft of
18 the proposed DAC-IPAD language for Appendix 2.1
19 as part of your read ahead package, we will have
20 additional time for discussion, and textual
21 revisions of Appendix 2.1 before the subcommittee
22 report is finalized, and voted on by the entire

1 committee later this spring.

2 With that in mind, here is how we plan
3 to use our time today. First, the subcommittee
4 will discuss with you the revised draft of
5 Appendix 2.1. On March 20th, our subcommittee met
6 virtually to address the comments, and edits
7 offered by Committee Members General Schwenk, Ms.
8 Goldberg, Ms. Tokash, Ms. Long, Dr. Spohn, and
9 Ms. Garvin, all of whom proposed textual
10 revisions.

11 The draft before you reflects those
12 proposals. We will deliberate on those
13 proposals, and see if you have any additional
14 edits to propose. Keeping in mind that the vote
15 today is on the recommendations and not the final
16 language of Appendix 2.1, unless the DAC-IPAD is
17 prepared to vote on that as well.

18 Second, the full committee will vote
19 on all three recommendations. After today's
20 meeting, the staff will update the draft Appendix
21 2.1 with the language we agree upon today. At a
22 future meeting, the staff will provide the

1 committee with a draft report supporting the
2 committee's recommendations, along with the final
3 version of Appendix 2.1 for your final review,
4 and approval.

5 I'd like to take a brief moment to
6 discuss the DAC-IPAD's previous vote. On March
7 14th, the DAC-IPAD, after DAC-IPAD members
8 approved a motion to proceed with the vote as to
9 recommendations 1 Alpha and 1 Bravo, and voted to
10 approve recommendations 1 Alpha and 1 Bravo with
11 respect to the Article 32 preliminary hearing
12 process.

13 At that time Ms. Goldberg proposed
14 that recommendations one through three should be
15 considered as a whole. The subcommittee
16 wholeheartedly agrees that those recommended
17 reforms to Article 32, to Appendix 2.1, and to
18 the training requirements for judge advocates are
19 indeed a package that taken together, will bring
20 about positive change to the military justice
21 system.

22 Therefore, after our presentation, and

1 deliberations today, we suggest that we vote on
2 the three recommendations as a complete package.
3 I also want to note that General Schwenk has
4 explained to DAC-IPAD staff that his initial vote
5 against recommendations 1 Alpha and 1 Bravo
6 reflected a concern that the DAC-IPAD clarify its
7 authority to make such recommendations that have
8 system wide impacts, versus just the DAC-IPAD
9 charter.

10 His vote was not in opposition to the
11 substantive proposal, because he supports a
12 binding, no probable cause finding by the Article
13 32 preliminary hearing officer with an
14 opportunity for reconsideration in the context of
15 the DAC-IPAD's review of sexual assault cases.
16 The DAC-IPAD should address General Schwenk's
17 concern in our forthcoming standalone report, and
18 explain our statutory authority that will
19 accompany these recommendations.

20 That statement of authority, and the
21 upcoming report will explain how, in the course
22 of studying sexual assault cases, the DAC-IPAD's

1 expertise often leads to recommendations that
2 positively impact the military justice system as
3 a whole. We also appreciate that our designated
4 federal official at previous meetings, Mr. Dwight
5 Sullivan, will tell us if we ever run afoul of
6 our mandate.

7 To date, Mr. Sullivan has advised that
8 the DAC-IPAD may make any recommendation it sees
9 fit with respect to the military justice system.
10 General Schwenk may want to speak more fully to
11 this point during our deliberations today, and he
12 is welcome to do so. At this point, I would like
13 to turn the floor over to my colleague, Judge
14 Paul Grimm, to explain the revised Appendix 2.1
15 language. Judge Grimm?

16 MEMBER GRIMM: All right. I want to
17 thank our colleagues for giving us the
18 opportunity to consider the important suggestions
19 that were raised at our last meeting. I think we
20 benefitted from the opportunity to think
21 carefully through those revisions that were
22 suggested. We have made some changes in the

1 materials that we'll go over today in light of
2 that.

3 It's a little bit -- this is a little
4 bit of a cumbersome structure, because we're
5 voting on the recommendation number two, that's
6 all we're voting on, and not the actual language
7 in Appendix 2.1, but we gave you Appendix 2.1
8 with all of the red line changes made to Appendix
9 2.1. And the recommendations in recommendation
10 two are manifest in Appendix 2.1.

11 So, you have to sort of talk about
12 both together, but the bottom line goal today is
13 to have a vote on recommendation two. If in the
14 course of doing so, we agree that the full edits
15 to 2.1 can be voted on, then we'll go ahead and
16 do that if our Chair Smith agrees with doing
17 that. But it might be helpful, it was for me, in
18 preparing today, to have the two documents side
19 by side so you can refer back and forth to them
20 as you need to do so.

21 And we'll particularly be focusing on
22 the changes to Appendix 2.1 that flow from the

1 recommendation; that is recommendation number
2 two. All right, so if you can turn your attention
3 to recommendation two that you got last week as
4 part of your read ahead materials, I want to
5 focus briefly on the reasons that we have made
6 revisions to recommendation number two.

7 The reasons why we are recommending
8 amendments to 2.1 rather than listing the
9 specific revisions to 2.1, we have revised and
10 updated recommendation two since the March 14th
11 committee meeting, and that the uniform
12 prosecution standards should guide prosecutors to
13 weigh the likelihood of conviction in terms of
14 whether an unbiased fact finder would convict.

15 We were persuaded by the comments of
16 our colleagues that we still have a way to go
17 before we exist in an environment in which the
18 juries that are selected for a court-martial will
19 be free from any potential biases that have
20 historically plagued the prosecution of these
21 serious cases, and that it would be improper for
22 the special trial counsel in determining whether

1 or not to exercise these new powers that they
2 have to determine, for example, that probable
3 cause existed.

4 And that the standard for prosecution
5 that we have recommended that takes guidance from
6 the Department of Justice were met, but then
7 decide not to prosecute because of a concern that
8 the jury's going to not care what the evidence
9 is, they're just going to do what they're going
10 to do.

11 That would be inappropriate in our
12 view. And so, we have added to the language of
13 standards that the assessment is an objective
14 assessment based upon the existence of probable
15 cause to believe that an offense was committed.
16 And that the facts meet the standard that we'll
17 talk about in much more detail in just a moment,
18 as considered by an unbiased fact finder.

19 Whether an unbiased fact finder would
20 convict. That's an important condition to this,
21 and strikes the balance that we want to
22 recommend. You've also received, as I mentioned,

1 the updated draft of 2.1, of the Appendix 2.1 for
2 the Manual for Courts-Martial, which we think
3 would implement the disposition guidance for the
4 special trial counsel if this recommendation is
5 approved.

6 I'm just going to talk about the
7 sections of 2.1 that are most relevant to our
8 recommendation number two. There's a lot there,
9 and I think that the chair of our subcommittee,
10 Subcommittee Chair Tokash, and the rest of us on
11 the committee don't want to get lost in the weeds
12 on some other grammatical, or other change that
13 doesn't deal specifically with what we're talking
14 about here today.

15 You'll recall from the virtual public
16 meeting on March 14th, the subcommittee believes
17 that revising Appendix 2.1 is really the best way
18 to effectuate uniform prosecution standards akin
19 to the Department of Justice's policy guidance.
20 We do not recommend, you'll recall from our
21 conversation last time, a statutory amendment to
22 Article 33, this would require congressional

1 action.

2 And if it required congressional
3 action, Congress would first have to decide
4 whether it would undertake it, and then it would
5 have to go through the process of doing so, and
6 that would necessarily involve delay in
7 implementation of new prosecution standards that
8 are going to have to be implemented, in all
9 likelihood before any congressional revision
10 could take place.

11 We believe that the power to issue
12 prosecution standards rests with the Secretary of
13 Defense, and that a statutory change is not
14 required for the Secretary of Defense to exercise
15 this existing authority to give guidance to
16 special trial counsel. This is also the reason
17 why Appendix 2.1 uses the words throughout,
18 should instead of shall, or must.

19 Article 33 of the Uniform Code of
20 Military Justice as it now exists directs the
21 Secretary of Defense to issue non-binding
22 disposition guidance. And to make sure there's

1 no misapprehension about this, the very first
2 sentence of Appendix 2 explains that it is non-
3 binding guidance.

4 That sentence says this appendix
5 provides non-binding disposition guidance issued
6 by the Secretary of Defense in consultation with
7 the Secretary of Homeland Security pursuant to
8 Article 33, et cetera, et cetera. Because the
9 first sentence sets that out, because we assume
10 that those who read this will read the first
11 sentence, and understand that it sets the tone
12 for the remainder of it, we deleted all the
13 subsequent non-binding references.

14 If you say this is non-binding, and
15 then the next sentence you say by the way, this
16 is non-binding, and then two sentences later you
17 say did we tell you that it was non-binding, and
18 then let me remind you that it was non-binding,
19 that sends a signal that we don't think is
20 necessary, nor appropriate. And so, we believe
21 as a matter of emphasis, and policy that it's
22 unnecessary to repeat the phrase non-binding

1 throughout the proposed changes to Appendix 2.1.

2 Now, if you could, go to the
3 disposition factors of Appendix 2.1, and there's
4 a list in paragraph 2.1, A through N. And the
5 materials, I think those start on page two, and
6 pages three. With that in mind, we propose
7 aligning the military prosecution guidance with
8 the U.S. Department of Justice's manual,
9 Principles of Federal Prosecution.

10 Now, we know, and we were educated by
11 some of the materials that our committee members
12 sent to us after the March 14th conference, where
13 academic, and others perhaps involved in state
14 prosecutions were providing very thoughtful
15 discussions about what they felt the appropriate
16 standard was for the determination whether to
17 move forward in these kinds of cases.

18 All that informs our -- was part of
19 the background of our considerations. But the
20 truth of the matter is that Article 33 of the
21 Uniform Code of Military Justice directs the
22 Secretary of Defense to issue guidance to judge

1 advocates and convening authorities considering
2 the principles contained in the official guidance
3 of the Attorney General to attorneys for the
4 government with respect to the disposition of
5 federal criminal cases with appropriate
6 consideration of military requirements.

7 For us, therefore, the text that
8 Congress itself believed was most important for
9 us to consider in making these recommendations
10 was the Attorney General's. And that, we think
11 is the reason why we were most persuaded by that
12 language. You'll see that in recommendation H,
13 which is on page four of the materials, H as in
14 hotel.

15 Says that the recommended language,
16 which is part of what recommendation two is
17 putting forward for the committee, whether
18 admissible evidence will probably be sufficient
19 to obtain, and sustain a conviction in a trial by
20 court-martial. We have eliminated the word
21 likely, and replaced it with probably. And why
22 did we do that?

1 Well, number one, that's the language
2 in the Department of Justice manual. Secondly,
3 while there was some discussion about whether, or
4 not probable was too amorphous a standard, we do
5 not feel that probability, probable cause,
6 preponderance probability is an unusual concept
7 to prosecutors who are trained attorneys in
8 making an evaluation of evidence in criminal
9 cases.

10 And you'll see that the existing
11 Appendix 2.1, if you go down to subparagraph M,
12 talks about an assessment of the probable
13 sentence that might be done. So, we don't think
14 that the use of the word probable, which already
15 exists in the guidance, is going to cause any
16 lack of appreciation for what the proper standard
17 is.

18 And moreover, if you go to Merriam-
19 Webster's Dictionary online, probably is defined
20 as insofar as seems reasonably true, factual, or
21 to be expected without much doubt. Likely is
22 defined as having high probability of occurring.

1 So, we think that the two words are often used
2 synonymously. We think that probable is
3 probability in terms of things such as probable
4 cause, preponderance, these definitions are well
5 understood by attorneys.

6 And we therefore recommend that we not
7 use the word likely, but rather probably, because
8 that's the language that's used in the Attorney
9 General's guidance. We considered those
10 suggestions from our colleagues who think that
11 the suggestion of legally sufficient, which was
12 offered as an alternative to likely, we are
13 concerned that at the time of referral a
14 prosecutor does not know what will be legally
15 sufficient.

16 That's a determination of the judge
17 made at the end of the case when all the evidence
18 has been introduced, and one side makes the
19 motion as to whether or not the evidence was
20 sufficient, and that's what the judge rules. So,
21 we thought that legally sufficient was
22 interjecting an issue into the equation that is

1 controlled by the judge, not by the prosecutor.

2 And that the word probably best
3 reflects the nature of the prosecutor's role when
4 exercising that discretion. I'd like, if you
5 could please now, to go down to paragraph 2.3 of
6 the proposed text amendment to Appendix 2.1.
7 This is the one I think that our colleagues were
8 -- their thoughtful comments focused on, and we
9 want to respond to our further consideration in
10 light of what they said.

11 This deals with referral. And the
12 referral standard there, there was a proposal to
13 strike the word only. So, as it would
14 potentially read with only, and then without
15 only. With only it would say probable cause must
16 exist for each charge in the specifications
17 referred to a court-martial. That's the title of
18 2.3.

19 Special trial counsel should only
20 refer, and judge advocates should only recommend
21 that a convening authority refer the charge to a
22 general court-martial if they believe that the

1 service member's conduct constitutes an offense
2 under the UCMJ, and that the admissible evidence
3 will probably be sufficient to obtain a
4 conviction.

5 So, the issue is do we have it say
6 that, or do we say special trial counsel should
7 refer, and the judge advocate should recommend
8 that a convening authority refer the charge to
9 the general court-martial if they believe, and
10 that would go for the rest of the way. So, the
11 question then is whether, or not the word only
12 should be in there.

13 I would like to -- I would just like
14 the committee to keep in mind that there was a
15 discussion the last time that I think should be
16 forefront in our recollection today. What is the
17 function of the standard in 2.3? The original
18 intent of what we were talking about was we need
19 a floor below which you cannot go.

20 You cannot bring charges unless there
21 is probable cause to believe that there was an
22 offense on one of these offenses that are within

1 the purview of the special trial counsel, and
2 that the evidence will probably be sufficient to,
3 as the rest of it says. So, it would never be
4 appropriate to bring a charge if you did not have
5 those criteria.

6 That was a -- the that without which
7 there cannot be more, the sine qua non of going
8 forward on it. If we took the word only out, it
9 would change the emphasis in the sense that it
10 would say if you have this you should refer. But
11 we thought that that would cause confusion,
12 because what you have is, in section two, a list
13 of considerations for all cases.

14 And these considerations, even if you
15 have the standard probable cause and the
16 evidentiary standard, a prosecutor might well
17 decide not to refer even though that standard was
18 met if the victim did not want to proceed
19 forward, if there were other avenues available,
20 and there's a whole list of them that might be
21 considered.

22 So, to have language in there that

1 suggests if you remove the word only, that you
2 should refer if you have these factors, is
3 somewhat inconsistent with the notion that if you
4 do have the proper standards, there may be
5 certain circumstances that are listed in the
6 appendix already existing that might suggest that
7 they would not go forward.

8 Not included now, is the notion of a
9 biased jury, that's been removed, and we'll talk
10 about that in just a second. So, I think it was
11 the thought of the subcommittee that the word
12 only is important to establish a floor, and not a
13 if you have this then you should prosecute, but
14 rather you may not prosecute unless you have this
15 standard.

16 So, we think that the word only, it's
17 important, to keep it there. But that's what
18 we'll discuss today, and that will be for the
19 committee to decide. Now, you'll see that
20 elsewhere in the standard, that the word, if you
21 go to paragraph 2.3 in blue text, and that is on
22 page five.

1 That uses the language where the law
2 and the facts create a sound prosecutable case,
3 the likelihood of an acquittal due to
4 impermissible biases a fact finder may harbor is
5 not an appropriate factor for consideration in
6 the referral decision. Instead, the referral
7 decision should be based upon an evaluation of
8 the evidence as viewed objectively by an unbiased
9 fact finder.

10 We put that language in there because
11 we thought that that was an excellent suggestion
12 from our colleagues, because much as we would
13 like to think that bias has been eliminated in
14 the jury pool, experience suggests to us that
15 perhaps that's not the case. So, one of the
16 things that we -- that the phrase we use, sound,
17 prosecutable case, we thought that that was the
18 proper language to use.

19 Our belief is that the referral
20 decision should be grounded in an objective
21 analysis of the evidence, and the quantum of
22 proof needed to convict in the court-martial,

1 that the evidentiary analysis reflects the well-
2 established ethics rules and guidelines, as well
3 as concerns about the fundamental fairness of the
4 system.

5 In addition, we revised the paragraph,
6 as I just mentioned, to address the concern about
7 inappropriate considerations at the referral
8 stage. We also deleted certain military specific
9 examples. And finally, if you scroll down to
10 paragraph 2.6, inappropriate considerations,
11 we've also added victim to the list to reinforce
12 the point that improper biases as to not just the
13 accused, but also the victim have no place in the
14 evaluation by the prosecutor.

15 So, those, and I guess I sort of
16 glossed over this, but I'll read it for the
17 record. The standard that we recommend is that -
18 - is found at paragraph 2.1H, whether admissible
19 evidence will probably be sufficient to obtain
20 and sustain a conviction by a trial -- by court-
21 martial. And that's the DOJ guidance that we are
22 recommending.

1 So, with that, Subcommittee Chair
2 Tokash, did you want discussion on this, or did
3 you want to go to the other materials that you
4 have, and have discussion about everything at one
5 time?

6 MEMBER TOKASH: Why don't we go ahead
7 Judge Grimm, and have discussion on this right
8 now, if there's any follow up discussion to the
9 changes that we've made based on the input from
10 our fellow committee members. Ms. Goldberg has
11 her hand, so Ms. Goldberg please go first, and
12 then Ms. Long can go after her.

13 MEMBER GOLDBERG: First of all, thank
14 you so much for all of the work, and for the
15 really thoughtful changes, and for the excellent
16 descriptions just now. I have a couple of
17 comments. I'm not certain they fit here, so if
18 they don't, just stop me, but I wasn't sure what
19 you were shifting to next, so I want to be
20 thoughtful about that.

21 The first is, and the only in terms of
22 the recommendation, which I appreciate the change

1 to recommendation two, and that seems wise to me,
2 and this may be outside the scope, but
3 recommendation three, I'll just note for
4 colleagues to consider, I wonder why we wouldn't
5 add the when viewed objectively by an unbiased
6 fact finder to the end of the sentence there.

7 And I think that it makes sense to
8 put it there, because it parallels recommendation
9 two, and reinforces recommendation two. And we
10 may be past the point of that, but that strikes
11 me as, if we have room to do that, that is
12 something I would suggest. And then the other
13 two comments I have are about the appendix, but
14 it's not -- I'm not actually engaging in the
15 debate on only, or not only.

16 I think I don't have a strong view on
17 that. I did want to propose for consideration,
18 restoring the example on page five about the
19 popularity of the accused, and I wanted to
20 propose restoring that with one edit. So, this
21 would be -- I will back up, and say I found, when
22 I read the first draft that included the example

1 about the popularity of the accused, or the
2 unpopularity of the prosecution, that that was
3 illuminating.

4 And would be, or could be useful for
5 a person working on one of these cases. I would
6 propose, and the example is in a comment along
7 the side from Meghan Peters, where she included
8 the now deleted text. And are folks with me
9 enough to know what I'm talking about? So, where
10 the law, and the facts create a sound,
11 prosecutable case, etcetera.

12 I propose that we restore the example,
13 but remove the language about overwhelming
14 popularity, remove the word overwhelming.
15 Because overwhelming seems to me that the
16 popularity shouldn't have to be overwhelming to
17 be inappropriate as a factor for consideration.
18 I know that does come from the justice manual,
19 but I disagree with it there as well.

20 And I think there is another part of
21 the example. If you go -- I'm unfortunately only
22 working from one screen, it's a little bit

1 challenging, but if you go further down in that
2 example, there's a sentence that says in such a
3 case despite their negative assessment, etcetera,
4 the special trial counsel, or judge advocate,
5 then it says may properly conclude that it is
6 appropriate to refer the case.

7 And my suggestion would be should
8 properly conclude absent exceptional
9 circumstances. Because as I read it at least,
10 may properly conclude suggests that it is equally
11 permissible to not conclude that it's appropriate
12 to refer the case, and I think the point of the
13 example is to say that popularity, or
14 unpopularity of a person, or a prosecution, or a
15 charge should never be the deciding point in
16 whether to move a case forward.

17 One other comment, which I'll just
18 mention now, just to get it in, and then I'll
19 stop, which is on page six, in 2.6, under
20 inappropriate considerations, and if I'm getting
21 too far ahead, somebody please jump in, and stop
22 me. I just wanted to note that in 2.6A, there is

1 a helpful list of race, ethnicity, religion,
2 etcetera.

3 I wondered where the list came from,
4 and I want to suggest at a minimum, adding
5 disability to the list, and gender identity to
6 the list. But there may be a more comprehensive
7 list of non-discrimination factors in military
8 law that should be imported here. I do support
9 including the victim, as well as the accused.
10 So, thank you for bearing with me on all of those
11 points, and I will stop here.

12 MEMBER TOKASH: Yes --

13 MEMBER GRIMM: Meghan, could I just --
14 I think that Ms. Goldberg is correct, that if we
15 approve the language in recommendation two, that
16 objectively, by an unbiased fact finder, that
17 language should be parallel in three. I'm just --
18 - I don't know when we're going to come back to
19 that, but I just want to throw my hat in on that,
20 I think that it should.

21 MEMBER TOKASH: Great. And again, Ms.
22 Goldberg, thank you for your comments. I'm going

1 to next take Ms. Long's, and then I see General
2 Schwenk raised his hand. I just want to keep in
3 mind that today we're voting on recommendations
4 two and three, that is to recommend establishment
5 of these robust prosecution standards in Appendix
6 2.1.

7 And then also recommend training of
8 judge advocates in these new concepts. We will
9 still -- this is helpful to gather comments right
10 now about potential additional changes, but I
11 just want to assure the committee as a whole that
12 we still have some elbow room to be able to
13 provide, and debate about textual changes. So,
14 with that I'll pass the floor over to Ms. Long,
15 and then to General Schwenk. Thank you.

16 CHAIR SMITH: Ms. Long, hold on one
17 second, let me just add in that we are at 1:09,
18 so we only have 21 minutes left, and we want to
19 be able to finish this conversation about
20 recommendations two and three. I think we don't
21 want to get too into the weeds about the language
22 in 2.1, etcetera, because we're going to be able

1 to come back to that.

2 But the question is overall, whether
3 we want to make these recommendations. So, with
4 that, sorry, Ms. Long?

5 MEMBER LONG: No, and this might be --
6 this is something that you can defer if it's more
7 related to the language, and I apologize that I'm
8 not fully following. But the interplay between
9 our recommendations, and then the text of
10 something like 2.1, 2.3, that's just -- those
11 recommendations are enabling us, if you will, to
12 be able to make the language.

13 I was just losing, following back and
14 forth, because I was getting lost a little bit in
15 the language of where unbiased fact finder, would
16 it be -- where would it sit, your recommendation
17 versus what then ends up in the text? So, if
18 this is something that really is not germane to
19 our ruling, our voting on the recommendations
20 themselves, absolutely I can defer this question.

21 MEMBER TOKASH: Yeah, this is Meghan
22 Tokash again. I think we can defer that. For

1 example, Ms. Long, if you want to suggest that in
2 the list of things not to consider, we include a
3 prosecutor's prediction that a jury will acquit,
4 go ahead, and make that recommendation. But
5 we're not voting on the language today, we're
6 voting on the overarching recommendation. So,
7 thank you, General Schwenk?

8 MEMBER LONG: Thank you.

9 MEMBER SCHWENK: Well, first thing
10 I'll say is you can teach an old dog new tricks,
11 because at the last meeting, Suzanne told me I
12 shouldn't be waving my hand in the air, I should
13 go to reactions and use raise your hand, so I
14 did. So, I have two comments on recommendations
15 two and three. Scope, both of them are limited
16 to special trial counsel and judge advocates.

17 And I know one of the underlying
18 philosophies that we have is we don't want two
19 military justice systems, one for special trial
20 counsel cases, the covered offenses, and one for
21 everybody else. So, I'm wondering whether we
22 should consider also addressing commanders, and

1 convening authorities, since Appendix 2.1
2 addresses everybody.

3 And the second one is recommendation
4 two is limited to general court-martial, and that
5 may be just a typo, because recommendation three
6 applies to all referrals, to any court-martial.
7 And it would seem to me that it's pretty clear
8 from what everybody, what Judge Grimm just said,
9 that we're talking about all courts-martial and
10 not just on GCMs.

11 So, that one may be easy to get rid
12 of. And there's probably a way to write two and
13 three to say something about the commanders and
14 the convening authorities so we have one standard
15 that's being applied in some way to everybody.
16 Those are my only comments on those two, thank
17 you.

18 MEMBER TOKASH: Great. Thanks so
19 much, General Schwenk. I will now pass it to Ms.
20 Garvin, who has her hand raised.

21 MEMBER GARVIN: Just a brief comment,
22 and this may have been what Judge Grimm and Ms.

1 Goldberg was commenting on, and I was lost
2 between 2.1 and the actual recommendations two
3 and three. But it seems to me that
4 recommendation three, the closing phrasing should
5 also include the when viewed objectively by an
6 unbiased fact finder.

7 Just so that if recommendation three
8 is ever reviewed independent of recommendation
9 two, the training is encompassing of the whole
10 standard. I think that's what was being
11 discussed, but if not, I just wanted to flag
12 that, thank you.

13 MEMBER TOKASH: Great, thank you for
14 flagging that Ms. Garvin. Any other questions
15 before I briefly go onto recommendation three?
16 And then I will pass it over to Chair Smith to
17 call us to a vote. Okay, seeing no hands raised,
18 I will continue with recommendation three. A
19 quick reminder that recommendation three would
20 require training of all special trial counsel,
21 and judge advocates.

22 Advising convening authorities on the

1 disposition guidance contained in Appendix 2.1 of
2 the Manual for Courts-Martial. The training
3 shall emphasize the principle that referral is
4 only appropriate if they believe that the service
5 member's conduct constitutes an offense under the
6 UCMJ, and that the admissible evidence will
7 probably be sufficient to obtain and sustain a
8 conviction.

9 And as our colleagues raised here, we
10 will also look at including the when viewed by an
11 unbiased fact finder language. So, just for
12 reference, unbiased fact finder is in the
13 commentary of the justice manual, not in the
14 actual standard. But again, that is something
15 that we can look at in terms of textual tweaking
16 prior to adopting the final report.

17 So, as we've discussed today, the
18 purpose of these changes is to promote uniformity
19 and enhanced trust in the system by establishing
20 clear standards throughout the pretrial
21 processing of cases from the preliminary hearing
22 all the way through referral. So, we'd like to

1 now talk about voting.

2 In terms of a quick, administrative
3 note, your vote on recommendation two reflects
4 the committee's views on adopting sufficiency of
5 the evidence as a uniform prosecution standard as
6 part of the SECDEF's policy guidance in Appendix
7 2.1. Again, we're not asking to vote on specific
8 language discussed in 2.1 today.

9 Instead, the proposed revisions that
10 we discussed today and in previous meetings for
11 2.1, will be attached to the draft standalone
12 report that you will receive in April to read,
13 submit changes, and to vote on before the final
14 report is sent to the Congress and the Department
15 of Defense.

16 We will also just want to emphasize,
17 because General Schwenk also did a great job of
18 emphasizing it as well, we are very, very
19 sensitive to the fact that we do not want to
20 create two separate systems of justice, one for
21 covered, and related offenses, and one for all
22 other offenses. That is why this is very

1 important.

2 What we do here today will help inform
3 the Military Justice Review Panel that is looking
4 at the system as a whole. And so, with that, I
5 am going to turn the floor over to Chair Smith to
6 call for a vote on recommendations two and three.
7 And then she will call on a vote for the
8 packaging of all three recommendations into a
9 standalone report later this spring. Chair
10 Smith?

11 CHAIR SMITH: Great, thank you Ms.
12 Tokash. All right, so keeping in mind we're not
13 voting on the 2.1 language, we're voting on two
14 and then three. Is there a motion to approve
15 recommendation two?

16 MEMBER MARKOWITZ: I move.

17 CHAIR SMITH: All right, Ms.
18 Markowitz. And is there a second?

19 MEMBER CASSARA: Second.

20 CHAIR SMITH: All right, second. Any
21 objections to the approval of recommendation two?
22 I don't see any hands up and I don't hear any, so

1 recommendation number two is approved and adopted
2 by the committee. Moving onto recommendation
3 number three. Is there a motion to approve
4 recommendation number three?

5 MEMBER GOLDBERG: May I ask a question
6 before --

7 CHAIR SMITH: Sure.

8 MEMBER GOLDBERG: We move to this, I'm
9 not sure if that's procedurally in order, but --

10 CHAIR SMITH: It's fine.

11 MEMBER GOLDBERG: I just wanted to
12 understand, is the motion to approve
13 recommendation three with the additional language
14 to parallel recommendation two, or without it?

15 CHAIR SMITH: It seemed to me, Ms.
16 Tokash said that the subcommittee would talk
17 amongst themselves, but it seems to me maybe we
18 should flesh that out since we're asking to
19 recommend it. I know Judge Grimm thinks it's a
20 good idea, I think it's a good idea, do we want
21 to do a preliminary vote on the addition of that
22 language and then a vote on recommendation three?

1 Okay.

2 So, adding in the language and I
3 actually wrote it down on recommendation three.
4 So, we would add at the end of the sentence, just
5 as it appears at the end of recommendation two,
6 and just reading the end of the sentence, and
7 that the admissible evidence will probably be
8 sufficient to obtain and sustain a conviction
9 when viewed objectively by an unbiased fact
10 finder.

11 So, I'm just going to ask is there
12 anyone who objects to the addition of that
13 language to recommendation three? Hearing no
14 objections, and seeing no objections, that will
15 be the recommendation three that we're going to
16 vote on with that additional language. So,
17 anyone move to approve recommendation three?

18 MEMBER CASSARA: So moved.

19 CHAIR SMITH: Okay, Mr. Cassara,
20 anyone second that?

21 MEMBER SCHWENK: I second it.

22 CHAIR SMITH: All right, seconded.

1 Any objections to the approval and adoption of
2 recommendation three? All right, seeing and
3 hearing no objections, recommendation three is
4 approved and adopted. So, we're going to now
5 vote to package the three recommendations into a
6 standalone report.

7 Since we've already voted on them
8 individually, and given that we have completed
9 this over the course of our two meetings, I'm
10 recommending that we vote on it as a package that
11 would be included in the stand alone report. The
12 staff will prepare a draft standalone report if
13 we agree that that's what want to see happen.

14 So, let's vote on having all three
15 recommendations combined together in a standalone
16 report, and it would be later this spring.

17 Anyone -- okay, who moved?

18 MEMBER TOKASH: Ms. Tokash.

19 CHAIR SMITH: All right, Ms. Tokash
20 moved, any second?

21 MEMBER MARKOWITZ: I second it.

22 CHAIR SMITH: All right, Ms.

1 Markowitz. So, any objection to having all three
2 recommendations appear in a standalone report?
3 Hearing, and seeing none, that will be approved
4 and adopted. All right, so the staff will
5 prepare a draft standalone report for initial
6 review by the special project committee.

7 Once that's reviewed by special
8 project, it will be sent to the full committee by
9 the end of April. The standalone report should
10 include the documentary and narrative support for
11 those three recommendations, and the updated
12 language that we discussed with respect to
13 Appendix 2.1, understanding that folks are still
14 going to be able to comment.

15 And I assume the subcommittee will put
16 into their draft, or their final draft that comes
17 to us, incorporate all of the suggestions that
18 folks have made today. Judge Grimm?

19 MEMBER GRIMM: I just wanted to end by
20 thanking my colleagues. I think that the benefit
21 of those suggestions that we had on March 14th
22 have resulted in a much better, fairer, and

1 balanced recommendation. I've always expressed
2 my amazement at the wisdom and the experience of
3 the members of the panel to be augmented by this
4 phenomenal staff.

5 But as someone who worked with the
6 subcommittee, I am very grateful for the
7 opportunity to have checked our work as a result
8 of those comments, and want to thank those who
9 expressed them for helping us come up with a
10 better product, I think.

11 CHAIR SMITH: Thank you for that, and
12 let me just add that the -- I think I said this
13 on the 14th, but the work the subcommittee did on
14 this is amazing. And so, I mean just really,
15 really excellent, thorough, competent work. So,
16 with that, I think our business for today has
17 been completed. So, I'm going to pass it over to
18 Colonel Bovarnick.

19 COL BOVARNICK: Yes, Judge Smith. I
20 acknowledge also, just procedure wise, the key
21 thing is that all the additional comments go back
22 just to the subcommittee, so that can take place.

1 Once the subcommittee presents the full, final
2 report, then that'll be sent out kind of in a
3 similar fashion that we did for the other
4 standalone reports.

5 And then do a survey to find out --
6 work that into a public meeting, similar to this,
7 if we want to do that by the end of June, so that
8 it can be done, and we can probably do that. So,
9 we'll follow up after this report whenever the
10 subcommittee is done with their revisions. The
11 last thing I'll just note for the group, we saw
12 the stand alone report, so that will get
13 transmitted today, which is the due date to the
14 HASC staff.

15 So, just putting the final touches on
16 the appellate review study, and the victim impact
17 statement study with some administrative
18 formatting and stuff. And that will be --
19 they'll both be finalized today, I'll send those
20 to the members, and then same thing, get those
21 transmitted to Congress. Chair Smith, that's all
22 I have, so back to you for any closing comments,

1 or remarks before the DFO closes us out.

2 CHAIR SMITH: All right, thank you
3 colonel. Thank you again everyone, and be on the
4 lookout for the report revisions from the
5 subcommittee, and also figuring out a date for
6 May. Thank you again.

7 MEMBER TOKASH: Chair Smith?

8 CHAIR SMITH: Yes.

9 MEMBER TOKASH: I'm sorry, I see Dr.
10 Markowitz and Judge Grimm have hands raised.

11 CHAIR SMITH: Okay, yes, I think Judge
12 Grimm didn't mean to. Dr. Markowitz?

13 MEMBER MARKOWITZ: I just really
14 briefly want to make sure that we acknowledge the
15 incredibly hard work of both Meghan Peters and
16 Eleanor Vuono on this task as well, because they
17 put in some incredibly long hours pulling all of
18 this together for the subcommittee. So, we would
19 be remiss in also not acknowledging their work on
20 this, so just wanted to make sure we mentioned
21 that as well.

22 CHAIR SMITH: Thank you for catching

1 that, absolutely, the staff is wonderful as per
2 usual, so thanks for that. And with that I'm
3 going to turn it over to the DFO.

4 LT COL FOX: All right, thank you
5 ma'am. And with that, this public meeting is
6 closed, thank you.

7 (Whereupon, the above-entitled matter
8 went off the record at 1:25 p.m.)
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In the matter of: Public Meeting

Before: DOHA DAC-IPAD

Date: 03-30-23

Place: teleconference

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate complete record of the proceedings.

Neal R Gross

Court Reporter

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