

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  
MARCH 14, 2023

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The Advisory Committee met via Video  
Teleconference, at 1:00 p.m. EDT, the Honorable  
Karla N. Smith, Chair, presiding.

PRESENT

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

ALSO PRESENT

Mr. Dwight Sullivan, Designated Federal Officer

## DAC-IPAD STAFF

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

Ms. Julie Carson, Deputy Director

Mr. Dale L. Trexler, Chief of Staff

Ms. Stacy A. Boggess, Senior Paralegal

Ms. Theresa Gallagher, Staff Attorney

Ms. Nalini Gupta, Staff Attorney

Ms. Amanda L. Hagy, Senior Paralegal

Mr. R. Chuck Mason, Staff Attorney

Ms. Marguerite McKinney, Analyst

Ms. Meghan Peters, Staff Attorney

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri Saunders, Staff Attorney

Ms. Eleanor Magers Vuono, Staff Attorney

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Adjournment

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

2 1:00 p.m.

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

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

11 CHAIR SMITH: Thank you, Mr. Sullivan,  
12 and good afternoon. I want to welcome the  
13 members and all attendees to the 27th 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 is by videoconference via Zoom  
18 for members. For everyone joining today, please  
19 mute when not speaking. If we have technical  
20 difficulties, we will break for ten minutes, move  
21 to a teleconference line, and send the  
22 instructions by email.

1                   The Secretary of Defense created the  
2 DAC-IPAD pursuant to the National Defense  
3 Authorization Act for fiscal year 2015. The DAC-  
4 IPAD's statutory purpose is to advise the  
5 Secretary of Defense on the investigation,  
6 prosecution, and defense of allegations of sexual  
7 assault and sexual misconduct involving members  
8 of the armed forces. Representatives from the  
9 military services' criminal law divisions who  
10 serve as the DAC-IPAD serve as specific experts  
11 and liaisons to those services have joined us  
12 today.

13                   Welcome. At today's meeting, we'll  
14 discuss the Committee's Fifth Annual Report, the  
15 Victim Impact Statement Report submitted by the  
16 Policy Subcommittee, and the Appellate Review  
17 Report submitted by the Case Review Subcommittee.  
18 Each subcommittee has proposed that their  
19 standalone report be adopted and issued by the  
20 full Committee. Following the voting on the  
21 three reports, we will hear from the Special  
22 Project Subcommittee and its recommendations on

1 the subcommittee's work on pretrial processes.

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

6 If a meeting attendee wants to make a  
7 public comment, please submit your name no later  
8 than 1:30 p.m. to  
9 whs.pentagon.emmbx.dacipad@mail.mil. Comments  
10 will be heard at my discretion at the end of the  
11 meeting. Written public comments may be  
12 submitted at any time for Committee  
13 consideration.

14 To assist the court reporter and to  
15 avoid multiple people speaking at the same time,  
16 Committee members should signal if they have a  
17 question or wish to speak by stating your name  
18 and waiting to be acknowledged before proceeding.

19 Thank you to everyone for attending  
20 today. Over to you, Colonel Bovarnick, to start  
21 the meeting.

22 COL BOVARNICK: Members, before we get

1 to the reports, I want to bring to your attention  
2 a second new member proposal submitted by Ms.  
3 Bashford. The proposed nominee has extensive  
4 investigation experience. For the Committee's  
5 approval, I revised the packet. I submitted it  
6 to the DoD general counsel at the February  
7 meeting, so it includes both proposals for the  
8 two new members to be nominated by the general  
9 counsel for appointment to the DAC-IPAD.

10 Does any member have any objection to  
11 this submission of a new member, the new member  
12 proposal from Ms. Bashford for an experienced  
13 investigator to be submitted for nomination?  
14 Apparently not, so I'll add that to the current  
15 roster.

16 Okay. So for public comment, the  
17 Committee did receive two written submissions  
18 that were forwarded to the members prior to the  
19 meeting. The first submission is a nine-page  
20 letter from Mr. Michael Conzachi, Director of  
21 Investigations for the Save Our Heroes project.  
22 The second submission is a series of three

1 documents from William and Donna Santucci of  
2 Ohio, and their packet consists of a three-page  
3 cover letter and two appellate briefs filed in  
4 the U.S. Court of Appeals for the Tenth Circuit,  
5 one in September of 2020 and one in December of  
6 2020. All written submissions will be posted on  
7 the DAC-IPAD's public website.

8 To orient the members to the read-  
9 ahead materials for today's meeting, you received  
10 the three reports subject to deliberations and  
11 the vote today, I'll cover those in a moment; a  
12 letter from Dr. Elizabeth Hillman, the Chair of  
13 the Military Justice Review Panel that Judge  
14 Smith had forwarded to the full Committee that  
15 describes the interest in the DAC-IPAD's work on  
16 the pretrial processes. Members of the MJRP were  
17 provided a link to today's public discussion and  
18 some members observing today. Finally, at Tab 6,  
19 you have the read-ahead materials from the  
20 Special Projects Subcommittee to be discussed  
21 during the second half of today's meeting.

22 So the three reports are the primary



1 purpose of today's meeting, and I'd like to  
2 provide you a brief update on the revisions  
3 included in the March 9th versions we'll discuss  
4 today. First, in the Appellate Review Report,  
5 there were two small typos. Those were both  
6 corrected. For the Victim Impact Statement  
7 Report, there were also two small typos that were  
8 corrected. And other than recommended changes  
9 that will depend on the discussion of the Fifth  
10 Annual Report, as the changes to the Victim  
11 Impact Statement Report should mirror the final  
12 outcome for the Fifth Annual Report. Finally --  
13 and that will become clear later, so basically  
14 recommendations to the Victim Impact Statement  
15 should object to the Fifth Annual Report.

16 So, finally, for the Fifth Annual  
17 Report, I'll cover a few changes and then note  
18 the changes that will be open for discussion. So  
19 three minor changes, two typos and the additions  
20 of the words at least before the court's public  
21 opinion on page 19. On page 13, case numbers  
22 were added after the percentages. And then to be

1 open for discussion in the decision of  
2 highlighted recommendations on pages five and six  
3 that correspond with the Victim Impact Statement  
4 responses and recommendations.

5 On page five, you'll see in the  
6 response to the joint explanatory statement  
7 question two, you'll see a recommendation to add  
8 the word generally in two places, and for  
9 recommendation 43 on page six of the Fifth Annual  
10 Report, there's a recommendation to change the  
11 word providing to allowing. And, finally, I  
12 acknowledge there are two footnotes, links, and  
13 graphics that will be finalized immediately  
14 following the meeting scope.

15 So, Chair Smith, I recommend we start  
16 with the Fifth Annual Report and open up for the  
17 members to discuss those proposed changes on  
18 pages five and six and the other points on the  
19 Fifth Annual Report.

20 CHAIR SMITH: Okay. Before we get  
21 started with the specifics on pages five and six  
22 that the Colonel just kind of discussed, does any

1 member have any comments or questions about any  
2 other changes made in the report or any general  
3 comments about the Fifth Annual Report? Hearing  
4 nothing, let's head on to page five.

5 So response to JES question number two  
6 on page five, is there any member who opposes the  
7 addition of the word generally in the two places  
8 that it was added? No. All right. So that is  
9 agreed to. With no objections, the word  
10 generally will be added in both places and the  
11 corresponding change will be made in the Victim  
12 Impact Statement Report.

13 All right. So going on to  
14 Recommendation 43 on page six, is there any  
15 member of the Committee who opposes changing the  
16 word providing to allowing? No, no opposition.  
17 So with no objections, the word providing will be  
18 changed to allowing, and the corresponding change  
19 will be made in the Victim Impact Statement  
20 Report.

21 With the acknowledgment that, as  
22 Colonel Bovarnick stated before, there's some

1 footnotes and other things that need to be added,  
2 references and links, and the final report will  
3 be formatted by a graphic designer to mirror the  
4 format of prior annual reports, I think we're  
5 ready to vote on the Fifth Annual Report. Is  
6 there any member who opposes the adoption of the  
7 Fifth Annual Report? Hearing no opposition, the  
8 Fifth Annual Report will be adopted by the  
9 Committee.

10 Colonel Bovarnick, please ensure it's  
11 finalized and a cover letter is prepared for  
12 transmission of the report to the Senate and  
13 House Armed Services Committee and Secretary of  
14 Defense for signature by all members. A draft of  
15 that letter will be sent to all members and, once  
16 it's finalized, each member will coordinate  
17 directly with Colonel Bovarnick to authorize your  
18 electronic signature to be affixed to the final  
19 letter.

20 COL BOVARNICK: Yes. Judge Smith,  
21 acknowledge. I will send a draft of that cover  
22 letter to members this week, and we'll have the

1 final report completed no later than one week  
2 from today, next Tuesday, March 21st, and get the  
3 members one last look at it in its final format.

4 And I think we can now move to the  
5 Victim Impact Statement Report and acknowledge  
6 the comments that have already been made on the  
7 changes that will mirror the recommendations and  
8 the response to question number two.

9 CHAIR SMITH: All right. Thank you.  
10 First, I'll ask General Schwenk, who is the  
11 Policy Subcommittee Chair, whether he has any  
12 remarks on the Victim Impact Statement Report.  
13 Next, I'll ask if any other member has comments  
14 about the report. And then, finally, I'll ask  
15 General Schwenk, ask if General Schwenk has a  
16 proposal for the full Committee to adopt the  
17 Victim Impact Statement Report as a full  
18 Committee standalone report, and then we'll have  
19 the vote.

20 So, General Schwenk, do you have any  
21 remarks about the Victim Impact Statement Report?

22 MEMBER SCHWENK: Sure. Thank you,

1 Madam Chair. Let me just assure all the members  
2 that, as you saw looking at the annual report and  
3 the draft Victim Impact Statement Report, the two  
4 answers to the two questions asked in the joint  
5 explanatory statement remain unchanged; and  
6 except as amended by the previous votes, the five  
7 recommendations that we have discussed several  
8 times remain unchanged. So I, therefore, move  
9 that the full DAC-IPAD accept as a standalone  
10 report for publication by the Chair the Victim  
11 Impact Statement Report, as amended just moments  
12 ago, in our votes. Thank you.

13 CHAIR SMITH: All right. So first of  
14 all, does any member have any comment that they  
15 wanted to make about the Victim Impact Statement  
16 Report? Hearing nothing. So --

17 MEMBER KRAMER: I'm sorry. This is --

18 CHAIR SMITH: Sorry. Go ahead. Sorry  
19 about that. Go ahead.

20 MEMBER KRAMER: Sorry. I just wanted  
21 to repeat my objection to the recommendation 42,  
22 which is allowing a victim impact statement to

1 include a recommendation of a specific sentence.  
2 I think I made that clear at the last full  
3 Committee meeting but just wanted to reiterate  
4 it.

5 CHAIR SMITH: Thank you for that.

6 MEMBER KRAMER: I'm sorry. It's A.J.  
7 Kramer. I apologize.

8 CHAIR SMITH: All right. And Mr.  
9 Kramer made those objections known at the hearing  
10 where we discussed the report. In light of Mr.  
11 Kramer's objection -- who is that? Does anyone  
12 have any comments that they want to make with  
13 respect to the Victim Impact Statement Report?  
14 No.

15 All right. So aside from Mr. Kramer's  
16 objection, is there any objection to, one,  
17 adopting the Victim Impact Statement Report and  
18 then, two, adopting it as a full Committee  
19 standalone report? Hearing no objection, the  
20 Victim Impact Statement Report will be adopted as  
21 a full Committee standalone report but also  
22 included in the entire report.

1           Colonel Bovarnick, please ensure the  
2 Victim Impact Statement Report is finalized in  
3 the same manner and time line for the Fifth  
4 Annual Report.

5           COL BOVARNICK: Yes, ma'am.  
6 Acknowledged. And I think now we can move to the  
7 Appellate Review Report.

8           CHAIR SMITH: All right. So similar  
9 to the process that we just followed, I'll start  
10 with Ms. Bashford, as she's the Chair of the Case  
11 Review Subcommittee, and then open it to members  
12 for any comments that they may have about the  
13 case review report, Appellate Review Report, and  
14 then we'll vote on that.

15           So, Ms. Bashford, do you have any  
16 remarks about the Appellate Review Report?

17           MEMBER BASHFORD: First, I want to say  
18 the staff did a remarkable job aided by some of  
19 the subcommittee members. They reviewed over 250  
20 appellate decisions and identified five basic  
21 issues. Those were factual sufficiency, post-  
22 trial delay, evidentiary issues, prosecutorial



1 misconduct or ineffective assistance of counsel,  
2 and panel member selection; and they've gone  
3 through all of those in the report. I think it's  
4 a great report, and I would ask that it be moved  
5 as a standalone report for the DAC-IPAD as a  
6 whole.

7 CHAIR SMITH: Great. Thank you. Any  
8 members have any comments that they want to make  
9 about the Appellate Review Report? No. Okay.  
10 So any opposition to adopting the Appellate  
11 Review Report as a full Committee standalone  
12 report? Hearing nothing. It will be adopted.

13 Colonel Bovarnick, please ensure the  
14 Appellate Review is finalized in the manner  
15 described for the two other reports.

16 COL BOVARNICK: Yes, ma'am. So  
17 acknowledged for all three reports. I think that  
18 closes out part one of the session, so we're  
19 ready for Ms. Tokash to start the next session.  
20 But back to you, Judge Smith.

21 CHAIR SMITH: All right. Ms. Tokash,  
22 are you ready to brief everyone?

1                   MEMBER TOKASH: Yes, Chair Smith. May  
2 I proceed?

3                   CHAIR SMITH: Sure.

4                   MEMBER TOKASH: Thank you. The  
5 Special Projects Subcommittee is presenting three  
6 recommendations regarding pretrial procedures and  
7 prosecution standards to the entire DAC-IPAD for  
8 deliberation and vote. Today's recommendations  
9 are the culmination of five years of work on  
10 these subject matter areas.

11                   The members of the subcommittee will  
12 explain each of the recommendations, along with a  
13 rationale for change, and at the end of the  
14 presentation we'll open the floor for questions,  
15 deliberations, proposed edits, and a vote.

16                   First, I want to talk about how we got  
17 to this point. Since 2018, the DAC-IPAD has been  
18 evaluating the military's pretrial processes and  
19 undertaken a comprehensive study of Articles 32,  
20 33, and 34. The impetus for the DAC-IPAD's  
21 review was a series of concerning reports from  
22 the predecessor panel; that is the Judicial

1 Proceedings Panel. At the end of its three-year  
2 tenure, the Judicial Proceedings Panel issued a  
3 report with its concerns that serious problems  
4 persist in the pretrial phase of a case and  
5 recommended that the Department of Defense and  
6 the DAC-IPAD examine whether Article 32  
7 determinations should be given more weight by the  
8 convening authority, evaluate how effectively  
9 disposition guidance contained in Appendix 2.1  
10 pursuant to Article 33 was being used by judge  
11 advocates and convening authorities, and to  
12 assess potential changes to pretrial advice  
13 process that would promote better informed  
14 referral decisions.

15 Over the course of five years, the  
16 DAC-IPAD heard from numerous groups on these  
17 various issues and reviewed court-martial records  
18 for thousands of cases in which a sexual offense  
19 was preferred. The data was informative. From  
20 this wealth of information, the staff was able to  
21 review hundreds of preliminary hearing officer  
22 reports and annually assess the outcomes of

1 sexual offenses prosecuted in the military.

2 In addition, the members of the  
3 original DAC-IPAD met with various stakeholders  
4 and military justice practitioners to discuss the  
5 decisions to refer adult penetrative sex assault  
6 cases to general courts-martial, including the  
7 Military Services Criminal Law and Military  
8 Justice Policy chiefs, Trial Defense Service  
9 Organization chiefs, Special Victims' Counsel and  
10 Victims' Legal Counsel Program managers, staff  
11 judge advocates, former military judges, judge  
12 advocates with experience as preliminary hearing  
13 officers, other stakeholders such as Protect Our  
14 Defenders, and stakeholders from outside  
15 prosecution authorities, like representatives  
16 from district attorneys offices and the  
17 Department of Justice.

18 Most importantly, we considered the  
19 perspectives of the services and the Judge  
20 Advocates General. In particular, we considered  
21 both the most recent testimony at the December  
22 2022 and February 2023 public meetings. We spent

1 considerable time considering the oppositional  
2 points of view that were detailed by the Judge  
3 Advocates General and the services.

4 The DAC-IPAD also solicited a very  
5 informative and incredibly detailed narrative  
6 explanations from the services on both the  
7 benefits and costs of various changes to the  
8 military pretrial processes.

9 Lastly, the DAC-IPAD's work in this  
10 area has considered the statutory history and  
11 case law pertaining to Articles 32, 33, and 34 of  
12 the UCMJ, as well as practices used in the United  
13 States District Courts, as referenced in Article  
14 36 of the UCMJ.

15 In a moment, you will hear from my  
16 subcommittee member colleagues how this  
17 information supports the subcommittee's  
18 recommendations which were voted on and passed by  
19 the subcommittee on March 9th, 2023. They  
20 include: one, barring referral of a charge that,  
21 as determined by an impartial preliminary hearing  
22 officer, lacks probable cause; two, enhancing the

1 Secretary of Defense's disposition guidance  
2 promulgated in Appendix 2.1 of the Manual for  
3 Courts-Martial; and, three, mandatory training of  
4 special trial counsel and judge advocates on how  
5 to exercise the reasoned exercise of  
6 prosecutorial authority under the enhanced  
7 disposition guidance we propose in recommendation  
8 two.

9           Again, we listened to stakeholders and  
10 could not ignore their experiences, nor could we  
11 ignore the data that makes the need for these  
12 recommendations clear. These recommendations  
13 protect the accused from criminal liability of  
14 baseless charges and safeguard victim  
15 expectations of court-martial outcomes. They  
16 promote confidence in the military community that  
17 prosecutors within the DoD are guided by  
18 structured decision-making so as to preliminary  
19 hearings determinations and initial case  
20 disposition.

21           These are not radical ideas. In fact,  
22 they foster a healthier military justice system,

1 one which promotes the reasoned exercise of  
2 prosecutorial authority and one on parity with  
3 federal civilian prosecutor colleagues as  
4 suggested by Article 36 of the UCMJ.

5 Now I will turn to our current task.  
6 Last year, the DoD general counsel asked the DAC-  
7 IPAD to study the implementation of the new  
8 offices of the special trial counsel and make  
9 recommendations for effective policy and  
10 procedures. The Special Project Subcommittee  
11 took on this project and has focused on the need  
12 for more effective pretrial procedures and  
13 uniform standards to guide the new independent  
14 prosecutorial offices.

15 That work culminated in the three  
16 recommendations, which I previously mentioned and  
17 that my colleagues will now highlight. I will  
18 now turn the floor over to Judge Walton. Judge.

19 CHAIR SMITH: You're on mute, Judge  
20 Walton.

21 MEMBER WALTON: I knew I would do  
22 that. Our first recommendation is that Congress

1 should amend Article 32 to create a binding no  
2 probable cause determination by the preliminary  
3 hearing officer with a limited opportunity for  
4 reconsideration. In essence, this amendment  
5 would give meaningful substance to the  
6 preliminary hearing process, which it doesn't  
7 have at this time.

8 Special Project Committee

9 Recommendation 1A: this proposed amendment would  
10 amend, would recommend that Article 32 be amended  
11 to provide that a preliminary hearing officer's  
12 determination of no probable cause is an absolute  
13 bar to referral of the affected specifications to  
14 court-martial subject to reconsideration, as  
15 described in Recommendation 1B. And  
16 Recommendation 1B would provide for the amendment  
17 of Article 32 and also Rule of Court-Martial 402  
18 to permit reconsideration of a preliminary  
19 hearing officer's no probable cause determination  
20 upon the presentation of newly-discovered  
21 evidence or evidence that, in the exercise of due  
22 diligence, could not reasonably have been



1 obtained before the original hearing, subject to  
2 the following: one, trial counsel within ten days  
3 of receiving the preliminary hearing officer's  
4 report petitions the preliminary hearing officer  
5 to reopen the Article 32 preliminary hearing,  
6 stating the nature of the newly-discovered  
7 evidence and the reason it was not previously  
8 presented; and, two, the preliminary hearing  
9 officer shall reconsider their previous no  
10 probable cause determination one time upon  
11 reopening the Article 32 preliminary hearing to  
12 receive the evidence as described above. After  
13 reconsideration, the preliminary hearing  
14 officer's determination as to whether probable  
15 cause exists is final.

16 Over the last decade, Congress has  
17 made several legislative changes to Article 32  
18 that have transformed its purpose and its scope.  
19 You can find those statutory changes in the chart  
20 at tab 2 of your materials. Currently, Article  
21 32 is a preliminary hearing with two primary  
22 purposes: one, to determine whether there is

1       probable cause to believe that the accused  
2       committed the offenses charged and, two, to  
3       recommend the disposition that should be made of  
4       the case.

5               In amending 32, however, Congress did  
6       not change the advisory nature of Article 32  
7       preliminary hearing officer, of the Article 32  
8       preliminary hearing officer's determination.

9       Therefore, when the preliminary hearing officer  
10      issues their determination that a charge is not  
11      supported by probable cause, the convening  
12      authority and, in the near future, special trial  
13      counsel are not bound by that conclusion. They  
14      can make their own probable cause determination  
15      and refer the charges to general court-martial  
16      over the objection of the preliminary hearing  
17      officer.

18              In making the recommendation regarding  
19      the changes that should be adopted regarding  
20      Article 32, our subcommittee made two key  
21      findings with respect to the advisory no probable  
22      cause determination under Article 32: one, an

1 advisory no probable cause determination fails to  
2 provide incentive for the government or the  
3 prosecution to present evidence that establishes  
4 probable cause and thus fails to fulfill a  
5 primary purpose of Article 32; and, two, the  
6 advisory nature of Article 32 undermines the  
7 purpose of Article 32 and creates systemic  
8 problems regarding pretrial processing of  
9 criminal misconduct. Those are the two related  
10 recommendations regarding the first  
11 recommendation that the subcommittee makes.

12 MEMBER TOKASH: We will now turn to  
13 Mr. Kramer. Thank you, Judge Walton.

14 MEMBER KRAMER: Thank you, Meghan and  
15 Judge Walton. So as some background for the  
16 reason for these changes, the staff of the DAC-  
17 IPAD has done its usual wonderful job in  
18 reviewing no probable cause determinations over a  
19 six-year time span, and the DAC-IPAD has reviewed  
20 those figures, and the DAC-IPAD's ongoing review  
21 of courts-martial case documents shows that in 17  
22 percent of the penetrative sexual offense cases

1 completed where there was an Article 32  
2 preliminary hearing, the preliminary hearing  
3 officer determined one or more distinct  
4 penetrative sexual offense charges lacked  
5 probable cause, 17 percent of the cases.

6 Yet, less than one-fifth of all  
7 preliminary hearings held in fiscal year 2021  
8 involved live testimony from any witness at all.  
9 A witness, an investigative officer, the victim,  
10 any defense witness, no witness at all testified  
11 in these preliminary hearings. Less than one-  
12 fifth of them had any witness, indicating that  
13 the government rarely uses live testimony,  
14 obviously, for military investigators to  
15 establish probable cause and also suggests that  
16 either the defense is not requesting witnesses  
17 very often or defense counsel's witness requests  
18 are not granted very often.

19 Therefore, in current trial practice,  
20 trial counsel may, without consequence, submit as  
21 their only exhibit an entire report of  
22 investigation from the investigative organization

1 or elect to provide investigative summaries in  
2 lieu of evidence such as live testimony. I think  
3 the staff has done, again, their wonderful job in  
4 compiling some supporting data for this, if I  
5 could call on them.

6 MS. PETERS: Thank you, Mr. Kramer.  
7 This is Meghan Peters. From the DAC-IPAD's  
8 previous studies, the studies have revealed that,  
9 out of the adult victim penetrative sexual  
10 offense cases tried in fiscal years 2016 through  
11 2018, more than 30 percent of the cases ended in  
12 a full acquittal. A separate study that is the  
13 result of the case review project, a three-year  
14 study involving a review of the investigative  
15 police files for 1900 investigations opened  
16 across the services and completed in 2017, when  
17 those files were reviewed, the investigative and  
18 prosecution files, there were 235 adult victim  
19 penetrative sexual offense charges tried to  
20 verdict in 2017 from the DAC-IPAD's review. More  
21 than 60 percent of those cases resulted in a  
22 finding of not guilty on the penetrative sexual

1 offense. For reference, the DAC-IPAD has  
2 published this finding in its Investigative Case  
3 File Review Report issued in 2020, and that is  
4 DAC-IPAD finding number 90.

5 Thank you. Over to you, Mr. Kramer.

6 MEMBER KRAMER: Thank you so much.  
7 Appreciate it. And I think it's fair to say the  
8 DAC-IPAD has wrestled with those statistics since  
9 its inception and the reasoning behind them, and  
10 that's the main issue and reason for our  
11 recommendations.

12 I note further that, in some cases in  
13 which adult victim sexual offenses were tried at  
14 general courts-martial after the Article 32  
15 preliminary hearing officer found no probable  
16 cause, the appellate courts overturned some of  
17 those convictions for lack of factual  
18 sufficiency. So even cases that proceeded to  
19 general courts-martial were reversed on appeal  
20 for insufficient evidence, some of those.

21 As one judge observed, this  
22 preliminary hearing, at least with respect to

1 these specifications, provided no meaningful  
2 protection for appellant and no check on the  
3 government's ability to expose him to felony-  
4 level punishment. So this example underscores  
5 the problem of an advisory Article 32 no probable  
6 cause determination.

7 Trial counsel tend, as a result of all  
8 of this, to treat the preliminary hearing in a  
9 perfunctory manner, and this practice continues  
10 to systematic referral of weak cases. And those  
11 referral of weak cases is harmful to a number of  
12 participants in the proceeding. Crime victims  
13 are not benefitted by referral of weak cases like  
14 that where there's no probable cause. The  
15 accused, obviously, suffers where there's no  
16 probable cause finding. And the overall health  
17 of the system itself where there's been no  
18 probable cause finding is not benefitted either  
19 because for three main reasons: the threshold of  
20 probable cause, the constitutional threshold of  
21 probable cause, which I understand, obviously,  
22 may not be applicable to other military, but the

1 standard of probable cause, if even that is not  
2 met, that harms the military justice system by  
3 proceeding to trial; and it also does not meet,  
4 obviously, the much higher burden of beyond a  
5 reasonable doubt at trial, so that also is  
6 another reason; and it can result in a conviction  
7 that cannot survive further appellate review. So  
8 for those three reasons, those are three reasons  
9 that the systematic referral of no probable cause  
10 cases harms all participants in the system if  
11 they can't meet those standards.

12 And at this point, I think I'll turn  
13 it back to Ms. Tokash.

14 MEMBER TOKASH: Thank you, Mr. Kramer.  
15 I will now turn to Dr. Markowitz, who will talk  
16 about the value of reforming the Article 32  
17 process. Dr. Markowitz.

18 MEMBER MARKOWITZ: Thank you. So the  
19 subcommittee believes that a binding no probable  
20 cause determination would produce systemic  
21 benefits to the pretrial processing of criminal  
22 misconduct. One, service members would be



1 protected against prosecution on baseless  
2 charges. Two, an Article 32 preliminary hearing  
3 that weed out unsupported charges will lead to a  
4 more effective and efficient military justice  
5 system, better protect victims and accused, and  
6 improve the overall health of the processing of  
7 criminal cases in the armed forces.

8 The penalty of dismissal would  
9 incentivize counsel to more effectively screen  
10 cases and present evidence in a manner that  
11 clearly establishes probable cause. A more  
12 robust presentation of evidence will enhance the  
13 Article 32 preliminary hearing officer's report  
14 and disposition recommendation.

15 The military would better align with  
16 federal civilian practice where the failure of  
17 the government to meet the minimal requirement of  
18 probable cause is an absolute bar to initiating a  
19 federal prosecution and, in some circumstances,  
20 may preclude reference to other prosecuting  
21 authorities or recourse to non-criminal measures.

22 The DAC-IPAD has heard and considered

1 concerns about how Article 32 reform might affect  
2 a victim's statutory right to refuse to testify.  
3 We find that this right in Article 32 is not  
4 diminished by the requirement for a binding no  
5 probable cause determination for the following  
6 reasons: First off, a prosecutor must have the  
7 victim's agreement to testify or a prosecutor may  
8 present the testimony of other witnesses, such as  
9 investigators, to establish probable cause. Our  
10 review of Article 32 reports indicates the  
11 government does not often call investigators to  
12 testify in Article 32 preliminary hearings.  
13 However, that is an available option should  
14 victims assert their right not to testify. Also,  
15 Article 32 and the Rules for Court-Martial permit  
16 alternatives to live testimony, such as recorded  
17 statements to law enforcement.

18 The victim's right to defer with  
19 counsel for the government, the convening  
20 authority, or the special trial counsel regarding  
21 the preference as to disposition is not  
22 diminished by the requirement for a binding

1 probable cause determination. The victim's non-  
2 binding preference as to disposition is one of  
3 several considerations in the disposition  
4 guidance in Appendix 2.1 of the Manual for  
5 Courts-Martial.

6 Article 32 preliminary hearing  
7 officers, mostly field-grade judge advocates,  
8 consistently provide in-depth analyses of how the  
9 case file evidence aligns with the elements of  
10 each offense. These Article 32 reports indicate  
11 that persons with sufficient legal expertise are  
12 serving as preliminary hearing officers and are  
13 qualified to render a binding no probable cause  
14 determination.

15 In the vast majority of FY21 cases in  
16 which a preliminary hearing officer found no  
17 probable cause for one or more charged offenses,  
18 this charge was either dismissed or the accused  
19 was found not guilty, indicating that preliminary  
20 hearing officers' assessments are reasonable  
21 predictive of the appropriate disposition of the  
22 charges. The binding no probable cause

1 determination is an important step, and we  
2 recognize that this reform should also provide an  
3 opportunity for reconsideration. Therefore, we  
4 recommend that pretrial procedures provide  
5 opportunity for trial counsel to petition the  
6 preliminary hearing officer to reopen the Article  
7 32 preliminary hearing and reconsider the no  
8 probable cause determination. The prosecution  
9 also retains the ability to re-prefer charges  
10 following dismissal.

11 And with that, I'll turn it over to  
12 Ms. Tokash again.

13 MEMBER TOKASH: Thank you, Dr.  
14 Markowitz. I will now turn to my colleague,  
15 Judge Grimm, to talk about recommendation two.  
16 Judge Grimm.

17 MEMBER GRIMM: Yes. Thank you very  
18 much, Chair Tokash. I want to thank our chair.  
19 Meghan Tokash was extraordinarily hardworking on  
20 this. She, along with our wonderful staff,  
21 exercised exceptional leadership and  
22 organization, and my fellow subcommittee members

1 and I were privileged to have the opportunity to  
2 work on this important series of recommendations.  
3 The staff also did what we now have become  
4 accustomed to, which is their usual phenomenal  
5 work. But just because we're accustomed to it  
6 doesn't mean we shouldn't recognize it, so I want  
7 to say how much I appreciated that.

8           There are three parts to our second  
9 recommendation, all of which involve proposed  
10 revisions to Appendix 2.1, the Manual for Courts-  
11 Martial. The first is to remove the language  
12 non-binding from the title of Appendix 2.1, and  
13 we feel that this is desirable for it would align  
14 the title to Article 33 of the Uniform Code of  
15 Military Justice Disposition Guidance, which is  
16 the statutory source from which Appendix 2.1 is  
17 based.

18           Secondly, and this is the substantive  
19 recommendation that we are making and I think it  
20 follows directly from the recommendations that  
21 we've already heard today with regard to the  
22 Article 32, which demonstrate that charges that

1 are weak have, to an alarming degree, been able  
2 to go to trial, resulting in either acquittals on  
3 the most serious offenses, which, as you have  
4 heard, that doesn't benefit either the military,  
5 the prosecution, or the victim, and also a  
6 reversal on appeal in numbers that would just  
7 simply not be tolerated in a civilian prosecution  
8 system.

9           The guidance that we recommend for  
10 changing Section 2.3 of Appendix 2.1 to provide  
11 that the special trial counsel who will have the  
12 authority to bring these charges, substantial  
13 authority, unprecedented authority given the new  
14 changes, should only refer charges to a general  
15 court-martial and judge advocates should only  
16 recommend that the convening authority refer  
17 charges to a general court-martial if they  
18 believe that the Servicemember's conduct, one,  
19 constitutes an offense in the Uniform Code of  
20 Military Justice and that the admissible evidence  
21 that will be likely accepted at trial probably  
22 will be sufficient to obtain and support on

1 appeal a conviction. And those proposed changes  
2 are part of the reports in this.

3 And then the final part of this  
4 recommendation number two is to update Appendix  
5 2.1 to reflect the new authorities of the special  
6 trial counsel, which, of course, at present, it  
7 does not do.

8 Now, what brings us to these  
9 recommendations? Number one, we feel that the  
10 Secretary of Defense should create uniform  
11 disposition guidance for special trial counsel  
12 and convening authorities with regard to the  
13 referral of charges to general courts-martial  
14 only if the admissible evidence will probably be  
15 sufficient to obtain and sustain a conviction.

16 What brings us to this recommendation?  
17 Article 33 of the Uniform Code for Military  
18 Justice says the Secretary of Defense is required  
19 to issue disposition guidance. That current  
20 guidance is found at paragraph 2.1 at the Manual  
21 for Courts-Martial. The subcommittee believes  
22 that revising Appendix 2.1 is the best way to

1 achieve the uniform standards throughout the  
2 military and is akin to the United States  
3 Attorney General's policy guidance to federal  
4 prosecutions. We do not believe that a statutory  
5 amendment to Article 33 is an effective approach  
6 because the Secretary of Defense already has the  
7 authority and the mandate and the power to issue  
8 recommended policy guidance. Therefore, a  
9 statutory change is unnecessary. And if we were  
10 to recommend it, first Congress would have to  
11 decide whether they agreed with it and, if they  
12 did, it would involve the delay inherent with the  
13 legislative process as they considered it.

14 Tab 2 of the materials contain our  
15 recommended changes to Appendix 2.1. The key  
16 features are as follows: We think that the  
17 recommendation is to delete the words non-binding  
18 from the title of Appendix 2.1 to make it align  
19 with the title of Article 33, UCMJ, which is  
20 disposition guidance. Secondly, we believe that  
21 the guidance at paragraph 2.3 of Appendix 2.1  
22 should be revised to provide the special trial



1 counsel may only recommend that the convening  
2 authority refer charges to a general court-  
3 martial if they believe that the Servicemember's  
4 conduct constitutes a violation of the Uniform  
5 Code of Military Justice and that the admissible  
6 evidence will probably be sufficient to obtain a  
7 conviction.

8           There are two statutory provisions of  
9 the Uniform Code of Military Justice that inform  
10 these recommendations. Number one, Article 36 of  
11 the Uniform Code of Military Justice requires  
12 that pretrial, trial, and post-trial procedures  
13 for courts-martial shall apply the principles of  
14 law and rules of evidence generally recognized in  
15 the trial of criminal cases in the United States  
16 District Courts.

17           Secondly, Article 33 of the Uniform  
18 Code of Military Justice directs the Secretary of  
19 Defense to issue guidance regarding factors judge  
20 advocates and convening authorities should take  
21 into account with the appropriate considerations  
22 for military requirements when exercising the

1 duties as to the disposition of charges. The  
2 statute further requires that the guidance to  
3 take into account principles contained in  
4 official guidance of the attorney general to  
5 government attorneys with respect to disposition  
6 of federal criminal cases in accordance with the  
7 principle of fair and even-handed administration  
8 of federal criminal laws.

9 As I mentioned, the subcommittee  
10 believes that revising Appendix 2.1 is the best  
11 way to proceed, as doing so would be similar to  
12 the U.S. Department of Justice's policy guidance  
13 found in the Justice Manual. For this reason, we  
14 felt that our initial impulse, which we began  
15 with, to recommend that Article 33 be amended was  
16 not the best way to proceed since our reading of  
17 Article 36 convinces us that that article, as  
18 already enacted by Congress, requires that court-  
19 martial procedures apply principles of law and  
20 rules of evidence that are generally recognized  
21 within the criminal trials in the United States  
22 District Courts. And as a matter of uniformity

1 between district courts and criminal prosecutions  
2 and the courts-martial prosecutions, it would be  
3 enhanced if this standard was adopted. Since the  
4 Department of Justice manual itself is policy and  
5 not statutory mandate, we feel that there should  
6 be parity with paragraph 2.1 that should be based  
7 upon guidance from the Secretary, as opposed to  
8 congressional mandate. And this has the  
9 additional advantage of avoiding what could be a  
10 substantial delay in adopting the recommendations  
11 that we are making.

12 Appendix 2.1 is the current policy  
13 guidance that informs the exercise of  
14 prosecutorial discretion in the military. To  
15 implement the letter and the spirit of Articles  
16 33 and 36, the subcommittee believes that the  
17 decision to refer a case to the general court-  
18 martial should require a special trial counsel or  
19 Judge Advocates General advising the convening  
20 authority must believe that the admissible  
21 evidence will probably be sufficient to obtain  
22 and sustain a conviction before taking a case to

1 trial.

2 Guidance promulgated pursuant to  
3 Article 33 and Appendix (audio interference) by  
4 adopting uniform prosecution standards that are  
5 aligned with the United States Department of  
6 Justice's Manual and principles for federal  
7 prosecutions which provide more nuanced  
8 commentary on the prudent exercise of  
9 prosecutorial discretion and would provide more  
10 nuanced commentary on the exercise of  
11 prosecutorial discretion within the military.

12 The Department of Justice Manual  
13 requires federal prosecutors to believe that the  
14 admissible evidence probably will be sufficient  
15 to obtain and sustain a conviction before taking  
16 a case to trial. This standard is necessary to  
17 avoid a judgment of acquittal at a criminal case.  
18 In the military, referral decisions should be  
19 grounded in technical analysis of the  
20 admissibility of the evidence and the quantum of  
21 proof needed to convict in a criminal trial.  
22 Such standards reflect long-established legal and

1 ethical rules and guidelines, and they ensure  
2 that fundamental fairness of the system and  
3 recognition of how significant the initiation of  
4 criminal charges affects a Servicemember.

5 And those are my comments. I'll turn  
6 it back over to our subcommittee chair.

7 MEMBER TOKASH: Thank you, Judge  
8 Grimm. The final recommendation is Special  
9 Projects Subcommittee Recommendation 3. That is  
10 requiring mandatory training of all special trial  
11 counsel and judge advocates advising convening  
12 authorities on the exercise of reasoned  
13 prosecutorial discretion, as outlined in Appendix  
14 2.1 of the MCM that incorporates the  
15 subcommittee's Recommendation 2. The training  
16 shall emphasize the reasoned exercise of  
17 prosecutorial authority including the principle  
18 that referral is only appropriate if they believe  
19 that the Servicemember's conduct constitutes an  
20 offense under the UCMJ and that the admissible  
21 evidence will probably be sufficient to obtain  
22 and sustain a conviction.

1                   We believe that the training  
2 requirement is important, as the exercise of  
3 prosecutorial discretion in this regard and under  
4 our proposed Recommendation 2 will be new for  
5 special trial counsel and for all judge advocates  
6 who advise convening authorities.

7                   So just a quick note before some very  
8 brief concluding remarks, and we thank all those  
9 in attendance and the full Committee for your  
10 patience in listening to this presentation.

11 Again, it's been half a decade of preparation for  
12 this moment in terms of data collection and  
13 listening to stakeholders and coming up with what  
14 we believe are the best recommendations for the  
15 overall health of the military justice system.

16                   I just wanted to clarify, when Judge  
17 Walton was speaking, I believe he misspoke and  
18 errantly said Rule for Court-Martial 402. I  
19 believe Judge Walton meant to say Rule for Court-  
20 Martial 405. Judge Walton, I don't want to put  
21 you on the spot, but I also want to make sure  
22 that that is correct before we go forward.

1 CHAIR SMITH: You said Judge Walton,  
2 correct?

3 MEMBER TOKASH: Yes.

4 CHAIR SMITH: Judge Walton, you're on  
5 mute.

6 MEMBER WALTON: I apologize. I  
7 somehow disconnected myself. But you're  
8 absolutely correct. That was my error.

9 MEMBER TOKASH: No problem, Your  
10 Honor. Thank you. I just wanted to make sure  
11 that our full Committee had the most accurate  
12 information prior to debate and questions.

13 So thank you. In conclusion, the  
14 purpose of these recommended changes is to  
15 promote uniformity and to enhance trust in the  
16 system by establishing clear standards throughout  
17 the pretrial processing of cases from the  
18 preliminary hearing through the referral  
19 decision. In the case of Appendix 2.1, there is  
20 no better moment than now as the new offices of  
21 special trial counsel stand up to give special  
22 trial counsel and all judge advocates tools

1 designed to assist in structuring their decision-  
2 making process.

3 Appendix 2.1 is cast in general terms  
4 with a view to providing guidance, rather than  
5 mandating results. That is why we did not  
6 believe statutory reform was appropriate. The  
7 intent here is to assure regulatory without  
8 regimentation and to prevent unwarranted  
9 disparity without sacrificing the necessary  
10 flexibility. We believe that this serves both  
11 victims and accused and the overall health of the  
12 military justice system.

13 In the case of the change to Article  
14 32, all U.S. jurisdictions have, in some form, an  
15 independent check on the prosecutor's decision to  
16 charge an individual. And this change to bar  
17 referral of cases without probable cause would  
18 provide that same check on the system and,  
19 importantly, afford military members true  
20 protection against prosecution on baseless  
21 charges. Again, this protects both victims and  
22 accused and the overall health of the military



1 justice system.

2 The data and the input from  
3 stakeholders demonstrate we clearly need to do a  
4 better job in regard to protecting the accused  
5 and victim expectations as it pertains to  
6 military courts-martial outcome. The current  
7 Article 32 and Article 34 are not standing up to  
8 the standard that they should.

9 Finally, I want to address a concern  
10 raised by at least one member regarding these  
11 recommendations and the DAC-IPAD charter and the  
12 military justice system as a whole. Last week, I  
13 spoke with the Chair of the Military Justice  
14 Review Panel, Dr. Hillman. Not only is the  
15 Military Justice Review Panel interested in our  
16 findings and recommendations on this topic, but  
17 they would like us to brief them at their April  
18 18th meeting. Dr. Hillman, as I, believe that  
19 our recommendations here today will better help  
20 the Military Justice Review Panel as they look at  
21 similar issues for the entirety of the justice  
22 system.

1           So once the DAC-IPAD has issued its  
2 recommendations, we would propose forwarding the  
3 DAC-IPAD report to the Military Justice Review  
4 Panel and briefing them on April 18th at the same  
5 time, we send our report to the Secretary of  
6 Defense general counsel and Congress.

7           So, again, thank you all for your very  
8 careful patience here. Again, it's been half a  
9 decade of work in this subject area. We feel  
10 that it is critically important to the military  
11 justice system that we get this right and that  
12 this is the critical moment to do so.

13           So with that, I'd like to open the  
14 floor to discussion, deliberations, and a vote.  
15 Madam Chair.

16           CHAIR SMITH: First, let me just say  
17 it is so clear the amount of work that went into  
18 these recommendations and preparing the  
19 presentation. I know that we had conversations  
20 about it at the last hearing. It's clear Ms.  
21 Tokash and the committee heard the concerns, went  
22 back to the drawing table along with the staff,

1 and really worked very hard on this. So on  
2 behalf of everyone, I just want to say we  
3 appreciate that work.

4 So we could go to a vote and see where  
5 we're at, kind of starting backwards I suppose.  
6 Let's look at SPSC Recommendation 3. Well, I  
7 guess we'll start with 1, 1A. Yes?

8 MEMBER TOKASH: Judge Smith, may I  
9 propose, just I see a couple of hand raises by  
10 Ms. Long, and so maybe we'll just take questions  
11 first.

12 CHAIR SMITH: Okay. Sounds good.

13 MEMBER TOKASH: Thank you. Ms. Long.

14 MEMBER LONG: Hi. Thank you, Ms.  
15 Tokash, Meghan, and other people. I mean, I  
16 won't belabor. Obviously, there was a lot of  
17 work done, and I really appreciate all of the  
18 background and how clear it was.

19 I really have one comment, and I  
20 believe it's on Recommendation 2. I mean, minor  
21 in terms of all of the recommendations and work  
22 that you've done, but I think substantial. I

1 have a significant pause at the charging standard  
2 of the, I guess, final clause of probably lead to  
3 a conviction. I think that two decades of work  
4 looking at this, what goes off in my head is a  
5 little bit of encouragement of speculation and,  
6 again, a wall. We're trying to give guidance,  
7 not really clear guidance.

8 I would go back to language that I  
9 think was proffered by Michelle Dempsey,  
10 professor at Villanova, that talked about  
11 sufficiency in terms of what would lead, you  
12 know, to an outcome. And it's what an objective,  
13 impartial, and reasonable jury properly directed  
14 and acting in accordance of the law, that they  
15 are more likely than not to convict the  
16 defendant. I think that that is a more reasoned  
17 approach that encourages people not to speculate  
18 what a jury would do but to really, and not to  
19 think about the myths but to really look to be  
20 educated themselves because, I mean, the way it's  
21 written, you could have a very messy set of facts  
22 that one might think this is probably not going

1 to lead to a conviction in your mind if you don't  
2 stop and methodically think, okay, if we had a  
3 jury that was properly directed, if they  
4 understood, let's just say, intimate partner  
5 violence, and maybe how, you know, when we're  
6 thinking about complex things, how a prior abuse  
7 could potentially have established force in a  
8 particular case, something like that.

9 So I feel like the wording that I've  
10 offered encourages that kind of methodical  
11 thinking and evidence, rather than what I heard  
12 you propose, which I'm concerned is going to lead  
13 to speculation on the jury.

14 But thank you very much for all of  
15 your work.

16 MEMBER TOKASH: Ms. Long, can you say  
17 in what jurisdictions that language is used?  
18 Because I will note the language that we propose  
19 is on par with the standard that's used by the  
20 Department of Justice.

21 MEMBER LONG: I understand. And, I  
22 mean, the bottom line is the Department of

1 Justice, I think that this is inline with the  
2 Department of Justice because the Department of  
3 Justice, frankly, doesn't deal with street crime  
4 so isn't dealing with the enormity of rape and  
5 intimate partner violence and some of the pieces,  
6 although the Washington, D.C. one is. It may not  
7 -- maybe what your standard is and how its  
8 written might be sufficient. This is honestly  
9 what I cited. I'm going to go back and look. I  
10 believe it's from a law review article governing  
11 the UK, and it's how we help explain the ethical  
12 standard. It's based on trying to explain to  
13 prosecutors their standard.

14 It certainly, I think, is more  
15 methodical than the Department of Justice  
16 standard, to be honest. I mean, it actually lays  
17 something out to consider. I think that the  
18 Department of Justice standard, as you wrote it,  
19 is going to, that probably is going to lead to  
20 maybe not correct, not protective much. This is  
21 still very protective of an offender, I think,  
22 while still providing guidance.

1                   So I understand what you're saying,  
2                   that you're pulling something from Department of  
3                   Justice. I just don't know that that leads us  
4                   where we want to go.

5                   MEMBER TOKASH: Judge Grimm.

6                   MEMBER GRIMM: I understand and  
7                   appreciate that comment. I think that when we  
8                   use the word probably, probably is more likely  
9                   than not. That's the standard that Ms. Long is  
10                  proposing. I think that the guidance that the  
11                  subcommittee has recommended is such that allows  
12                  the decision to be made by judge advocates, the  
13                  special trial counsel and the judge advocates who  
14                  are themselves lawyers and who can be expected to  
15                  provide the dispassionate analysis of the  
16                  evidence that is admissible and they have to  
17                  factor in what evidence is likely to be allowed  
18                  and to be heard by the finder of fact by the  
19                  military judge and that, as the result of that,  
20                  it would probably, which means more likely than  
21                  not, which is the same standard, result in a  
22                  conviction that would not only survive a trial

1 but also the appellate review.

2           When you start adding other factors in  
3 there, particularly if there are other factors  
4 that perhaps has terms that are not as familiar,  
5 I wonder about whether or not you are making the  
6 process unnecessarily complicated. So I  
7 appreciate that there are, there may not be the  
8 volume of sexual offense charges in the federal  
9 courts, I think that Judge Walton and I can  
10 attest to the fact that they're not unfamiliar to  
11 the federal courts, as well. And the key is  
12 that the evidence, the decision to prosecute from  
13 a prosecutor is ethically complying with their  
14 obligation, has to be based upon an ethical  
15 evaluation of what evidence is likely to be  
16 admissible in court and, secondly, that that  
17 evidence is more likely than not, which is what  
18 probably means, going to result in a conviction.  
19 There are plenty of cases in which a conviction  
20 does not occur, and there are plenty of cases in  
21 which the prosecutor may assume that certain  
22 evidence is going to be admitted when it's not,



1 but that standard of admissible evidence and more  
2 likely than not seems to capture what the  
3 subcommittee believes is the proper standard.

4 And so those are my thoughts that I  
5 would share.

6 MEMBER LONG: If it's admissibility,  
7 we are on the same page. It's just, what does  
8 probably mean? And to me, it needs that piece of  
9 they're properly directed acting in accordance  
10 with the law, or else it's speculation. So I  
11 just want to make clear -- I didn't want to talk  
12 back out of turn. I just want to make clear it's  
13 not the admissibility of the evidence, it's just  
14 that piece that would make it more likely than  
15 not. What I'm trying to do is avoid what's  
16 happening all over now, the speculation of what  
17 they would do versus what they should do.

18 MEMBER TOKASH: I do see Ms.  
19 Goldberg's hand. I just did want to reference  
20 one thing for Ms. Long. Just to look at the  
21 expanded paragraph in paragraph 2.3, this  
22 addresses, I think, exactly your point where

1 we've included viewed objectively by an unbiased  
2 fact finder. So I just wanted to point that out  
3 by way of reference.

4 But before we get to Ms. Goldberg's  
5 question, I want to see if there are any other  
6 members who want to weigh in.

7 MEMBER KRAMER: Ms. Tokash, could I --  
8 it's A.J. Kramer.

9 MEMBER TOKASH: Yes. A.J., and then  
10 Judge Walton.

11 MEMBER KRAMER: I'm happy to cede to  
12 Judge Walton first and go after.

13 MEMBER WALTON: Go ahead. I'd like to  
14 hear it from a defense counsel first before I  
15 speak.

16 MEMBER KRAMER: I hope you'll say that  
17 in court sometime. So I think that, first of  
18 all, Ms. Long, I understand what you're saying,  
19 but I have two things. First, there are not an  
20 insignificant number of sexual assault cases in  
21 federal court, both on various jurisdictional  
22 grounds and especially in districts where there

1 are Native American reservations. There are a  
2 large number of sexual assault cases in federal  
3 court in those jurisdictions. So I think the  
4 premise that federal court is not dealing with  
5 these types of cases is not correct.

6 And, secondly, I think it's getting a  
7 little bit, so to speak, too much into the weeds  
8 of trying to determine what a jury might be  
9 instructed and are you going to go with things  
10 like impeachment of witnesses and all kinds of  
11 instructions that a jury might get.

12 So I think it has covered it for DOJ  
13 for years, and I think that, getting into all  
14 these specifics, we're going to start saying,  
15 people are going to add more specifics to clarify  
16 it or that they think are important to it, and it  
17 just starts to get too loaded down.

18 But I understand exactly what you're  
19 saying; don't get me wrong, as always. But I  
20 just think it's going too far.

21 MEMBER TOKASH: Judge Walton.

22 MEMBER WALTON: I share the comments

1 made by both Judge Grimm and Mr. Kramer because  
2 the reality is that you can't totally take  
3 subjectivity out of the evaluation that a  
4 prosecutor is making in assessing whether or not  
5 he or she are going to be able to obtain a  
6 conviction, and it's always very difficult to  
7 predict what a jury is going to do because you  
8 don't know what the makeup of that jury is going  
9 to be.

10 So I do think that adding that  
11 additional language really is unnecessary, and,  
12 you know, hopefully, you've got honest, objective  
13 people making these subjective decisions and that  
14 the probability assessment is going to be  
15 obviously influenced by the individual  
16 predilections of the person who's making that  
17 decision, and I just don't think you're going to  
18 really take the subjectivity out of it by adding  
19 the language that's being suggested.

20 MEMBER TOKASH: Thank you. And I see  
21 Ms. Bashford was trying, has been trying to  
22 speak. Ms. Bashford, just make sure you're off

1       mute.

2                   MEMBER BASHFORD: I have one comment  
3       and one question. The comment refers to the  
4       first bullet point under number three. It's  
5       showing up on my screen as page four. It says  
6       Servicemembers would be protected against  
7       prosecution on baseless charges. I don't like  
8       the word baseless. I don't think anybody has  
9       seen cases where -- it sounds like it's just  
10      people are coming in and completely making up a  
11      prosecution. I would prefer that that said  
12      something, against prosecution on charges where  
13      the threshold of probable cause has not been met.  
14      When we did the case review, I don't think we saw  
15      anything where we would say it's baseless. It  
16      sounds sort of pejorative to me.

17                   CHAIR SMITH: Ms. Bashford, will you  
18      repeat where that is so that everyone can find  
19      it?

20                   MEMBER BASHFORD: It's number three on  
21      page four. The value of reforming Article 32 is  
22      the title, and it's the first bullet point.

1 MS. PETERS: This is Meghan Peters.

2 For the rendered --

3 COL BOVARNICK: Maybe on the PDF, it's  
4 a different page. I think at the bottom of the  
5 page it says page three.

6 MEMBER BASHFORD: Yes, my thing just  
7 says, I mean, yes, it says page three on the --  
8 so it's number three, first bullet point.

9 MS. PETERS: Yes. Ms. Bashford,  
10 you're referring to the Special Project  
11 Subcommittee materials. This is Meghan Peters,  
12 for the record. There were four parts to that.  
13 There was the package of recommendations and  
14 supporting findings, and you're discussing the  
15 verbiage of one of the findings within that  
16 document. The second part of the package is the  
17 proposed revisions to Appendix 2.1 where the  
18 language Ms. Tokash just spoke from to address  
19 Ms. Long's comment came from. So that would be,  
20 was Tab 2 as you originally received it. And the  
21 other two tabs you received were background on  
22 Articles 32 and Article 33, just for the record.

1           If anyone is referring to the combined  
2 read-ahead materials as repackaged that reference  
3 all of the reports and these subcommittee  
4 materials, just for the record, you're referring  
5 to Tab 6, Tabs 6A and 6B respectively. Thank  
6 you.

7           MEMBER BASHFORD: This is called read-  
8 ahead materials for SPSC update.

9           MS. PETERS: Right. You're in Tabs 1  
10 and 2, and Tab 1 has the findings and  
11 recommendations. Thank you, Ms. Bashford.

12           MEMBER TOKASH: Thank you. Ms.  
13 Goldberg, you had a question, and then I see Ms.  
14 Garvin also has her hand up.

15           MEMBER BASHFORD: I'm sorry. I wasn't  
16 done.

17           MEMBER TOKASH: Oh, I'm sorry, Martha.  
18 Excuse me.

19           MEMBER BASHFORD: That's okay. My  
20 question also, apart from the I don't like the  
21 baseless charges, but my question is does this  
22 envision that, in order to sustain a finding of

1       probable cause, you would have to have some form  
2       of live testimony so they could no longer just  
3       put the ROI in? Because I don't know what impact  
4       that would have on investigators and, you know,  
5       where they may be found by the time the 32 comes  
6       around.

7                   MEMBER TOKASH: Judge Walton, did you  
8       want to weigh in? I see you're off mute.

9                   MEMBER WALTON: No, no, I don't.

10                  MEMBER TOKASH: Okay. We would  
11       envision that, yes, there would be some need to  
12       have live witnesses testify, much like they would  
13       at a preliminary hearing in the civilian sector.

14                  MEMBER BASHFORD: That seems to be a  
15       big change, though. Did we, were the  
16       Servicemembers asked about that, the service --

17                  MEMBER TOKASH: You mean a change back  
18       to the way the Article 32 used to be before the  
19       last iteration of changes?

20                  MEMBER BASHFORD: Yes. The  
21       requirement of some live testimony.

22                  CHAIR SMITH: Can that live testimony



1 be in the form of the investigator just, you  
2 know, testifying about this is what we found in  
3 our investigation? Because I think that's pretty  
4 standard.

5 MEMBER GRIMM: So excuse me for  
6 jumping in, but I think that I'm seeing bullet  
7 points that Ms. Bashford was talking about, the  
8 baseless charges, and I would agree with her  
9 recommendation that we come up with a different  
10 word than baseless. Unsubstantiated or  
11 insufficient or something that -- there's a snap  
12 to the word baseless that I don't think that we  
13 mean to imply. But we say in the fifth bullet  
14 point that Article 32 and Rule for Courts-Martial  
15 405 also permit alternatives to live testimony,  
16 such as recorded statements to law enforcement.  
17 So you could have recorded statements offered in  
18 lieu of it, if I'm reading this correctly. And,  
19 secondly, you could have the testimony of the  
20 investigating officer, as opposed to the actual  
21 victim who has a right not to testify if the  
22 victim does not wish to do so.

1                   MEMBER TOKASH: Mr. Schwenk, General  
2 Schwenk.

3                   MEMBER SCHWENK: Yes. Thank you. I  
4 don't, I remember reading this and I didn't see  
5 anything that would lead me to conclude that we  
6 were recommending that there had to be live  
7 testimony in order for an Article 32 preliminary  
8 hearing to be valid.

9                   MEMBER TOKASH: Correct.

10                  MEMBER SCHWENK: We just have examples  
11 of live testimony. So is that true that there is  
12 no requirement that there be live testimony and  
13 it's up to the trial counsel if he wants to take  
14 his shot by giving the record the report of  
15 investigation, he submits the report of  
16 investigation and sees what happens --

17                  MEMBER TOKASH: That's right.

18                  MEMBER SCHWENK: -- without any live  
19 testimony.

20                  MEMBER TOKASH: General Schwenk,  
21 you're absolutely right. Our recommendation does  
22 not say must have live witnesses. I mean, that

1 might be the result, you know. But just to be  
2 clear, the recommendation does not recommend live  
3 witnesses. You were absolutely right.

4 Okay. Ms. Goldberg.

5 MEMBER GOLDBERG: I think, actually,  
6 Ms. Garvin had her hand up before I did, so I'm  
7 happy to defer to you, Meg, if you want to --  
8 okay. Suzanne Goldberg, for the record. And I  
9 apologize because I had to drop off a call for  
10 something unavoidable, but I think my comment  
11 actually followed directly on what Jennifer was  
12 talking about and the exchange that we had when I  
13 came on. So if everyone has already plowed  
14 through this, feel free to tell me.

15 But, actually, parenthetically, first,  
16 on the issue that Ms. Bashford raised, I read the  
17 proposed change to suggest that, while a  
18 prosecutor did not have to provide live  
19 testimony, the prosecutor was taking a risk not  
20 to do so. So, General Schwenk, in response to  
21 your comment, right, the prosecutor takes his or  
22 her chances when not presenting live testimony,

1 so I read this as kind of putting a thumb on the  
2 scale, if I were a prosecutor, of giving it all I  
3 had if I wanted to go forward with the case and  
4 feeling like if I were to go in only with some  
5 written documents, I might not be giving it all I  
6 had in terms of getting the go-ahead to move a  
7 case forward.

8 So I think, even if in writing there's  
9 permission for sort of proceeding on writing,  
10 even if the rules permit, the proposed rules  
11 permit proceeding on writing, it wasn't clear to  
12 me that that would be the takeaway from those  
13 prosecuting cases. I don't have enough  
14 information about the context to say one way or  
15 another, but if it's sort of, if the written and  
16 oral testimony are, if the view here is the  
17 recommendation is that they are equally valuable  
18 and that there shouldn't be any sort of concern  
19 about written testimony, then I think that it may  
20 be worth clarifying. But that was not my  
21 takeaway.

22 But, you know, on the point that

1 followed on Jennifer's question, I guess, in  
2 comment, I read the appendix and it's a little  
3 hard for me -- I'll go back to the screen where I  
4 can track exactly where that is. But I guess the  
5 way I read the text in 2.3 on referral, which is  
6 on page four of the appendix in the read-ahead  
7 materials for the SPSC update, as allowing a  
8 prosecutor or the decision-maker here to take  
9 account of juries' reluctance to convict for rape  
10 and other sexual violence crimes at a higher rate  
11 than other kinds of crimes. And the reason I  
12 read -- and I guess my question to the  
13 subcommittee is is that what you intended, to  
14 have that -- I know you say that, in one place,  
15 that maybe that should be impermissible, and I  
16 don't have that page right in front of me, but  
17 the text here says, gives an example, and, again,  
18 it's on page 5 of the appendix in the read-ahead  
19 materials or 12 of the PDF, it gives an example  
20 in the first full paragraph on the page, in a  
21 case involving a highly-decorated officer, it  
22 might be clear that evidence of guilt viewed

1 objectively by an unbiased fact finder will  
2 probably be sufficient to obtain and sustain a  
3 conviction, yet counsel or the judge advocate  
4 might doubt based on the circumstances that the  
5 court-martial panel would convict.

6 But this is the sentence that actually  
7 really gave me pause. It's the next sentence, in  
8 such a case, despite their negative assessment of  
9 the likelihood of a guilty verdict -- I'll skip  
10 the parenthetical -- the special trial counsel or  
11 judge advocate may properly conclude that it is  
12 appropriate to refer the case. And the may  
13 properly conclude point suggests that it would  
14 also be proper to conclude that it's not  
15 appropriate to refer, even when the evidence,  
16 when viewed objectively by an unbiased fact  
17 finder, will probably be sufficient to obtain and  
18 sustain a conviction.

19 So my question is, to me, this reads  
20 as though it permits a decision-maker to say,  
21 well, we know juries are likely to, you know, or  
22 decision-makers are likely to be more reluctant

1 to convict in rape cases or other sexual violence  
2 cases and I can take that into account if I  
3 choose to do so. Is that the Committee's  
4 understanding of its text? That gives me a lot  
5 of concern.

6 CHAIR SMITH: I mean, I think that  
7 when assessing whether or not to prosecute a  
8 case, to charge a case, that's part of the  
9 assessment is whether or not you're going to be  
10 able to sustain a conviction, and there are a  
11 million factors that can possibly go into that  
12 decision-making. I don't think the language is  
13 saying anything other than they're to use, as  
14 this independent person who's assessing the case,  
15 assess whether or not they can get a conviction  
16 on it, and that's what we want them to do, I  
17 think. I mean, that's what prosecutors do day-in  
18 and day-out everyday is assess the evidence and  
19 come to a conclusion about taking into account  
20 all the different factors that exist in a  
21 particular case and make an assessment about  
22 whether or not not only is there probable cause

1 but, beyond that, will a jury find this person  
2 guilty beyond a reasonable doubt. Day-in and  
3 day-out, that's the charge of the prosecutor.

4 MEMBER TOKASH: And the goal here is  
5 not to give permission to decide not to  
6 prosecute. What we are trying to say is the  
7 prosecutor can refer cases even if they are  
8 unpopular, and that's the prosecutorial  
9 discretion. It is the reason why we have framed  
10 this and we were very much persuaded by General  
11 Schwenk's comments at the prior meeting with  
12 respect to not making this statutory is because  
13 this should be an aspirational guide, that this  
14 should provide some form of guidance for  
15 prosecutors, especially the new ones who are  
16 going to be taking charge of the offices of  
17 special trial counsel and dealing with crimes of  
18 sexual violence on a day-to-day basis, to be able  
19 to have guidance that, again, is not regimented,  
20 that allows for proper and appropriate  
21 flexibility, but also has some type of a  
22 framework within which they can make structured



1 decision-making.

2           So, again, even those unpopular cases,  
3 which most rape and sexual assault cases are, and  
4 I echo A.J.'s comment about cases of sexual  
5 violence in the federal system, we actually have  
6 a very robust practice of federal sexual  
7 prosecution cases under the Violence Against  
8 Women Act on Indian lands and territories and,  
9 you know, several other cases. But, again,  
10 saying that even when unpopular, a prosecutor can  
11 exercise their prosecutorial authority to say I  
12 am still going to take this case forward.

13           MEMBER GOLDBERG: May I respond?

14           MEMBER TOKASH: Oh, absolutely.

15 Please.

16           MEMBER GOLDBERG: So, first of all, I  
17 appreciate Judge Smith's point, right, that the  
18 role of prosecutors is to exercise discretion all  
19 the time and not to move ahead. It's not so  
20 sensible to move ahead if there's a serious  
21 question of obtaining a conviction.

22           I think the challenge I have here or

1 the question I have here is, you know, we're not  
2 talking about a level playing field. We're  
3 talking about a set of cases in which female  
4 victims are less likely to be believed by juries  
5 if that's part of how we understand the  
6 disproportionate reluctance to convict in these  
7 kinds of crimes, as opposed to others. And so it  
8 does give me pause to treat these like all others  
9 without taking account of, you know, that the  
10 landscape here is somewhat different for reasons  
11 that I think would be concerning from a sort of,  
12 you know, I'm not a criminal lawyer, but  
13 potentially, constitutional perspective, but also  
14 an ethical perspective.

15 So that would be my point one in my  
16 concern about sort of treat prosecutorial  
17 discretion here like we treat it anywhere when we  
18 know that there are biases that infect this  
19 particular set of prosecutions. And I don't just  
20 mean gender biases. I mean, obviously we've  
21 talked a lot on this committee about racial  
22 biases, too, depending on who's a complainant,

1 the race of the complainant, the race of a victim  
2 and the race of a defendant. So I think there's  
3 a lot that comes into play, and I think this is  
4 an area where we need to have heightened care  
5 where a prosecutor might decide not to go forward  
6 for that reason, as well, for race-related  
7 reasons, as well.

8 The second category which you were  
9 responding to, Ms. Tokash, I understand the  
10 context in which you were writing, in which the  
11 committee was writing the sentence that gave me  
12 pause. The issue I'm raising is that, when  
13 viewed in a broader frame, that sentence really  
14 does sound like it signs off on a view that it's  
15 okay for prosecutors to take gender, race, or  
16 other kinds of biases into account when deciding  
17 to move forward.

18 CHAIR SMITH: Where are you referring  
19 to, Ms. Goldberg? Sorry.

20 MEMBER GOLDBERG: This is the moment  
21 at which I wish I had my second monitor working,  
22 and it's not right now. But I'm referring to the

1 read-ahead materials, Section 2.3 that's called  
2 referral. It's the first full paragraph on the  
3 top of page five.

4 COL BOVARNICK: Right. So it's Tab 6  
5 of the final packet, Special Projects  
6 Subcommittee, and then it's the proposed  
7 revisions to Appendix 2.1, and it's a big red  
8 paragraph at the top. To the extent this is laid  
9 out, Ms. Goldberg is referring to the second part  
10 of the full paragraph, page five at the bottom.

11 MEMBER GOLDBERG: The second and third  
12 sentences in that paragraph. But -- I'll stop.

13 MEMBER GARVIN: I was just going to  
14 say, if I may, because mine was similar, Ms.  
15 Goldberg, my comment. And I read it the same way  
16 you did, and that's why I'm chiming in. So, Ms.  
17 Tokash, when Ms. Long raised the question about  
18 the language in the recommendation, the  
19 conversation is, you know, well, this is what the  
20 federal does, and I think we could have lots of  
21 debate about that comparative expertise of state  
22 versus federal on sexual assault, but I don't

1 know that that gets us anywhere.

2 But the response, in part, was this  
3 paragraph helps to ensure that bias, as I  
4 understood the conversation, that biases against  
5 sexual assault victims or against this crime or  
6 the challenges that are, historically been  
7 present in IPV cases, this paragraph helps  
8 provide guidance that those should not. But as I  
9 read the paragraph, as Ms. Goldberg reads it, it  
10 actually could be read as though it's okay to  
11 have those biases because juries might not  
12 convict and that that's an okay consideration. I  
13 feel like that sort of conversation is done, but  
14 we've spent, you know -- the law around sexual  
15 assault changing away from kind of the historical  
16 stuff of, you know, might be, at most, right, a  
17 prompt outcry, all those things we all think  
18 they're so historical, but they're not. Like,  
19 they're so close in our history that we have lots  
20 of research that says these crimes are different  
21 in the biases.

22 And so I get nervous this paragraph

1 does condone factoring of biases to not go  
2 forward. I don't think that was the intent. I  
3 think it's the reverse intent, but the way it's  
4 drafted and the may properly conclude, as opposed  
5 to if the law, it says based on facts and  
6 objective view of the law and the facts, if the  
7 objective view of the law and the facts is that  
8 it should sustain a conviction, then it should go  
9 forward.

10 MEMBER TOKASH: So, Ms. Garvin, can  
11 you -- is that the proposed language or, sorry,  
12 not to put you on the spot --

13 MEMBER GARVIN: If we're staying with  
14 the language in the recommendation, which I  
15 understand there's been a substantial debate  
16 around and there seems to be consensus around  
17 aligning with the federal, then if this paragraph  
18 is to help contextualize and provide guidance,  
19 then, yes, that would be my recommendation. So  
20 in the last clause of that paragraph, the special  
21 trial counsel or judge advocate should properly  
22 conclude that it is appropriate to refer a case.

1                   CHAIR SMITH: I think that's dangerous  
2 language, only because there are times when  
3 there, for a variety of reasons, that there may  
4 be a conclusion that it shouldn't go forward.  
5 Don't ask me to come up with them right now, but,  
6 you know, there are a million different scenarios  
7 where there may be a determination made, and it  
8 could be something -- well, I don't know. In the  
9 military world, it wouldn't be the same, but,  
10 let's say in the civilian world, you may have all  
11 your boxes checked and all the evidence in the  
12 world, but, at the end of the day, you know, the  
13 victim is suicidal and you have to make that  
14 call, okay, I can't proceed because this person  
15 can't manage ultimately going to trial. Not to  
16 say it would be the same in the military, but  
17 there are instances where that they have to be  
18 able to make that call. And so I would be  
19 hesitant to box them in to proceeding, so maybe  
20 there's another nuanced way of saying that, you  
21 know, absent extenuating circumstances or  
22 whatever.

1                   MEMBER GARVIN: That example might be  
2 one where maybe, pursuant to affording the right  
3 of referral to the victim, right? Like, we have  
4 other rights that get there and that maybe could  
5 do it, so maybe it's not the perfect language  
6 choice. But I do have concerns along what I  
7 think I was hearing Ms. Goldberg share and that  
8 started with what Ms. Long was saying.

9                   And just, I have some things on other  
10 things that were said, but it looked like there  
11 were people who wanted to chime in on this, so  
12 I'll hold those.

13                   MEMBER SCHWENK: Jim Schwenk.

14                   MEMBER TOKASH: Go ahead, General  
15 Schwenk.

16                   MEMBER SCHWENK: Thank you. So one of  
17 the things that I never noticed because I'm not  
18 good at reading, being a Marine, is the  
19 Department of Justice slant on their Principles  
20 of Federal Prosecution is different than the  
21 slant that we have in Appendix 2.1 and that we're  
22 recommending the department continue. And that



1 difference, it seems to me, is exactly what  
2 everybody is talking about right now.

3           The 2.1 says you should consider these  
4 factors in making a decision in these different  
5 circumstances, like referral decision. And one  
6 of the factors is whether there's sufficient  
7 evidence probably we're recommending, instead of  
8 likely like it says now, sufficient evidence to  
9 obtain and sustain a conviction, a sort of  
10 neutral fact you should consider. But when I was  
11 looking at the Military Justice Review group's  
12 report, which, thank you, you appended to our  
13 read-ahead, it quotes from the Principles of  
14 Federal Prosecution in the DOJ guidelines. And  
15 assuming that that hasn't been changed, it says  
16 the attorney for the government should commence  
17 or recommend federal prosecution if he/she  
18 believes that the person's conduct constitutes a  
19 federal offense and that the admissible evidence  
20 will probably be sufficient to obtain or sustain  
21 a conviction unless in his or her judgment  
22 prosecution should be declined because, one, no

1 substantial federal interest would be served by  
2 prosecution; two, the person subject to effect of  
3 prosecution in other jurisdiction; or, three,  
4 there exists an adequate non-criminal alternative  
5 to prosecution.

6           So it seems to me, if that's still the  
7 language in the DOJ guidelines, it's putting the  
8 thumb down to the prosecutor should commence or  
9 recommend if, A, federal offense and, B,  
10 sufficient admissible evidence to probably obtain  
11 and sustain a conviction. So it's not just a  
12 neutral factor in the federal guidelines,  
13 consider whether there is probably sufficient  
14 evidence; it's an actual if it's there you should  
15 go forward.

16           So I guess that raises, to me, if I'm  
17 right, which I could be wrong, if I'm right, it  
18 raises whether we should amend our recommendation  
19 to have that same approach. If it's there, you  
20 should go forward unless.

21           So I don't know. I had never thought  
22 about that before, and, in reading it in

1 preparation for today, I realized, wow, it looks  
2 to me like they have their finger on going  
3 forward unless, whereas we just have one of the  
4 factors to consider is this. Thank you.

5 CHAIR SMITH: I think this should go  
6 forward, but the unless is important. I think  
7 you have to, if you're going to say should, then  
8 you need your unless. You have to kind of spell  
9 out and make it clear that there are  
10 circumstances where that is not, you know, that  
11 that might not happen. That's it. That's all I  
12 have to say.

13 MEMBER TOKASH: And this is Meghan  
14 Tokash, for the record. That also would, I  
15 think, preclude the other factors that we have to  
16 consider in 2.1. So, you know, we could say  
17 should go forward unless the, you know, the 2.1  
18 factors one, two, three, outweigh that.

19 MEMBER SCHWENK: This is Jim Schwenk.  
20 I think that's a good way to approach it. I  
21 mean, I'm opening up a complicated issue that  
22 we're not going to resolve in the next half an

1 hour, but I was trying to make a comment that was  
2 responsive to the concerns that we just heard  
3 from Jen and Suzanne and Meg.

4 MEMBER WALTON: Could I say that, as  
5 Judge Smith indicated, there can be other factors  
6 that would negate proceeding with a prosecution.  
7 I think one that frequently arises when you're  
8 talking about children and the testimony of a  
9 minor child is going to be necessary, many times  
10 the prosecution will not go forward because of  
11 the harm they think the child will suffer if that  
12 child has to testify during the trial. So there  
13 can be other circumstances other than those three  
14 that may be a basis for a case not going forward  
15 even though the evidence supports moving forward  
16 with the prosecution.

17 MEMBER TOKASH: Ms. Goldberg.

18 MEMBER GOLDBERG: Yes. Judge Walton,  
19 I mean, as somebody who does not prosecute  
20 criminal cases but, as a human being, that makes  
21 a lot of sense to me and the same with Judge  
22 Smith's point before that sometimes there are

1       extenuating circumstances related to the  
2       vulnerability of the victim or possibly a key  
3       witness.

4               I think part of what I think a few of  
5       us were trying to get at is the question of how  
6       to craft language that specifically forecloses, I  
7       mean, if the group agrees, it's not clear to me  
8       that everybody agrees, but that forecloses, you  
9       know, considerations of, you know, jury or  
10      decision-maker panel bias on impermissible  
11      grounds. And I think what is difficult about  
12      writing that is that those, you know, prosecutors  
13      or special trial counsel may not be always aware  
14      that their skepticism about the likelihood of a  
15      conviction, you know, results from a kind of  
16      backdrop of general understanding that many  
17      panelists may be more skeptical of testimony by  
18      victims in rape cases than other kinds of assault  
19      cases, for example.

20              So the question, to me at least, is  
21      how to craft language that makes those guardrails  
22      clear and, at the same time, allows prosecutors

1 to reasonably exercise discretion when there's,  
2 you know, a very vulnerable witness or in some of  
3 the other circumstances, including those outlined  
4 in 2.1 I think it is. But to do nothing in  
5 language that signals that it would be  
6 permissible to take account of impermissible  
7 biases on the part of, the possible biases on the  
8 part of decision-makers. I think it's tricky  
9 language to craft, although I imagine it exists  
10 elsewhere because this is not a new problem.

11 MEMBER TOKASH: Thank you, Ms.  
12 Goldberg. Thank you very much. I think that  
13 it's super important to get as many perspectives  
14 on this as possible, so that's truly, your input  
15 is truly appreciated. And I see that Judge  
16 Grimm's hand has been up, and then Ms. Bashford  
17 raised hers, and then I'm going to turn to  
18 Eleanor Vuono.

19 MEMBER GRIMM: So this is an excellent  
20 discussion. If you are saying you should refer  
21 charges unless, then the unless category has to  
22 be broad enough to cover all of the very

1       excellent examples that our chair and Judge  
2       Walton and others have pointed out that might  
3       cause a prosecutor legitimately to say, yes, a  
4       jury could -- I mean, admissible evidence  
5       probably is sufficient to sustain and support a  
6       conviction, but I'm not going forward because of  
7       the damage it could do to a child or the other  
8       things.

9                 So if you're going to say you should  
10       go forward unless, the unless has to be broad  
11       enough to cover all of the legitimate factors  
12       that a prosecutor ethically could decide not to  
13       bring, refer the charges or recommend referring  
14       charges, despite the fact that you have the  
15       evidentiary standard of admissible evidence  
16       probably cause it. And I think that may have  
17       been why it was phrased the way it was. You  
18       cannot recommend that you go forward unless you  
19       do have, based upon your experience, a belief  
20       that the admissible evidence would be sufficient  
21       to sustain a conviction means that's the  
22       baseline. Below that you can't go. You have to

1 have that. If you do have that, there can be  
2 these other considerations that might cause you  
3 not to do so but are legitimate considerations.

4 So that doesn't foreclose considering  
5 all those other things that we talked about that  
6 are important to deal with. On the other hand,  
7 if you say you shall go forward, then you face  
8 that problem of trying to make sure that you've  
9 included all of the things that a prosecutor  
10 might legitimately do it.

11 So in the absence of trying to wrestle  
12 with all of that, I think what we were trying to  
13 do is have a baseline below which you could not  
14 go, and I don't -- and even while the language in  
15 some other jurisdictions might have language that  
16 personally I think should not be in there, like  
17 trying to evaluate what the judge is going to  
18 instruct. The prosecutor doesn't decide what the  
19 instructions are going to be, that's the judge.  
20 And so to consider what the legally instructed  
21 person is going to do I think is, frankly, the  
22 wrong standard to suggest when you have to try to



1 figure out someone who has the authority to make  
2 that decision that the prosecutor doesn't have.

3 But it's a problem. The question that  
4 becomes, if you want to say, if the Committee is  
5 of the view that you'd want to say you should  
6 move forward with a recommendation unless, then  
7 all of the unless language has to be in there to  
8 give the proper consideration and discretion to  
9 the people making the recommendation. On the  
10 other hand, if you say you can't unless you have  
11 this, you're not foreclosing all those other  
12 considerations, but you're saying below this you  
13 can't go.

14 I think our concern, based upon the  
15 history, of the court-martial results and the  
16 fact that the Article 32s did not seem to be  
17 accomplishing their function and the belief that  
18 the Article 32 officers are experienced judge  
19 advocates who have demonstrated that they're  
20 looking at the evidence from mature legal  
21 analysis that has been borne out by results of  
22 either the trials or the appellate review, that

1 you got to have an ability to have a standard  
2 that will, when you don't have admissible  
3 evidence probable to result in a conviction then  
4 you shouldn't be going forward.

5 So if you turn the way in which the  
6 language is begun, which may be the Committee's  
7 decision that they want to do, you've got to have  
8 a lot more time spent on what those other carve-  
9 outs will be that our Chair has pointed out and  
10 as has Judge Walton.

11 MEMBER TOKASH: So Ms. Bashford, Dr.  
12 Markowitz, and then Ms. Garvin.

13 MEMBER BASHFORD: It's just odd to me  
14 that, if you look at civilian prosecutions, I  
15 don't always agree with this, but there has been  
16 a very strong move in the past few years to  
17 divert from prosecution so that you have checked  
18 all the boxes where you're saying criminal  
19 prosecution is not necessarily the best way to  
20 go. And I keep coming back to these rules would  
21 apply to everything. We're looking at it through  
22 our sexual assault lens, but they would apply to

1 everything. Somebody who steals from the company  
2 store may not, you can check all the boxes, but  
3 maybe you don't have to prosecute, maybe that's  
4 not the right thing.

5 So I really agree with Judge Grimm's  
6 more of the below this you cannot go, as opposed  
7 to trying to figure out all the other possible  
8 reasons of why you might not want to proceed  
9 anyhow.

10 MEMBER TOKASH: Thank you, Ms.  
11 Bashford. Dr. Markowitz.

12 MEMBER MARKOWITZ: I'll actually cede  
13 my time. I don't have anything original to add  
14 at this point, so I'm going to go ahead and turn  
15 it back to anyone else who has a comment. Thank  
16 you, though.

17 MEMBER TOKASH: Ms. Garvin and then  
18 Mr. Cassara. Thank you.

19 MEMBER GARVIN: I appreciate the  
20 conversation so much, and I definitely appreciate  
21 the thought about how the draftings happened,  
22 like you'd have to have more if you do the

1 unless.

2           So I do, again, not for perfect  
3 drafting, but I do wonder if there would be a way  
4 to move into the recommendation vocabulary  
5 around, you know, sustain a conviction, you know,  
6 in front of an objective and unbiased fact  
7 finder, like something that gets the, which I  
8 know we should presume, but just something that  
9 gets the don't factor the bias of the fact  
10 finder because that's what I see in practice.

11 And when I talk to prosecutors on a regular  
12 basis, they tell me they aren't going to go  
13 forward because they're not going to get a  
14 conviction. And I'll give a concrete example.

15           A woman I worked with was assaulted by  
16 a person with a disability, and the prosecutor  
17 said to her face with her lawyer in the room, not  
18 me, her other lawyer, I don't think I can  
19 convince a jury that a person with only one arm  
20 could have raped you. That's a bias that was an  
21 inappropriate moment to factor, and I'm just  
22 trying to get at these moments of is there any

1 way to move -- I understand the amount of work  
2 that's gone into this and understand that I  
3 might, you know, there might not be a way to  
4 grapple with it, but I'm also hopeful that this  
5 conversation helps. If it moves through in this  
6 current language that this conversation alone  
7 could be used as guidance in training prosecutors  
8 to say, you know what, factor things, right.  
9 There's notions of legislative history in  
10 conversation, and I just wanted to express that  
11 there are improper biases being considered when  
12 deciding not to go forward with these cases here.

13 MEMBER TOKASH: Meg, thank you. I  
14 think we can all appreciate how important your  
15 perspective is to us, as your colleagues. And,  
16 again, I think you all know me well enough. My  
17 life motto is sunlight is the best disinfectant,  
18 and I really believe in robust discourse and  
19 hearing all perspectives. And so thank you very  
20 much for your very important input.

21 I want to just finally turn to Mr.  
22 Cassara, who also has a very important

1 perspective. And then we are going to turn to  
2 Ms. Vuono, who I think is going to just close us  
3 out here with the recommendations.

4 Mr. Cassara.

5 MEMBER CASSARA: So I support the  
6 proposed language, and I would add two things,  
7 one of which is, so much under to a small degree,  
8 we need to realize that we are not talking solely  
9 about sexual assault offenses, and that's a very  
10 important aspect. It limits the work that the  
11 Committee is allowed to do, and, as we look  
12 towards a more holistic approach, not to carve  
13 out an exception for sexual assault cases which  
14 is to apply to all cases.

15 The other thing that I wanted to add  
16 and I haven't heard yet is remember that, unlike  
17 in the civilian world, if an alleged offender is  
18 not criminally prosecuted, that is not, almost  
19 always, not the end of the road for that person.  
20 There are other avenues up to the command to get  
21 that person out of the military, potentially  
22 deprive that person of a retirement depending on

1 what their rank is; take pay from them depending  
2 on what action the commander wishes to take.

3 And so I think it's important that we  
4 keep in mind that, in the civilian world, if  
5 there's a no prosecution decision made, that's it  
6 and the alleged offender walks free. In the  
7 military world, if there is as no prosecution  
8 decision made, the alleged offender may still  
9 face administrative sanctions for the allegations  
10 against them, and I think that that's important  
11 for us to keep into consideration that this is  
12 not the stop-all that it is in the civilian  
13 world. Thank you.

14 MS. VUONO: Hi. So I'm going to just  
15 try and capture what we've heard sort of from a  
16 scribe's perspective and see if we have, if the  
17 DAC-IPAD has sort of an agreement on bringing all  
18 of these important perspectives into the text.  
19 And it sounds like the discussion regarding the  
20 sort of, where the thumb, as General Schwenk  
21 mentioned it, lies in the 2.1 guidance could be  
22 adjusted. That's not the recommendation itself.

1 The recommendation just says 2.1 should be  
2 amended for this to enhance the referral  
3 standard, but what I've heard everyone say is  
4 that there may be interest in acknowledging that,  
5 while you should go forward, you also have to  
6 consider the factors that mitigate against  
7 prosecution, which are all laid out in 2.1.  
8 They're listed as A through N.

9 So I don't know if you agree that this  
10 would be the sort of the summary of where you all  
11 landed in your conversation, but one approach  
12 could be to vote on the recommendations as  
13 written and provided to you today with a change  
14 to the specific language in Appendix 2.1,  
15 paragraph 2.3, which is the referral paragraph,  
16 which discusses the objective views of an  
17 unbiased fact finder. That language is in there,  
18 but the concern raised today was that it says may  
19 properly conclude and that might not move the  
20 prosecution in the direction that the Committee  
21 wants to go.

22 So one approach could be to say, for



1 that final sentence, the special trial counsel or  
2 judge advocate should properly conclude that  
3 referral is appropriate and allow the military  
4 justice process to operate in accordance with the  
5 principles set forth unless the factors in 2.1 A  
6 through N mitigate against prosecution. So  
7 bringing those two notions together, that if  
8 you've got sufficient evidence, which is the  
9 federal standard, you should be going forward  
10 unless A through N, which are all those  
11 considerations, the victims' desires, all those  
12 various things that prosecutors have to balance  
13 besides just the fact that they can take the case  
14 to trial, you could link them a little more  
15 clearly. And I don't know if that captures the  
16 conversation effectively, but it would change  
17 from a, it's not making it into a shall, but it's  
18 changing from a may to a should unless other  
19 factors mitigate. Is that clear? I think what  
20 we could do today is, if everyone is in agreement  
21 on the recommendations, we could provide you with  
22 the draft language of 2.1.

1                   MEMBER TOKASH: Eleanor, this is  
2 Meghan Tokash. Can I, since we're getting very  
3 close to the 3:00 hour, I'd like to suggest the  
4 following. I'd like to suggest voting on  
5 Recommendation 1 because I believe the discourse  
6 that we're having is surrounding Recommendation  
7 2. So I would like to see if we can at least  
8 vote on Recommendation 1 today. And then if we  
9 could, you know, elicit, you know, any comments,  
10 the subcommittee can then reconvene, and then we  
11 can get together for a vote within the next two  
12 weeks as an entire committee to vote on  
13 Recommendations 2 and 3.

14                   CHAIR SMITH: I think, given the hour,  
15 that probably makes sense. But, Ms. Vuono, I  
16 think is on to a good idea. The only thing I  
17 would add about going A through N is maybe then  
18 having, as Judge Grimm discussed, I believe it  
19 was Judge Grimm, having kind of a catch-all  
20 revision because I don't think A through N  
21 considers every possible scenario, and you have  
22 to have a way of saying or some other extenuating

1       circumstance that, you know, whatever catch-all  
2       phrase you would want to use.

3                   But is everyone okay with voting on 1  
4       now and then having the staff come back around  
5       with some language, taking into account  
6       everybody's concerns and considerations? Ms.  
7       Goldberg.

8                   MEMBER GOLDBERG: I don't want to be  
9       a pain about this, but, to me, 1 and 2 are  
10      closely interconnected and the meaning of 1 is  
11      informed by 2. So, you know, on the assumption  
12      that we can reach agreement on 2, then that makes  
13      sense. But if we say, you know, you can't go  
14      forward -- so 1 makes sense to me. To me, it  
15      also makes sense to have some explicit language  
16      that possible and permissible biases of the panel  
17      are never a permissible factor to take into  
18      account or something. I mean, that's just  
19      another though for Eleanor's, you know,  
20      consideration.

21                   But I guess, you know, if we have  
22      reassurance that we will certainly come back to 2

1 and 2 will ultimately inform 1, then that gives  
2 me a greater comfort level. I understand the  
3 time pressure. I do worry about the absence of  
4 clear guidance with, you know, with 1 alone.

5 CHAIR SMITH: I think we could  
6 successfully vote on 1, and then in two weeks  
7 have Beth provide the recommended changes with  
8 respect to 2. And then have probably, hopefully,  
9 a 30-minute meeting because if we give time for  
10 everyone to submit their comments or, you know,  
11 things that they'd like to see stated  
12 differently, we should be able to wrap it up.

13 MEMBER GOLDBERG: May I ask is there  
14 a reason why we should do this today rather than  
15 do a vote on 1 and 2 together with the 30-minute  
16 meeting that you're suggesting?

17 CHAIR SMITH: I think because we're  
18 now bumping up against when we need to have the  
19 report due, so I'm just trying to kind of manage.  
20 And 1 seems to be less controversial. I  
21 understand that they do kind of play off of each  
22 other, but, I mean -- I don't know. If other

1 people want to do the whole vote in two weeks,  
2 that's fine, too. But the only thing I would ask  
3 is that there's been a lot of discussion about  
4 it, so when the proposed changes are sent to  
5 everyone, if everyone could respond if you have  
6 objections, that would be great.

7 And this would be a standalone, but it  
8 would be a link in the annual report, correct?  
9 Ms. Vuono, maybe you can answer that.

10 MS. VUONO: No. Actually, I don't  
11 believe this particular one is going in the  
12 annual report, so we're tied to that time line in  
13 that sense.

14 MS. PETERS: Correct.

15 CHAIR SMITH: Okay. All right.

16 COL BOVARNICK: Yes. The Special  
17 Projects Subcommittee chapter in the Fifth Annual  
18 Report is totally separate.

19 CHAIR SMITH: Okay. All right. My  
20 misunderstanding. All right. So then I think --  
21 yes?

22 MEMBER BASHFORD: Madam Chair, I'm

1 going to move that we vote on the Recommendation  
2 1A and 1B. I don't know if there's a second of  
3 other people --

4 CHAIR SMITH: Anyone second that?

5 MEMBER KRAMER: Second that.

6 CHAIR SMITH: All right. So any folks  
7 who object to the adoption of 1A and 1B? Maybe  
8 use your hand on the -- okay. So General Schwenk  
9 objects to adopting 1A and 1B.

10 MEMBER GOLDBERG: Is it possible to  
11 abstain? I'm more comfortable abstaining until  
12 we --

13 CHAIR SMITH: Sure. Ms. Goldberg  
14 abstains. And I can't see anybody else  
15 objecting. It looks like nobody else is  
16 objecting, so, with that, we'll adopt 1A and 1B,  
17 but we agree as a committee that we will come  
18 back to 2 and 3 once some alternate language is  
19 proposed. And then staff will let us know when  
20 we can have a meeting in the next two weeks.  
21 Maybe we should say an hour. Maybe 30 minutes is  
22 -- I'm giving us more -- we might need an hour,

1 so let's see if everyone can give us an hour in  
2 the next two weeks. Does that sound appropriate?

3 MEMBER TOKASH: Yes.

4 CHAIR SMITH: Yes. Okay. Perfect.

5 MEMBER BASHFORD: Is that enough time  
6 to get it in the Federal Register?

7 CHAIR SMITH: Good question.

8 COL BOVARNICK: I think if we pick a  
9 day now, that that should be sufficient. But I  
10 don't know if people can do that that quickly.  
11 How about if folks, we can send out a quick note,  
12 and if you could provide us, we can figure out a  
13 day within the next few days, that will be fine.  
14 We just have to put it in the notice that it was  
15 going to be less than a week.

16 CHAIR SMITH: Okay.

17 MEMBER MARKOWITZ: Are we looking at  
18 the week of 27 March? Is that where we're  
19 talking about, just to clarify?

20 COL BOVARNICK: If I could, is there  
21 a specific, knowing that it isn't tied to the  
22 March 30th Fifth Annual Report, I didn't know if

1 there was a specific reason for the next two  
2 weeks, other than just to wrap it up in general,  
3 because the meeting isn't until, like, April 18th  
4 and 19th, so the intent was to, which I believe  
5 is the intent to provide some type of  
6 recommendation to the MJRP. That meeting is  
7 April 18th and 19th.

8 CHAIR SMITH: I think it would be  
9 appropriate to try and wrap it up sooner rather  
10 than later while everyone has it fresh in their  
11 minds, everyone has reviewed everything, we've  
12 had a robust conversation about it. So we  
13 probably would be better off doing it in the next  
14 two weeks.

15 MEMBER GRIMM: So, Madam Chair, a  
16 quick question just procedurally. Will Ms.  
17 Vuono's language go through the subcommittee for  
18 discussion and we could hold our own conversation  
19 about that and kick some ideas around. We've  
20 gotten some wonderful guidance from our  
21 colleagues that deserve to be taken a look at,  
22 and we want to try and see if there's a way to



1 square this circle because that would be very  
2 helpful. But if it came back to us first and  
3 then whatever language we would propose, to then  
4 go this is the intent that it would go directly  
5 from the staff to the full Committee without  
6 going to a subcommittee first.

7 CHAIR SMITH: I think that's a great  
8 idea, Judge Grimm, for it to go to your  
9 subcommittee first. You guys wrap it up and  
10 taking it into consideration all the comments  
11 that have been made and then, once it's ready, to  
12 pass it along to the full Committee and then we  
13 could have a meeting for an hour to discuss and  
14 hopefully adopt.

15 MEMBER TOKASH: Ms. Peters and Ms.  
16 Vuono, could you send out a doodle poll for the  
17 subcommittee so that we can meet maybe early,  
18 late this week or early next week. Thank you.

19 CHAIR SMITH: And then also for the  
20 wider committee in the next two weeks would be  
21 great.

22 MS. PETERS: Will do, Chair Smith.

1 CHAIR SMITH: Okay. Great. And then  
2 there was one comment, I think, Ms. Tokash, I  
3 just wanted to put this on the record and adopt  
4 it, that our report be forwarded to the Military  
5 Justice Review Panel and that will also have the  
6 briefing on April 18th with them.

7 MEMBER WALTON: I apologize. I'm  
8 sorry. But I have a 3:00 hearing I have to  
9 conduct, so I'm going to have to leave.

10 CHAIR SMITH: Thank you, Judge Walton.  
11 You were great today.

12 MEMBER MARKOWITZ: I also have another  
13 meeting. I've got to drop off; my apologies.

14 CHAIR SMITH: Thank you, Ms.  
15 Markowitz. You were wonderful, too.

16 All right. Colonel Bovarnick.

17 COL BOVARNICK: Yes. I was just going  
18 to add one other comment just because it came in  
19 from the services. So the services have asked if  
20 the Committee will consider having a summary of  
21 any testimony received by the committee, any  
22 panel during the December 2022 or February 2023

1 public meetings on the topics of making a  
2 preliminary hearing officer no probable cause  
3 binding and referral standards and any report the  
4 Committee intends to issue. Basically, a  
5 question to services to consider that, and that's  
6 my only comment.

7 MEMBER TOKASH: And this is -- I'm  
8 sorry, Colonel Bovarnick. I just want to say  
9 this on the record. This is Ms. Tokash. I said  
10 in my remarks on the record today that the  
11 subcommittee and I assume the DAC-IPAD, greater  
12 DAC-IPAD members who listened to those  
13 perspectives both in the meeting last month and  
14 in December, we certainly took those perspectives  
15 into account. I worry about the independence of  
16 this committee when third parties are asking us  
17 to include certain things in our report. I don't  
18 think that that is appropriate, and I think that  
19 the Committee will include the necessary  
20 perspectives. I also think that it just starts  
21 opening a can of worms for outside stakeholders  
22 to lobby the DAC-IPAD to ask for certain things

1 to be included in the report.

2 So I would just like to say that on  
3 the record. Thank you.

4 COL BOVARNICK: Yes, ma'am. I have no  
5 further comment, other than passing that on.  
6 Yes, understood.

7 CHAIR SMITH: I think Ms. Tokash's  
8 points are valid, so my inclination would be not  
9 to include it. Does anyone have strong feelings  
10 about inclusion? No. Hearing nothing, then I  
11 think we'll pass on including their comments in  
12 the report.

13 COL BOVARNICK: Yes, ma'am. So look  
14 to set a meeting, and we'll poll the members for  
15 dates the week of 27 March. And then we just get  
16 a consensus on the day, and, Judge Smith, you  
17 approve it, we'll lock that date in for the one-  
18 hour public meeting to conclude the pretrial  
19 processes.

20 CHAIR SMITH: All right.

21 MEMBER TOKASH: And, Colonel  
22 Bovarnick, this is Ms. Tokash again. I'm sorry.

1 I requested at the last public meeting Section  
2 549A and 542C briefs from the services to  
3 Congress on the status updates on the OSTCs. If  
4 somebody can get that to myself and the other  
5 subcommittee members, I think that that would be  
6 important to the recommendations and our  
7 continuing work. Thank you. That's all I have.

8 COL BOVARNICK: Yes, ma'am. I know  
9 you had some separate correspondence with the  
10 DMO. Is that what you're referring to? Those  
11 reports?

12 MEMBER TOKASH: Yes. I had inquired  
13 of Mr. Sullivan, as well, as to whether those  
14 reports could be made available to us so that it  
15 can better inform our work because, again, the  
16 services are asking us to include summaries in  
17 our report, so I think it's a two-way street. We  
18 should be having a feedback loop where what the  
19 services are telling Congress is available, you  
20 know, to us at the same time that Congress is  
21 receiving it so that we can be sensitive to both  
22 the services and the TJAGs and that we are

1 considering their perspectives, which I think are  
2 incredibly important perspectives. Thank you.

3 COL BOVARNICK: Yes, ma'am.

4 Acknowledged. Are you ready for kind of quick  
5 closing comments?

6 CHAIR SMITH: Thank you, everyone, for  
7 your hard work, particularly the staff. And  
8 tomorrow we'll receive a doodle poll about when  
9 to meet in the next two weeks. The committee  
10 will meet before that, and I think that's it.

11 COL BOVARNICK: Mr. Sullivan will  
12 close us out.

13 MR. SULLIVAN: All right. This public  
14 meeting of the DAC-IPAD is now closed.

15 (Whereupon, the above-entitled matter  
16 went off the record at 3:06 p.m.)

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