

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
MAY 30, 2023

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The Advisory Committee met via Video
Teleconference, at 12:00 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. Dave Gruber, Designated Federal Officer

DAC-IPAD Staff

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

Army, 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, Management & Program
Analyst

Ms. Meghan Peters, Staff Attorney

Ms. Stayce Rozell, Senior Paralegal

Ms. Terri Saunders, Staff Attorney

Ms. Eleanor Magers Vuono, Staff Attorney

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

2 12:00 p.m.

3 MR. GRUBER: All right, Madam Chair,
4 thank you very much, this is Dave Gruber, DFO for
5 the meeting, I would like to call this meeting to
6 order. Thank you.

7 CHAIR SMITH: Thank you, Mr. Gruber,
8 and good afternoon everyone. I want to welcome
9 the members, and all attendees to the 29th public
10 meeting of the Defense Advisory Committee on
11 Investigation Prosecution and Defense of Sexual
12 Assault in the Armed Forces, or DAC-IPAD.
13 Today's meeting is by video conference via Zoom
14 for members.

15 For everyone joining today, please
16 mute when not speaking. If we have technical
17 difficulties, we will break for ten minutes, move
18 to a teleconference line, and send the
19 instructions by email. The Secretary of Defense
20 created the DAC-IPAD pursuant to the National
21 Defense Authorization Act for fiscal year 2015.

22 The DAC-IPAD's statutory purpose is to

1 advise the Secretary of Defense on the
2 investigation, prosecution, and defense of
3 allegations of sexual assault, and sexual
4 misconduct involving members of the armed forces.
5 Representatives from the military services
6 criminal law divisions, who serve as the DAC-IPAD
7 serve as specific experts, and liaisons to their
8 services have joined us today, welcome.

9 At today's meeting we will discuss,
10 deliberate, and vote on a standalone report
11 submitted by the special projects subcommittee.
12 This meeting is being recorded, and transcribed,
13 and the complete written transcript will be
14 posted on the DAC-IPAD website at
15 www.dacipad.whs.mil.

16 Written public comments may be
17 submitted at any time for committee
18 consideration. Please submit written comments to
19 whs.pentagon.em.mbx.dacipad@mail.mil. To assist
20 the court report, and to avoid multiple people
21 speaking at the same time, committee members
22 should signal if they have a question, or wish to

1 speak by stating your name, and waiting to be
2 acknowledged before proceeding.

3 Thank you to everyone for attending
4 today. For today's meeting, we will go right to
5 Ms. Tokash, the special project subcommittee
6 chair to start the meeting. Thank you.

7 MS. TOKASH: Thank you, Chair Smith,
8 and thank you to everyone for joining us at this
9 third round of discussion, and vote on the stand
10 alone report of the DAC-IPAD titled Reforming
11 Pretrial Procedures and Establishing Uniform
12 Prosecution Standards: Recommendations for
13 Article 32, UCMJ, and the Secretary of Defense's
14 Disposition Guidance in Appendix 2.1 Manual for
15 Courts-Martial.

16 Before we turn to the report itself,
17 I want to briefly recap the years of work that
18 went into development of this report, and your
19 three recommendations. For the last five years,
20 the DAC-IPAD has evaluated the military's pre-
21 trial processes, and studied Articles 32, 33, and
22 34 of the UCMJ. The initial impetus for the DAC-

1 IPAD's review was a series of recommendations
2 from the Judicial Proceedings Panel.

3 This was the panel that was the DAC-
4 IPAD's predecessor. In 2017 the Judicial
5 Proceedings Panel issued a report with its
6 concerns that serious problems persist in the
7 pre-trial phase of a case. They recommended that
8 the Department of Defense, and the DAC-IPAD do
9 three things.

10 First, examine whether the Article 32
11 determinations should be given more weight by the
12 convening authority. Second, evaluate how
13 effectively the disposition guidance issued
14 pursuant to Article 33 was being used by judge
15 advocates, and convening authorities. And third,
16 assess potential changes to the pre-trial advice
17 process that would promote better informed
18 referral decisions.

19 In 2021, the independent review
20 commission on sex assault in the military known
21 as the IRC issued its report, and raised similar
22 concerns that despite the many statutory changes,

1 service members do not trust the military justice
2 system. This mistrust is due in part to the
3 manner in which sexual assault cases are handled
4 prior to trial.

5 Including that many military
6 commanders, on the advice of their staff judge
7 advocates, send cases to trial without regard for
8 the judicial result. In response, the IRC
9 recommended a thorough evaluation of the
10 military's pre-trial procedures laid out in
11 Articles 32, and 34 UCMJ with a view towards
12 reforms that would increase uniformity,
13 reliability, and consistency in the military
14 justice system.

15 The DAC-IPAD heard from numerous
16 groups on these issues including the military
17 services criminal law, and military justice
18 policy chiefs. Trial Defense Service
19 organization chief, Special Victims Counsel, and
20 Victims Legal Counsel programs, staff judge
21 advocates, former military judges, the judge
22 advocates general.

1 Judge advocates with experience as
2 preliminary hearing officers, and other
3 stakeholders such as Protect our Defenders. The
4 DAC-IPAD, and staff reviewed preliminary hearing
5 officer reports, and courts-martial records with
6 thousands of cases in which an adult sexual
7 assault offense was charged.

8 The DAC-IPAD also heard from each of
9 the services on both the benefits, and the costs
10 of changes to the military pre-trial process.
11 The impetus for this report was a tasking the
12 DAC-IPAD received last year in 2022 from the DoD
13 General Counsel asking us to study the
14 implementation of the new Offices of the Special
15 Trial Counsel, and make recommendations for
16 effective policies, and procedures.

17 The special projects subcommittee took
18 on this project, and focused on the need for pre-
19 trial procedures, and uniformed standards to
20 guide these new prosecutors. All of this work
21 led to the conclusion that serious problems
22 persist in the screening, charging, and referral

1 phases of military adult sexual assault
2 prosecutions.

3 As a result, at our March 30th, 2023
4 public meeting, this committee voted to approve
5 three recommendations that form the basis for the
6 report before you today. I want to mention one
7 final thing before we go onto deliberations, and
8 that is with respect to the DAC-IPAD authority.

9 It is worth reminding everyone that
10 the DAC-IPAD's study of pre-trial processes,
11 Article 32, and uniform prosecution standards
12 falls squarely within our statutory mandate to
13 advise both the Secretary of Defense, and inform
14 the Congress on the investigation, prosecution,
15 and defense of allegations of rape, forcible
16 sodomy, and sexual assault, and other sexual
17 misconduct involving members of the armed forces.

18 The collective expertise of the DAC-
19 IPAD leads to the conclusion that the
20 investigation, prosecution, and defense of sexual
21 misconduct will improve making systemic changes
22 that benefit the military justice system as a

1 whole regardless of the specific charge. The
2 DAC-IPAD also believes that there should not be
3 two separate systems of military justice.

4 One for covered, and related offenses
5 that fall under the jurisdiction of the new
6 Offices of the Special Trial Counsel, and yet
7 another for all other offenses, which are still
8 under the authority of military commanders. To
9 that end, by invitation, the DAC-IPAD shared its
10 work in this space with the Military Justice
11 Review Panel at the Military Justice Review
12 Panel's meeting in April 2023.

13 The review panel expressed a desire to
14 create a feedback loop to continue dialogue on
15 these, and other important issues. The report
16 before you for a vote today is particularly
17 timely, as the new Offices of Special Trial
18 Counsel will wield unprecedented prosecutorial
19 authority, akin to the traditional powers of
20 convening authorities for cases that involved
21 adult, and children sexual assault offense
22 charges, and other serious crimes.

1 Considering data gathered from the
2 past several years, special trial counsel will
3 likely prosecute a majority of the cases at
4 general courts-martial going forward. So, we now
5 turn to the work of reviewing, and voting on the
6 report before you. After the DAC-IPAD voted to
7 approve recommendations 48, 49, and 50 by vote at
8 the public meeting on March 30th, the special
9 project subcommittee drafted this report to
10 explain the methodology, history, and supporting
11 rationale for these changes.

12 The staff sent the DAC-IPAD members a
13 draft copy of the report in early May, and
14 received your comments, and suggested edits last
15 week. The version before you reflects all of the
16 helpful input that you provided. The staff will
17 now discuss with you each of the sections of the
18 report, and the relevant appendices, and give you
19 the opportunity to make comments, or discuss
20 changes.

21 After your deliberations, the chair
22 will call for a vote to adopt the report with any

1 final changes you have made today. And the staff
2 will prepare the report to send to Congress, the
3 Secretary of Defense, and the DoD General
4 Counsel. I will now pass it over to the staff to
5 lead the discussion, thank you.

6 MS. PETERS: This is Meghan Peters.
7 As our subcommittee chair has mentioned, the DAC-
8 IPAD approved by unanimous vote a package of
9 recommended changes to the pre-trial processing
10 of cases prosecuted in the military. Each time
11 the DAC-IPAD deliberated on those
12 recommendations, they were accompanied by a
13 series of helpful points, and arguments in favor
14 of those proposals.

15 And by way of background, the
16 subcommittee, and the staff have woven those
17 points throughout the body of this report. Now,
18 as noted in the executive summary, the
19 overarching message of this report is that the
20 DAC-IPAD's proposals do not call for large scale
21 changes, but they are critical ones, and are
22 founded on years of hard work by this committee,

1 and other independent groups that have made
2 assessments about military justice processes.

3 So now, we'll go through the report,
4 and highlight where members have provided edits,
5 or comments to the first version of the draft
6 report. And if you recall, the special project
7 subcommittee sent out a draft report with select
8 appendices on May 12th. We then received a
9 series of written comments, and suggestions, and
10 edits, and sent back to you on May 25th, the
11 version that we're walking through today.

12 And for everyone's reference, the
13 draft report with the comments is hanging on the
14 DAC-IPAD website within the materials for the May
15 30 meeting. Okay, and please, as I go through
16 the report, members, you're welcome to provide
17 additional comments, ask questions, and certainly
18 raise issues if your concerns are not addressed.
19 All right, so first I'll turn to the executive
20 summary.

21 The comment we want to share with you
22 in this section is an observation about

1 Recommendation 48A, and B, which the
2 recommendations are summarized here in the
3 executive summary. Recommendation 48A, and B
4 would bar referral of a charge only to a general
5 courts-martial if the 32 preliminary hearing
6 officer determines that there is no probable
7 cause.

8 And this recommendation is of course
9 subject to the government's opportunity for
10 reconsideration, and without prejudice to the
11 ability to bring new charges at a later date. As
12 an Article 32 preliminary hearing officer,
13 finding of probable cause is not a prerequisite
14 for a special, or summary courts-martial.

15 In fact the Article 32 preliminary
16 hearing is a statutory prerequisite for general
17 courts-martial only. That is the scope of this
18 recommendation. To provide that no probable
19 cause determination by the PHO bars referral of
20 the charge to a general courts-martial, and we
21 wanted to make that helpful clarification based
22 on comments we received from members.

1 But we thought it was important, and
2 helpful to explain this appropriate distinction
3 for why this recommendation only applies to the
4 referral process for general courts-martial. And
5 that's because Article 32 is only required if
6 you're going to refer it to a general courts-
7 martial. So, with that clarification, the staff
8 recommends a conforming change to the language of
9 Recommendation 48A.

10 Which appears in full in the report,
11 so I'll tie back to this later in the discussion.
12 We want to make sure that the recommendation
13 includes the words general courts-martial, rather
14 than just barring referral to courts-martial. We
15 will make sure, if the committee approves the
16 change, we would make sure that this reference to
17 general courts-martial was also woven through the
18 text of the report that supports that
19 recommendation as appropriate.

20 And we'll make sure that it's in the
21 text box for Recommendation 48A, and let me just
22 get you for quick reference, I think that is page

1 --

2 CHAIR SMITH: 17.

3 MS. PETERS: 17, thank you. Okay, are
4 there any questions, or comments on that point
5 before I move on? All right, hearing none, we'll
6 go to section one, introduction methodology, and
7 data analysis. And this is page one of the
8 report, that's where the section begins. The
9 first note here is that the recommendation you
10 previously voted to approve on March 30th, just
11 to note, they have been re-numbered to adhere to
12 the DAC-IPAD numbering conventions.

13 And thus, they're listed as 48A, B,
14 49, and 50 in the body of the report. And just
15 for clarity, this report often refers to both
16 recommendations 48A, and 48B together in order to
17 explain the effect of a no probable cause finding
18 by a preliminary hearing officer, and the
19 opportunity for the government to seek
20 reconsideration, or to refer new charges.

21 The second note is that as the staff
22 prepares this report for publication, we will

1 work with our graphic designer, Ms. Laurel Moran
2 to present the statistics, in particular those
3 listed on page five of this draft report. We'll
4 work with her to make them clear, and easy to
5 read in the format of a table, or graphic.

6 We're mindful that members have made
7 helpful comments to the effect that when it comes
8 to presenting numbers, and statistics, it's
9 helpful to present the information in a
10 narrative, and graphic form. So, give it to the
11 reader twice, and this approach can make it more
12 helpful for readers to understand. Any comments,
13 or questions?

14 Okay, moving on to page seven of the
15 draft report. Section two, background, and
16 recent developments. On page seven, you'll note
17 that much of the history of pre-trial processes,
18 and Article 32 has been moved to an appendix just
19 to enhance the flow in the readability of the
20 report. So, starting on page seven, the
21 background begins by noting two significant
22 recent developments.

1 The establishment of the Offices of
2 Special Trial Counsel, and the establishment of
3 the Military Justice Review Panel. The staff had
4 received a comment that the report should
5 recognize the mission of the Military Justice
6 Review Panel. And as you all recall, Ms. Tokash
7 briefed the Military Justice Review Panel in
8 April on the recommendations in this report, and
9 the supporting data, and rationale.

10 So, we've added a mention here that
11 the DAC-IPAD has shared its recommendations with
12 the members of the Military Justice Review Panel.
13 That's highlighted for you with a comment in the
14 text of this draft on page seven. Any comments,
15 or questions? Okay, moving on. We'll move to --
16 I will move onto section three unless there's any
17 comments, or questions about the remainder of
18 section two, background, and recent developments.

19 Okay, moving onto section three.
20 Performing Article 32 preliminary hearings, that
21 begins on page 17 of the draft. And this is
22 where first the conforming edit to Recommendation

1 48A would be made. And I've noted that the staff
2 will make a conforming edit to refer only to
3 general courts-martial subject any objections, or
4 corrections here today.

5 And we have not heard any, so we'll
6 move forward with that change, and the staff will
7 make conforming edits in the body of the report.
8 But this section in general provides a more
9 robust discussion of the process for how the
10 government will seek reconsideration, or prefer a
11 new if the preliminary hearing officer determines
12 that there is no probable cause.

13 It is very clear up front that the
14 finding of no probable cause by a preliminary
15 hearing officer would be without prejudice to the
16 government to bring new charges, or to their
17 ability to address misconduct in another forum.
18 And again, as we highlighted earlier, we will
19 make sure here in the text that it is clear that
20 the bar to referral is a bar to referral by trial
21 at a general courts-martial.

22 Are there any other comments, or

1 questions on section three that have not yet been
2 addressed?

3 MS. GOLDBERG: This is Suzanne
4 Goldberg, and I apologize if we discussed this at
5 length, and I'm not remembering. I wonder if you
6 could just provide some quick background on
7 Recommendation 48B, point one of two on the
8 choice of ten days for returning with newly
9 discovered evidence.

10 And secondly on the one time option
11 for a preliminary officer to reconsider their no
12 probable cause determination. If these questions
13 are better left for later discussion, that is
14 fine with me also.

15 MS. PETERS: Does anyone have a
16 comment? Or, I can lead off. The ten days
17 reflects a consideration of the need to keep the
18 pre-trial process moving at this early stage,
19 because the speedy trial clock is running. The
20 existing text of Article 32 allows for some
21 objections to be made within five days. So, I
22 think the subcommittee was sticking close to the

1 existing structure.

2 And it is certainly possible for the
3 government to ask for additional time.
4 Especially once they've identified how they might
5 go about identifying evidence upon which the
6 reconsideration may be based. So, certainly the
7 ten days does not preclude a request for more
8 time by the government.

9 MS. GOLDBERG: This is Suzanne
10 Goldberg again, maybe I could just follow up
11 briefly on that. Because I noticed later in the
12 draft, I think around page 29, the point you just
13 made around allowing more flexibility, and I
14 wondered whether the subcommittee had considered
15 noting that allowance in the proposal.

16 Because as it currently reads, it
17 doesn't sound like there is that flexibility to
18 seek an extension of time for good cause, or on
19 some other basis.

20 MS. PETERS: In current practice the
21 government, or the defense, the parties may seek
22 a delay in the hearing, they may seek to reopen

1 it within a certain window. And if we can make
2 it clear that that is the intent when we explain
3 it, it is certainly consistent with the
4 recommendation to add a sentence, or two to make
5 sure that it's clear that the government has the
6 opportunity to seek an extension.

7 And that is within the discretion of
8 the hearing officer to grant. I don't think
9 that's a problem to add, and that's certainly
10 consistent with the recommendations. Are there
11 any questions, or comments on the staff making
12 that addition to the text in section three? All
13 right, hearing no comments, or objections, thank
14 you, Ms. Goldberg.

15 We'll make sure that that
16 clarification is made in the text of the report.
17 If you would like, I can send you some draft
18 language for review following the meeting.

19 MS. GOLDBERG: I'd be happy to review
20 draft language, thank you for considering.

21 MS. VUONO: Just to be clear, Meghan
22 mentioned drafting the text. I think, Suzanne

1 Goldberg, you're suggesting it actually be in the
2 recommendation itself? Or were you also just
3 saying move it up further in the report? I think
4 I heard that you wanted to see that language
5 directly in Recommendation 48B.

6 MS. GOLDBERG: Thanks for raising that
7 Eleanor. I do think -- I do suggest that we
8 include the language in Recommendation 48B,
9 because without it, it seems like there is no
10 discretion to seek an extension for good cause.
11 You know, if what you're telling me, or if
12 Meghan's point is that there is some overarching
13 provision that would apply to this section that
14 provides for that kind of discretion.

15 So, that in context it would be
16 duplicative to provide that here. Then it may
17 not be necessary, but if that doesn't exist, I do
18 encourage us to make explicit in the DAC-IPAD's
19 recommendation, that there is that option.

20 MS. VUONO: And I see Judge Grimm has
21 his hand up, maybe he wants to weigh in on that.

22 HON. GRIMM: I think it's a good

1 suggestion. I just want to make sure that we're
2 clear that the good cause standard be in there.
3 So, it might very well be that they can't show
4 what the evidence is within ten days, because the
5 witness is deployed, or something, and they need
6 time to do it.

7 That would be a petition within ten
8 days in which they say we would like an extension
9 of 30 days, or 90 days in order to interview the
10 following witness who has been deployed, and then
11 the preliminary hearing officer would have the
12 opportunity to evaluate that, and determine
13 whether there was good cause.

14 And I think if that's what we all
15 agree with, which it sounds to me that we do, the
16 good cause standard for extending the length of
17 time to provide the evidence to be reconsidered
18 is best served in the actual recommendation
19 itself. So, I agree, I think Ms. Goldberg's
20 suggestion is an excellent one.

21 MS. PETERS: Okay, with that
22 suggestion, Recommendation 48B, subparagraph one

1 where it says trial counsel, within ten days of
2 receiving the preliminary hearing officer's
3 report, or longer upon a showing of good cause,
4 petitions the preliminary hearing officer to
5 reopen the Article 32 preliminary hearing stating
6 the nature of the newly discovered evidence, and
7 the reason it was not previously presented.

8 HON. GRIMM: I think the ten day
9 requirement to file the petition is fine, it's
10 just that in that petition it would have to
11 establish good cause to reopen, if it was going
12 to be longer than -- I mean, you may have where
13 they can actually provide the evidence, and say
14 there was five people, but we didn't put their
15 declarations, and here they are, we move to
16 reopen.

17 But we don't want -- as long as it's
18 clear that they have a ten day window in which to
19 either provide the information that's requested,
20 that this is the newly discovered evidence, and
21 here's why we didn't include it the first time.
22 Or say this is what we think the additional

1 evidence will be, but we are not able to provide
2 it to you until X number of days.

3 And that would be what would have to
4 have good cause, would be evaluated by the
5 preliminary hearing officer for good cause. I
6 don't think that the good cause requirement says
7 we'd like another 90 days to petition to do this.
8 Is that what we're saying?

9 MS. GOLDBERG: This is Suzanne
10 Goldberg again, and I defer to others who have
11 more familiarity with this process than I do.
12 The question that came to mind was whether trial
13 counsel learns of newly discovered evidence after
14 11 days, or 15 days, are they foreclosed from
15 moving forward with a proposed prosecution
16 because they didn't have access to the evidence
17 at that time?

18 If that's not foreclosed, then I very
19 much agree with Judge Grimm's point, that having
20 ten days in which to flag that the prosecutors
21 think there may be incoming evidence makes sense,
22 but I'm wondering about that space after the ten

1 days when the evidence is discovered, if there's
2 provision for trial counsel to flag that for the
3 preliminary hearing officer, or the other
4 authority who will be considering this.

5 MS. TOKASH: This is Meghan Tokash, I
6 think we also have to be mindful that there is
7 the ultimate tool that prosecutors may use in
8 their discretion, and that is if the Article 32
9 hearing officer says no probable cause, and if
10 the special trial counsel, and, or judge
11 advocates, advising convening authorities agree
12 that that is the end of the life of those
13 particular charges, those charges can always be
14 repreferred with the new evidence that is found.

15 I think this is raising a really good
16 point, Suzanne, because if that's not clear
17 enough in the report that that is a tool in the
18 trial counsel toolbox, then maybe we need to
19 state that more strongly.

20 MS. GOLDBERG: This is Suzanne
21 Goldberg again. I think it came across to me
22 that the government could come back, but I wonder

1 whether it is appropriate to incorporate that
2 point into the recommendation in some way, so
3 that the point isn't lost when Congress, or
4 others may be looking at the recommendations, and
5 not necessarily reading the full report.

6 I do think the point is recognized
7 further up, so again, I'm sensitive to that you,
8 and others have dug into this for far longer than
9 I have, but it did jump out at me as something
10 that we wanted to be sure to pin down here.

11 MS. TOKASH: I think it's incredibly
12 important, and a critical point, because if you
13 are raising it, Suzanne, we want this to be very
14 clear to the public, the Congress, the Secretary
15 of Defense, and I think this is very easy that we
16 can add a sentence to the recommendation flagging
17 that this is always an option.

18 So that even if the ten day window
19 passes, that if evidence is discovered beyond
20 those ten days, the government always has in its
21 power, the ability to be able to reprefer
22 charges, and bring the case again before the

1 preliminary hearing officer.

2 MS. VUONO: And I think, Meghan
3 Tokash, and Ms. Goldberg, to your point, that's
4 exactly what is done in the executive summary.
5 Because what happens, these recommendations were
6 written, I believe you all voted on these back in
7 March. And so these points have been made, and I
8 think we can make the point effectively if we add
9 that sentence that is directly in the executive
10 summary of this recommendation.

11 That says the Article 32 preliminary
12 hearing officers know probable cause
13 determination is without prejudice to the
14 government, we just add that to Recommendation
15 48B, and I think that may address your important
16 point.

17 MS. GOLDBERG: This is Suzanne
18 Goldberg. Thank you, Eleanor, I think that would
19 be very helpful. I also think the good cause
20 point that we were discussing before with Judge
21 Grimm would also be an important clarification.

22 MS. TOKASH: Great, thank you.

1 MS. PETERS: Okay, the Recommendation
2 48B would then add a sentence saying that
3 additional time may be granted upon a showing of
4 good cause, and we can work that into number one.
5 But that is a separate clause from the within ten
6 days of receiving the report the trial counsel
7 would petition the preliminary hearing officer.

8 Within ten days, they'd petition
9 stating the newly discovered evidence, or they
10 provide good cause to provide their petition at a
11 later date. Is that the opportunity that you
12 would like, Ms. Goldberg?

13 MS. GOLDBERG: Yes, I think that that
14 is the one that both Judge Grimm, and I were
15 talking about. That there may be some
16 circumstances where the evidence itself cannot be
17 presented within ten days fully, and to provide
18 some good cause based breathing room seems
19 important there.

20 MS. PETERS: With that context for an
21 amendment to Recommendation 48B, can we take up
22 that revision at the end of this meeting if the

1 committee is ready to proceed with a vote at that
2 time, we can read into the record, the amendment,
3 48B, when we revisit the report as a whole at the
4 end of this meeting. Would that suffice for all,
5 Chair Smith, and Ms. Tokash, everyone?

6 Okay, I'm seeing head nods. Thank
7 you, are there any other comments, or questions
8 on that point, on Recommendation 48B, and the
9 amendment? All right, hearing none, and I heard
10 -- I didn't see any other hands raised on any
11 other general comments, or specific comments on
12 other portions of section three, Article 32. So,
13 I just want to make sure we've heard everybody if
14 anyone had any comments, or questions on some
15 other aspect of that section.

16 COL BOVARNICK: I thought Ms. Goldberg
17 mentioned the (audio interference) one-time
18 option, are you going to address that next?

19 MS. PETERS: I'm sorry, Colonel
20 Bovarnick, I'm having trouble hearing that on my
21 end, can you repeat that?

22 COL BOVARNICK: Ms. Goldberg mentioned

1 she was concerned about whether there's just a
2 one-time option, and I don't know if you were
3 going to address that now, or later.

4 MS. VUONO: Yeah, that was the point
5 about adding an extra sentence to Recommendation
6 48B, that it's without prejudice to the
7 government to bring the charges. So, there's two
8 changes to 48B. One, the good cause standard
9 shown for an extension within ten days, and then
10 an overall statement, and the recommendation that
11 a no probable cause finding is without prejudice
12 to the government.

13 Using the same sentence that's in the
14 executive summary, I believe is what the approach
15 was. So, we can do a wholesome vote on that at
16 the very end.

17 MS. PETERS: Okay, any other
18 comments?Hearing none, moving on to section four,
19 page 26 of the draft report. Section four is
20 titled establishing uniform prosecutions
21 standards in Appendix 2.1 Manual for Courts-
22 Martial, and training the services. So, this
section contains

1 the policy analysis supporting the need to
2 establish prosecution standards in the military.

3 In this updated draft, the primary
4 change was the decision not to include excerpts
5 from the draft Appendix 2.1 that is in our
6 appendix to this report. But instead just to
7 direct the reader to the draft language for
8 uniform prosecution standards that is attached as
9 Appendix G to this report. So, we took out a
10 text box that was in a previous draft.

11 It really became a little bit
12 confusing for the reader, because it was an
13 excerpt without a lot of context. It's better
14 read in the context of the entire proposed
15 Appendix 2.1. And so, to avoid that confusion,
16 taking out the text box was the staff's best
17 solution from our perspective.

18 Does anyone want to discuss in general
19 how proposed changes to Appendix 2.1 are
20 addressed in this section? Section four of the
21 draft report. Okay, General Schwenk?

22 BGEN(R) SCHWENK: Yes, thank you. So,

1 Recommendation 49 says in the second sentence,
2 these revisions should provide that special trial
3 counsel refer charges to a general courts-
4 martial, and the same for recommendations to
5 convening authorities limited to a general
6 courts-martial. But Recommendation 50, which
7 talks about the training on the standards that 49
8 talks about, doesn't have that limitation of
9 general courts-martial.

10 It just says in line four, the
11 principle of that referral is appropriate only if
12 these people find that there's sufficient
13 evidence. So, seems to me that's inconsistent,
14 and my knowing that I voted against
15 Recommendation 48 last time, because I thought it
16 should apply to special courts-martial, I will go
17 down with the ship yet again, and say I think
18 that 49, and 50 should be consistent.

19 And they should talk about prosecution
20 standards for any courts-martial, not just
21 prosecution standards for general courts-martial,
22 and no prosecution standards for special courts-

1 martial. So, that's my comment.

2 MS. PETERS: Is there any comment, or
3 discussion first on -- well, I think if your
4 recommendation -- are you making a recommendation
5 to change Recommendation 49, and should we
6 revisit that issue before looking at your
7 suggestion on Recommendation 50?

8 BGEN(R) SCHWENK: Well, I guess I'm
9 just pointing out that it seems to me that
10 they're inconsistent with one another. And that
11 49 is limited to developing prosecution standards
12 only regarding referral to a GCM. But 50 talks
13 about referral without that limitation, so
14 arguably the training would be broader than the
15 standards. And my solution, from my perspective
16 is that we should not have the limitation in 49.

17 If we're going to have prosecution
18 standards, they should be prosecution standards
19 for courts-martial. Not prosecution standards
20 just for general courts-martial. So, I would
21 amend only Recommendation 49, and I would just
22 get rid of the to a general courts-martial

1 language both places it appears in 49.

2 MS. TOKASH: This is Meghan Tokash, I
3 agree with Jim Schwenk, that if we are making
4 overarching recommendations with respect to
5 uniform prosecution standards for the Department
6 of Defense, and we are calling out in our report
7 the promotion of uniformity, and consistency,
8 that keeping them consistent is critically
9 important.

10 And I guess I would also flag, or
11 raise if everybody is tracking what Jim Schwenk's
12 point is here for those members of the committee
13 who might not have practitioner background in
14 this area. If it's confusing, Meghan, and
15 Eleanor can, probably more eloquently than I,
16 state the problem, or the issue.

17 MS. GOLDBERG: It would be helpful to
18 have a sentence, or two of background, at least
19 for me, I can't speak for others.

20 MS. VUONO: And should we hear from
21 Judge Grimm, and Judge Walton on this before we
22 jump into the background?

1 HON. GRIMM: Reggie, will you first?
2 If you go ahead, and go first, and I'll follow
3 you.

4 HON. WALTON: Yeah, I just wanted to
5 say I agree with General Schwenk, and Ms. Tokash,
6 I agree with the recommendations they make about
7 the changes.

8 HON. GRIMM: Yeah, I agree too with
9 General Schwenk's recommendation. Prosecution
10 standards should be the same for any kind of a
11 courts-martial, even if the effect of the
12 recommendation of the preliminary hearing
13 examiner, or officer only deals with requirements
14 of going forward for a general courts-martial.
15 The standard should be the same, I think that's a
16 good recommendation.

17 MS. VUONO: So, Meghan Peters, it
18 seems to me unless there's any disagreement from
19 the group, rather than -- the suggested change to
20 49, and 50 would simply be to delete the word
21 general, so that at all times these prosecution
22 standards refer to disposition -- to the special

1 trial counsel referring charges to courts-
2 martial, and judge advocates recommending that a
3 convening authority refer charges to courts-
4 martial.

5 And then just remove the word general
6 both in Recommendation 49, and 50, and that
7 solves the problem.

8 MS. PETERS: And Eleanor, the floor is
9 yours to answer Ms. Goldberg's question with
10 respect to the different levels of courts-
11 martial.

12 MS. GOLDBERG: Suzanne Goldberg here,
13 it's okay, I think I have enough general sense,
14 and what our colleagues on the committee have
15 said makes sense to me. I do have a different
16 point slash question to raise about this section
17 at the appropriate time.

18 MS. PETERS: Okay, I will add as
19 background that I think the staff's approach was
20 to maintain consistency, and in that
21 Recommendation 48 addressed general courts-
22 martial, and we stuck with that for 49, and 50

1 thinking we could maintain that. We are talking
2 about general courts-martial, however this
3 discussion opens up, it's absolutely possible,
4 reasonable, and appropriate.

5 So, we'll take in the suggestion,
6 we'll make the amendment. It seems like the
7 problem is readily solved in the wording of
8 Recommendation 49 by deleting general from the
9 fourth line. And as result, Recommendation 50
10 wouldn't need a textual change, because it says
11 in the middle of the fourth line referral is
12 appropriate, and it doesn't specify any
13 particular courts-martial.

14 General Schwenk, I think that is what
15 would make it consistent, but does that appear to
16 address your concern, at least as to the wording,
17 and scope, and we will make conforming textual
18 edits

19 BGEN(R) SCHWENK: Yeah, it works for
20 me other than in 49 general is on line four, as
21 you mentioned, but also line six.

22 MS. PETERS: I see that, noted, thank

1 you. Ms. Goldberg? Anybody else?

2 MS. GOLDBERG: I have just a separate
3 topic question in this section. One comment, one
4 question. The question is in recommendation 49,
5 as I think we agreed to earlier, that the
6 Secretary should align the appendix to align with
7 the prosecution principles contained in the
8 guidance of the U.S. Attorney General with
9 respect to disposition of federal criminal cases.

10 I wanted just to ask how often that
11 guidance changes, and when I was reading this,
12 and reflecting on it, I wanted to just be aware
13 of the extent to which we might be tying the
14 prosecution principles to something that changes
15 relatively frequently, or might be susceptible to
16 different kinds of pressures to change, and don't
17 have a recommendation, or suggestion, or even a
18 view that we should change what's here.

19 I just wanted to check with those who
20 were more deeply involved whether you had
21 considered that, and found that those principles
22 -- that guidance is stable enough that there

1 wouldn't be concern.

2 MS. VUONO: Meghan Tokash can speak to
3 that.

4 MS. TOKASH: If that's okay, as a
5 practitioner, my day job at least, using the
6 Justice Manual, the federal principles of
7 prosecution that are contained in the Justice
8 Manual Section 9-27.001 (audio interference) that
9 is the overarching guidance for prosecutorial
10 decision making policy guidance.

11 Those are very stable, and do not
12 change. However, the Department of Justice does
13 push out periodic updates when there are
14 statutory changes that affect, and impact the
15 department. Or even policy guidance, so by way
16 of example, the attorney general's guidance for
17 victim witness assistance went into effect in
18 March of this year.

19 And so, the Justice Manual had a
20 review to make sure that if there were any
21 changes from the attorney general's guidance with
22 respect to the policy guidance on victim witness

1 assistance, if they needed to be incorporated in
2 the Justice Manual, they were incorporated as
3 such.

4 But in terms of the purpose of the
5 federal principles of prosecution,
6 implementation, modifications, and departures,
7 and the actual decision making guidance, those
8 remain almost solidly stable, and have done
9 basically since their existence.

10 MS. VUONO: The only other addition I
11 would add is that that is the direction from
12 Congress to the Secretary of Defense, to create
13 this guidance in accordance with the Justice
14 Manual. So, while it may not change very
15 frequently, and as it changes, we're supposed to
16 be aligned in that approach, as far as it's
17 appropriate for the military.

18 MS. GOLDBERG: Thank you for that. I
19 have one other, just a warning point, but it's
20 somewhat substantive, so I want to note it. It's
21 on page 28 in the paragraph called problems for
22 victims. And I appreciate the addition to the

1 paragraph here, and am raising this comment in
2 this context only because perhaps some colleagues
3 might see it as substantive.

4 There are several sentences that
5 describe the benefits to victim, and the burdens
6 of trial preparation including that victims may
7 find the process daunting. The next sentence is
8 the experience of an acquittal may thus cause a
9 victim to regret reporting, may cause emotional
10 devastation, and may encourage them, and others
11 from reporting other crimes.

12 I want to suggest that we remove the
13 thus there, because there are a lot of reasons
14 why a victim might not report if the process --
15 if their experience of the process is not a
16 relatively positive one, even if there is a
17 conviction. There's also some research that as
18 long as somebody feels the process is fair, they
19 will accept the results, and feel relatively good
20 about the process.

21 That is that the only -- the effect of
22 acquittal, or conviction is not the only factor

1 that affect's a victim's experience of a criminal
2 prosecution, or participating in one. So, my
3 suggestion to delete the thus, or change that
4 wording slightly is in an effort to avoid
5 suggesting that the acquittal alone may cause
6 regret.

7 It may, but it is not necessarily --
8 the point in the prior sentences, may cause
9 regret even if there's a conviction, and there's
10 just more to it. This is quite a complicated
11 area, as I know several colleagues on this
12 committee know. So, I'm not aiming towards myth
13 right here, but wanted to flag the issue, and
14 suggest at a minimum deleting thus will help with
15 my concern.

16 MS. PETERS: All right, staff has
17 noted the change, that's clear. And we want to
18 be clear in this section, and not connect ideas
19 that shouldn't necessarily be connected. Thank
20 you. Any other discussion on that paragraph on
21 page 28? Okay, thank you, Ms. Goldberg. So,
22 that, we are within Section four.

1 I just want to note that in this
2 section we also highlighted in the discussion on
3 training, we have made sure to highlight the fact
4 that the training on uniform prosecution
5 standards should be for all trial counsel, and
6 convening authorities for all offenses, both
7 covered offenses, and non-covered offenses.

8 So, we were trying to scope that as
9 broadly as possible in the description of the
10 training needed on uniform prosecution standards.

11 I just wanted to flag that that change has been
12 made in the body of the report there. Any other
13 comments, or questions on Section four? All
14 right, hearing none, I'll move onto the
15 appendices, and just have a few observations, and
16 notes to make for the group. All right, so --

17 BGEN(R) SCHWENK: Meghan, on that
18 training section, you have the general courts-
19 martial again, I hadn't noticed it, but it's
20 there.

21 MS. PETERS: Thank you. We're making
22 those conforming edits throughout, but that's

1 really helpful, thank you General Schwenk. Okay,
2 moving onto the appendices for the report. Most
3 of our appendices are standard, or typical for a
4 DAC-IPAD report, where we show all our work, and
5 provide our background research. But for today's
6 discussion, if possible we'd like to focus on
7 Appendices F, and G.

8 Turning to Appendix F, it's a proposed
9 amendment to Article 32 of the UCMJ. Now, we as
10 a staff did not have access to a legislative
11 drafter for the recommendation to amend Article
12 32, but rather than attempt our own draft of
13 legislative text, Appendix F provides Congress
14 with draft language that could be useful in
15 amending Article 32 to implement the DAC-IPAD's
16 recommendations.

17 Any comments, or questions on that
18 proposed amendment for Article 32 in Appendix F?

19 MS. TOKASH: This is Meghan Tokash, I
20 just want to thank the staff for drafting that.
21 I know that we were at a disadvantage, because we
22 did not have access to a legislative drafter. If

1 I learned anything from being a member of the
2 independent review commission, it was that if it
3 is not in the report, it is as if it never
4 happened.

5 So, that is why I felt very compelled
6 to make sure that we at least have a committee --
7 that we as a committee take a stab at proposed
8 drafting language. I know that we are not
9 legislative drafting experts, but I think that it
10 is important, and what you have captured in this
11 appendix captures the spirit of why we want to
12 propose this legislative change, so thank you.

13 MS. PETERS: Okay, this is Meghan
14 Peters. The next appendix for discussion is
15 Appendix G, which is the proposed revision to
16 Appendix 2.1 of the Manual for Courts-Martial,
17 disposition guidance. So, we have addressed your
18 past conversations at previous meetings about the
19 proper use of the word only, and how the language
20 in the proposed revision to Appendix 2.1 should
21 be used to emphasize the right points about
22 prosecution standards.

1 So, if you turn to page four, Appendix
2 21, and look at section 2.3, that should be on
3 page four. If you look at paragraph 2.3 for the
4 referral standard, the word only has been shifted
5 to later in the sentence to emphasize that a
6 referral authority should refer, but only if they
7 believe the admissible evidence will probably be
8 sufficient to obtain, and sustain a conviction.

9 And this section also includes the
10 requirement within the section in the subsequent
11 paragraph that in order to evaluate evidence, it
12 should be done through the lens of an unbiased
13 fact finder. So, I just wanted to highlight that
14 that language is now in paragraph 2.3. I'm going
15 to also raise General Schwenk's point.

16 And point the members agree on that
17 when discussing prosecution standards, the
18 language right now says referral to a general
19 courts-martial only if they believe the evidence
20 would be sufficient to obtain, and sustain a
21 conviction. But I believe the conforming edit
22 needs to be made to here to delete the word

1 general, and discuss referral to a courts-
2 martial. Yes, Ms. Bashford? I can't hear you
3 just yet.

4 MS. BASHFORD: The problem with
5 changing these from general to just courts-
6 martial, I think now we're talking about special
7 trial counsel only in this 2.3. Maybe I've
8 completely misread it, but special trial counsel
9 either accept the case, or reject the case. I
10 don't think they ever refer it to anything --
11 they can't refer it back to a regular courts-
12 martial, right? Doesn't it have to be a general
13 courts-martial?

14 MS. PETERS: No, they can refer to any
15 courts-martial type. The jurisdictional
16 limitation for them just happens to be in the
17 UCMJ that only general courts-martial have
18 jurisdiction for adult victim, and child victim
19 penetrative sexual offenses. So, in any case, no
20 one can refer those offenses to anything other
21 than a general courts-martial.

22 But this section is intended to apply

1 to, as drafted, special trial counsel, and judge
2 advocates who advise convening authorities who
3 have to make a recommendation. And so, special
4 trial counsel have the ability to refer the case
5 subject to those jurisdictional limitations to a
6 special, or a summary, they could. And judge
7 advocates can obviously recommend the same.

8 Are there any other questions, or
9 comments on the effect, or the need to delete the
10 word general from this paragraph 2.3? All right,
11 hearing no further comment, the staff will make
12 that edit, and treat it as a conforming edit.

13 I'd like to also turn to page five of appendix
14 2.3, or paragraph 2.3. There's an additional
15 comment in, it looks like the top paragraph on
16 page five.

17 There was a comment at a previous
18 meeting to add back in an example paragraph that
19 explained how one might apply the prosecution
20 standard in a given case. And so, that example
21 paragraph is there for you in the margin, it has
22 not changed. But the suggestion was to add that

1 back in, I just want to make sure you had an
2 opportunity to discuss that.

3 Or say whether you wanted it in, or it
4 should come out for any reason. But subject to
5 any particular suggestions, the staff can accept
6 the previous suggestion, add that paragraph back
7 in, it reads for example in a case involving a
8 highly decorated officer, it might be clear that
9 the evidence of guilt viewed objectively by an
10 unbiased fact finder will probably be sufficient
11 to obtain, and sustain a conviction.

12 If the special trial counsel, or judge
13 advocate might reasonably doubt based on the
14 circumstances that the courts-martial panel would
15 convict in such a case, despite the negative
16 assessment of the likelihood of a guilty verdict
17 based on factors extraneous to an objective view
18 of the law, and the facts, the special trial
19 counsel, or judge advocate may properly it is
20 appropriate to refer the case.

21 And allow the military justice process
22 to operate in accordance with the principles set

1 forth here. Is there any objection to adding
2 that back in to the appendix?

3 MS. TOKASH: This is Meghan Tokash. I
4 think I agree with it being added back in. I
5 think it aligns with the example that's in the
6 justice manual, and I think it lifts up a very
7 important principle that this committee wants to
8 make sure that we're putting forward. That this
9 is not about winning, or losing cases when making
10 a decision.

11 And the Justice Manual's comment
12 section for their example says where the law, and
13 facts create a sound prosecutable case, the
14 likelihood of an acquittal due to unpopularity of
15 some aspect of the prosecution, or because of the
16 overwhelmingly popularity of the defendant, or
17 their cause is not a factor prohibiting
18 prosecution.

19 So, these are things impermissible to
20 consider, and I think having the example is
21 helpful.

22 MS. GARVIN: Agree that having an

1 example is helpful. This particular one though,
2 I think we -- I like Meghan's wording that's
3 popularity, or lack of popularity better. But
4 here we're kind of saying that we don't trust
5 panels to do the right thing if -- in the case of
6 a highly decorated officer. Do we really want to
7 be putting that out as our example?

8 MS. GOLDBERG: This is Suzanne
9 Goldberg, and I appreciate both of those points.
10 Just in response to Martha's point first, I don't
11 read this as saying that. I do read this as
12 guarding against the risk of prejudice operating
13 within a panel, which is always a possibility,
14 and I don't see it as an accusation, or a
15 negative comment on panels generally.

16 If others read it that way, I'm happy
17 to revisit my views, but it's not how it comes
18 across to me, and I do think it's a serious
19 concern based on what I've heard in these
20 conversations, and elsewhere. I'm noting, not
21 asking for a change, but I do note that if a
22 trial counsel, or judge advocate believes that

1 there is sufficient evidence to obtain a
2 conviction if that evidence is viewed objectively
3 by an unbiased fact finder in most circumstances,
4 that person should proceed.

5 And I believe we talked last time
6 about whether that should be a may, or a must,
7 and I understand the reasons for keeping this at
8 a may, because there are many reason why we would
9 want a trial counsel, or a judge advocate to
10 exercise discretion that have nothing to do with
11 the possible bias of a panel.

12 I just note again, I want to be clear
13 at least for the record here that there are
14 legitimate reasons for a trial counsel to decide
15 not to go forward, and the way in which I read
16 this particular example is to try to clear away
17 the reasons that would be less well founded for a
18 decision, the exercise of discretion not to
19 pursue it.

20 MS. VUONO: So, just to summarize,
21 you're in agreement with adding the paragraph
22 back in then?

1 MS. GOLDBERG: Correct, I think the
2 paragraph makes an important point, and I think
3 that given that Meghan Tokash said there is a
4 kind of analog paragraph in the federal criminal
5 guidance, it seems like there's foundation for
6 it. But even without that, this seems to make a
7 very important point in a context in which
8 hierarchy is quite significant, and might affect
9 decision making.

10 MS. TOKASH: And if I may, this is
11 Meghan Tokash again, I was going to suggest at
12 the end of our discussion of the appendices
13 including as one additional appendix, just so the
14 reader doesn't have to go looking for it, but the
15 relevant provisions of the Justice Manual 9-
16 27.001 through the section that goes through 330.
17 So, that is the preface through selecting
18 charges.

19 Just be added as an appendix, so that
20 way the reader can cross reference, because
21 really, the federal principles of prosecution,
22 trying to mirror that, it may be helpful for the

1 reader. But we can talk about that at the end.
2 In any event, I just wanted to flag that, because
3 in the Justice Manual, there is that very good
4 example, I think, in the commentary section.

5 About where the law, and facts create
6 a sound, prosecutable case, the likelihood of an
7 acquittal due to unpopularity of some aspect is
8 not a factor prohibiting prosecution. And it
9 goes on to say that in such a case, despite the
10 prosecutor's negative assessment of the
11 likelihood of a guilty verdict based on factors
12 extraneous to an objective view of the law, and
13 facts.

14 The prosecutor may properly conclude
15 that it is necessary, and appropriate to
16 commence, or recommend prosecution, etcetera,
17 etcetera. So, I think that would be helpful, I
18 think for that just to be a reference. Thank
19 you.

20 MS. VUONO: And before jumping in with
21 General Schwenk, just to summarize, Ms. Tokash,
22 you're proposing that we create, just insert one

1 extra appendix, make it right, and then move the
2 rest down, so that it's just a copy of the
3 Justice Manual provisions that are relevant to
4 prosecution standards, include them as Appendix
5 J, and then the reader doesn't have to go on the
6 internet, and find them?

7 MS. TOKASH: Yes, that's my proposal.
8 So, essentially Sections 9-27.001 through 9-
9 27.330. And it could also be used for future
10 recommendations as the offices of the special
11 trial counsel develop, and grow.

12 MS. VUONO: And General Schwenk?

13 BGEN(R) SCHWENK: Yeah, I agree, I
14 think that's a good idea that Meghan had. I
15 don't know, for what it's worth, the first line
16 of that paragraph we're now going to add back in
17 that says a highly decorated officer, back in my
18 day it was a highly decorated enlisted person
19 that was more bullet proof.

20 Because the wide perception in the
21 Marine Corps was out of Vietnam, all the officers
22 got taken care of. But you really had to be

1 special as an enlisted member, enlisted Marine to
2 get a high decoration. So, I would say service
3 member instead of officer.

4 HON. GRIMM: I agree.

5 MS. PETERS: Okay, so are there any
6 other comments on that? So, we will make to that
7 paragraph, when it comes back in, we will change
8 officer to service member, we will change may in
9 the last sentence to should, so it reads --

10 MS. VUONO: I actually heard that the
11 may -- Ms. Goldberg wasn't suggesting that we
12 change may to should.

13 MS. PETERS: Okay, so we can leave may
14 in there. It'll still be may properly conclude
15 it's appropriate to refer. Is that accurate?
16 That's correct, Ms. Goldberg?

17 MS. GOLDBERG: That's correct, I just
18 note that (audio interference) is a front word
19 there, I don't have a better suggestion, and I
20 hope the example helps point in the direction of
21 the context of the way in which we believe this
22 should be understood.

1 CHAIR SMITH: This is Karla Smith. I
2 think that the may with the addition of Appendix
3 J, that Justice Manual addition should make it
4 clear that that's what the committee is saying.

5 MS. VUONO: And General Schwenk, you
6 had one more suggestion when it came to
7 Appendices?

8 BGEN(R) SCHWENK: No, I just forgot to
9 put my flag down. Karla's working with me on
10 that, but I'm not doing very well.

11 CHAIR SMITH: Yes, I told him to put
12 his hand down.

13 MS. PETERS: I don't see any other
14 hands, but are there any other comments on the
15 proposed Appendix 2.1? Okay, without hearing any
16 further comments on that appendix, those are all
17 the items that we have to bring to your attention
18 today. Are there any other topics, or questions
19 before I turn this over to Chair Smith for a
20 vote?

21 And I note that as we go through that,
22 there are changes, and additions to note in the

1 process of voting, so I can work through that
2 with you, Chair Smith. But I turn it over to you
3 at this point.

4 CHAIR SMITH: Well, real fast, there's
5 a hand up from Judge Grimm.

6 HON. GRIMM: I mean if we're going to
7 get ready to vote, I just wanted to say, I want
8 to make sure the record reflects the remarkably
9 hard work of our chair, Ms. Tokash in terms of
10 getting through all of these very significant
11 considerations, the helpfulness of all of the
12 committee members as we progress along that have
13 made it stronger, and the staff who, as always
14 take our sows ears, and turn them into silk
15 purses.

16 MS. GOLDBERG: I have a hand up as
17 well on a substantive point that I missed
18 flagging, but want to first echo Judge Grimm's
19 appreciation for all who put in many hours of
20 leadership work, thinking, and more on this. And
21 apologies for raising this late, I wanted to just
22 note on page six of Appendix B, under

1 inappropriate considerations, A refers to the
2 accused, or victim's race, ethnicity, etcetera,
3 includes gender, and sexual orientation.

4 I don't know what the particular non-
5 discrimination provisions are that the Defense
6 Department sets out that this may key into, but
7 gender identity is relevant here, so perhaps
8 gender, including gender identity would be the
9 way to put that. Others here may have other
10 suggestions, but that jumped out to me, and I
11 apologize for not flagging it sooner.

12 I think when I looked at this
13 originally I read it as gender subsuming gender
14 identity, but in this moment think that that may
15 not be sufficiently clear.

16 MS. PETERS: Okay, so that's an
17 addition to paragraph 2.6, inappropriate
18 considerations, subparagraph A, the accused, or
19 victim's race, ethnicity, religion, gender,
20 including gender identity, sexual orientation,
21 national origin, lawful political association
22 activities, or beliefs.

1 MS. GOLDBERG: That would be my
2 suggestion.

3 MS. PETERS: All right, any comments?
4 The staff will make that suggested edit in the
5 proposed Appendix 2.1 paragraph 2.6. All right,
6 thank you, Ms. Goldberg.

7 CHAIR SMITH: Okay, so first just
8 reiterating what has already been said. Thank
9 you so much to Ms. Tokash for her work as chair,
10 as well as to the subcommittee, the special
11 project subcommittee. The work on this has been
12 grueling maybe at points, clearly a lot of hard
13 work has gone into it.

14 The staff has done a remarkable job
15 making sure that the subcommittee's ideas, and
16 desires with respect to the report, as well as
17 the committee's comments have really come through
18 in this almost final product. So, obviously the
19 changes that we've discussed will be incorporated
20 into the report. I'm just thinking there was the
21 discussion of the 48B language.

22 I don't know if we were going to look

1 at that now, or Eleanor, did you want us to vote
2 on that now, or are you going to submit
3 something, or how are we going to do that? Or
4 Meghan.

5 MS. PETERS: I think that as long as
6 we're clear on what that edit would be, where the
7 commas, etcetera go, the staff can work that out,
8 but I can read that into the record now for the
9 vote.

10 CHAIR SMITH: Sure, perfect.

11 MS. PETERS: So, I can read the
12 changes to Recommendations 48A, and B, and 50 for
13 purposes of inclusion in the report along with
14 all of the other conforming edits noted, and
15 edits to appendices.

16 CHAIR SMITH: Okay, perfect.

17 MS. TOKASH: So, this is Meghan
18 Tokash. So, would we then be having at first just
19 a vote on the amended recommendations, and then
20 moving onto the report voting?

21 MS. PETERS: That would be clear for
22 the record, absolutely.

1 MS. TOKASH: Okay, thank you very
2 much.

3 MS. PETERS: Okay, Chair Smith, can I
4 go through, and I'm going to summarize the
5 additional language needed to 48A to get the
6 essence of the changes that the committee will
7 vote to adopt, and we'll go one recommendation at
8 a time, understanding we voted on these as a
9 package. But we'll vote on each recommendation
10 individually.

11 CHAIR SMITH: Sure.

12 MS. PETERS: Okay. So, DAC-IPAD
13 Recommendation 48A would read amend Article 32 to
14 provide that a preliminary hearing officer's
15 determination of no probable cause precludes
16 referral of the affected specifications to
17 courts-martial subject to reconsideration as
18 described in recommendation 48B, and without
19 prejudice to the government to prefer new
20 charges.

21 And that reflects the language already
22 in the executive summary that summarizes the

1 nature of the recommended change to Article 32.

2 CHAIR SMITH: You want us to vote on
3 that now?

4 MS. PETERS: Yes.

5 CHAIR SMITH: Okay. So, all those in
6 favor -- actually let's just, is anyone opposed
7 to that change? Hearing no opposition, that will
8 be adopted as a change.

9 MS. PETERS: All right, Recommendation
10 48B is to amend Article 32, and Rule for Courts-
11 Martial 405 to permit reconsideration of a
12 preliminary hearing officer's no probable cause
13 determination upon the presentation of newly
14 discovered evidence, or evidence that in the
15 exercise of due diligence could not reasonably
16 have been obtained before the original hearing
17 subject to the following.

18 Number one, trial counsel within ten
19 days of receiving the preliminary hearing
20 officer's report, or longer upon a showing of
21 good cause, petitions the preliminary hearing
22 officer to reopen the preliminary hearing stating

1 the nature of the newly discovered evidence, and
2 the reason it was not previously presented.

3 Number two, the preliminary hearing
4 officer shall reconsider their previous no
5 probable cause determination one time upon
6 reopening the Article 32 preliminary hearing to
7 receive the evidence as described above. After
8 reconsideration, the preliminary hearing
9 officer's determination as to whether probable
10 cause exists is final.

11 CHAIR SMITH: Subject to Ms.
12 Goldberg's point that we should also have in
13 Recommendation 48B, the sentence that this
14 determination is without prejudice to the
15 government's ability to prefer new charges. So,
16 the same sentence that you added to 48A needs to
17 be in 48B.

18 MS. PETERS: Judge Grimm?

19 HON. GRIMM: Could I just ask a
20 question? Forgive me for doing this, but the
21 notion of longer if good cause is shown, I agree
22 is correct. I think that was a good

1 modification. But I was looking as we were
2 talking at the federal rules of civil procedures,
3 and rule 60, which is the rule that allows after
4 a final judgement has been issued, the court to
5 sort of reopen.

6 It does have the sort of longer than
7 a certain number of days so long as it's not an
8 unreasonable amount of time. I just think that
9 if we could somehow have within a reasonable time
10 built in, and upon a showing of good cause, I
11 would feel more comfortable with that. Not that
12 -- I mean, I guess if it was unreasonable, you
13 could say it wasn't good cause.

14 But I just think the notion of
15 reasonableness in other rules that have tried to
16 capture this notion about we want a deadline, but
17 we recognize sometimes that deadline has to be
18 extended. There's a notion of finality, and
19 since it's without prejudice to just referring
20 them, I would just have them a little bit more
21 comfort factor, somehow the phrase reasonable
22 could be worked into that.

1 But if other people do not agree with
2 that, I'm happy to just put that in there for the
3 record, and go along with it the way it's been
4 proposed.

5 CHAIR SMITH: I agree with Judge
6 Grimm, excellent point, we don't want that to be
7 left open forever.

8 MS. GOLDBERG: Suzanne Goldberg, as a
9 former, and probably future civil procedure
10 professor who has a deep appreciation of Rule 60,
11 among other things, I like the idea, and I also
12 worry as we all do in the rule standards debates
13 that adding -- reasonable to one person is not --
14 one person's reasonable is not another person's
15 reasonable, and I worry a little bit that it
16 creates more opening for inconsistency that good
17 cause takes care of.

18 So, I personally lean against for that
19 reason, even though I completely appreciate the
20 point. I do think, like you said before, Judge
21 Grimm, at least to my reading, good cause takes
22 care of that taking an undue amount of time. So,

1 apologies for the civil procedure intervention
2 here, but that would be my view, although I
3 certainly appreciate the other point of view here
4 too.

5 CHAIR SMITH: Judge Walton, want to
6 weigh in?

7 HON. WALTON: I'm sort of conflicted.
8 I think I agree with Ms. Goldberg, but I also
9 think that you have to be concerned about stale
10 matters being brought up, and that the
11 reasonableness does at least to some degree
12 address that. But there can be obviously
13 extenuating circumstances that results in a
14 decision, or a new decision being made long after
15 maybe the initial decision was made.

16 But I think probably the good cause
17 standard does adequately cover that. So, I mean
18 I'm sort of conflicted, and I guess I probably
19 would think that we don't need to have the
20 reasonableness, and that the good cause standard
21 is adequate to cover that.

22 HON. GRIMM: I'm not prepared to die

1 in my ditch, if everybody else thinks that good
2 cause covers it, then that's good with me.

3 MS. PETERS: Any other comments?
4 Chair Smith, may I read back into the record
5 Recommendation 48B, but maybe a better version
6 that incorporates some of the concerns under Rule
7 60?

8 CHAIR SMITH: Sure.

9 MS. PETERS: Okay, so the
10 Recommendation 48B would read amend Article 32,
11 and Rule for Courts-Martial

12 405 to permit reconsideration of a
13 preliminary hearing officer's no probable cause
14 determination upon the presentation of newly
15 discovered evidence, or evidence that in the
16 exercise of due diligence could not reasonably
17 have been obtained before the original hearing
18 subject to the following.

19 One, trial counsel within ten days of
20 receiving the preliminary hearing officer's
21 report petitions the preliminary hearing officer
22 to reopen the Article 32 preliminary hearing

1 stating the nature of the newly discovered
2 evidence, that reason it was not previously
3 presented. A petition may be made after ten days
4 upon a showing of good cause.

5 Essentially we would encapsulate all
6 the concerns in an additional sentence in number
7 one there, about the timing of the petition. And
8 number two, the preliminary hearing officer shall
9 reconsider their previous no probable cause
10 determination one time upon reopening the Article
11 32 preliminary hearing to receive the evidence as
12 described above.

13 After reconsideration, the preliminary
14 hearing officer's determination as to whether
15 probable cause exists is final, and the
16 determination is without prejudice to the
17 government to reprefer charges.

18 CHAIR SMITH: All right, I don't see
19 anyone jumping in to comment, so let's go ahead,
20 and vote on that. Anyone opposed to those
21 changes to 48B? Hearing no opposition, and
22 seeing no opposition, 48B will be adopted as it's

1 written.

2 MS. PETERS: Okay, Recommendation 49
3 reads the Secretary of Defense should revise
4 Appendix 2.1 Manual for Courts-Martial to align
5 with the prosecution principles contained in
6 official guidance of the United States attorney
7 general with respect to disposition of federal
8 criminal cases.

9 These revisions should provide that
10 special trial counsel refer charges to a courts-
11 martial, and judge advocates recommend that a
12 convening authority refer charges to a courts-
13 martial only if they believe a service member's
14 conduct constitutes an offense under the UCMJ,
15 and that the admissible evidence will probably be
16 sufficient to obtain, and sustain a conviction
17 when viewed objectively by an unbiased fact
18 finder.

19 CHAIR SMITH: All right, any
20 opposition to the changes in Recommendation 49?
21 Hearing none --

22 HON. GRIMM: No opposition, I just

1 apologize to the committee, but I have to leave
2 for another meeting that I can't fail to attend.
3 I vote in favor of all of the remaining changes
4 that we have discussed today. So, if that's
5 allowed, then you have my proxy. If not, then I
6 will leave, and note vote on the remainder of it.

7 CHAIR SMITH: Okay, thank you.

8 MS. LONG: Chair, this is Jennifer
9 Long, I have the same issue as Judge Grimm, and
10 I'm in the same boat as he is, I don't object to
11 anything. I have something I can't miss at 1:30.

12 CHAIR SMITH: Okay, let me ask,
13 Colonel, how many people do we have once Ms. Long
14 signs off?

15 COL BOVARNICK: Ma'am, we still have
16 a quorum, at the end of the day we're just up to
17 Recommendation 50, but we can proceed, we still
18 have a quorum.

19 CHAIR SMITH: Okay, great, thank you.
20 Thank you, Ms. Long. All right, so I think I
21 said this, but 49, hearing no opposition, we'll
22 adopt those changes.

1 MS. PETERS: Chair Smith, for
2 Recommendation 50, there are no changes to that
3 once we make changes to 49, and approve those.
4 So, we can move onto the adoption of the report.

5 CHAIR SMITH: Okay, do we need to do
6 anything with respect to Appendix J? I think
7 there was -- no?

8 MS. VUONO: I think we can just walk
9 through the amended report as discussed on the
10 record. We've got the transcript that will add
11 Appendix J, we'll update appendix 2.1, and vote
12 on the report as it stands as amended.

13 CHAIR SMITH: Okay, great. All
14 righty, so moving on to the -- actually, Ms.
15 Tokash, do you have a proposal for the full
16 committee to adopt the pre-trial procedures
17 report as a full committee standalone report?

18 MS. TOKASH: Yes, I would like to make
19 a motion, Chair Smith, for the full committee to
20 adopt the report as a standalone report.

21 CHAIR SMITH: All right, very good.
22 Any opposition from anyone on the adoption of the

1 pre-trial procedures report as a standalone full
2 committee report? Okay. Hearing no opposition,
3 the report as amended, and discussed here today
4 will be adopted by the committee as a standalone
5 report.

6 Colonel Bovarnick, please ensure the
7 pre-trial procedures report is finalized with the
8 changes that we discussed today, and a cover
9 letter is prepared for signature by all members
10 for transmission of the final report, electronic,
11 and hard copy to the Senate, and House Armed
12 Services Committees, and the Secretary of
13 Defense.

14 Please send a draft of the final cover
15 letter to all members, and once finalized, affix
16 each member's electronic signature to the final
17 letter in the same manner as prior letters.

18 COL BOVARNICK: Chair Smith,
19 acknowledged. And I will skip the details of the
20 agenda, but the date for the next meeting is June
21 13th, and 14th, and I will send out a final agenda
22 later this week. Chair Smith, that is all I have.

1 Do you have any closing comments before we
2 adjourn?

3 CHAIR SMITH: No, just reiterating a
4 big thank you to Chair Tokash, to the
5 subcommittee, and the staff as well, as well as
6 everyone who made themselves available today to
7 participate in this meeting.

8 MS. TOKASH: I just have one request,
9 and second Chair Smith's request just -- and I
10 understand there are some budgetary concerns,
11 Colonel Bovarnick, but to the extent that we can
12 at least get some hard copies of the report for
13 HASC, and SASC, and the SecDef, and some other of
14 our stakeholders, that would be much appreciated.
15 Thank you very much.

16 COL BOVARNICK: Acknowledged, yes,
17 Ma'am, for the report we will do that.

18 CHAIR SMITH: All right, thank you.

19 COL BOVARNICK: Mr. Gruber, are you
20 still there to adjourn the meeting?

21

22 MR. GRUBER: Colonel Bovarnick, yes,

1 I am. And no additional business, so, Madam
2 Chair, I would recommend we adjourn the meeting.

3 CHAIR SMITH: Thank you.

4 MR. GRUBER: Thank you.

5 (Whereupon, the above-entitled matter
6 went off the record at 1:32 p.m.)
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This is to certify that the foregoing transcript

In the matter of: Public Meeting

Before: DAC-IPAD

Date: 05-30-23

Place: teleconference

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



Court Reporter

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