

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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PUBLIC MEETING

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FRIDAY,
JANUARY 15, 2016

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The Panel met in the Grand Ballroom,
Holiday Inn, 4610 Fairfax Drive, Arlington,
Virginia, at 9:06 a.m., Hon. Elizabeth Holtzman,
Chair, presiding.

PRESENT:

Hon. Elizabeth Holtzman
Hon. Barbara Jones
VADM (Ret) Patricia Tracey
Prof. Tom Taylor
Mr. Victor Stone

STAFF:

Colonel Kyle W. Green, U.S. Air Force - Staff
Director
Lieutenant Colonel Kelly L. McGovern, U.S. Army -
Deputy Staff Director
Nalini Gupta - Attorney Advisor
Lieutenant Colonel Glen Hines, U.S. Marine
Corps - Attorney Advisor
Kirt Marsh - Attorney Advisor
Maria Fried - Designated Federal Official

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

9:06 a.m.

1
2
3 MS. FRIED: Good morning, Panel
4 Members, this meeting is open. Happy New Year.

5 CHAIR HOLTZMAN: Thank you, thank you.

6 MS. FRIED: Thank you for being here
7 today. This is the 17th meeting of the Judicial
8 Proceedings Panel.

9 This Panel is a congressionally
10 mandated federal advisory committee. The
11 distinguished Panel Members are the Honorable
12 Elizabeth Holtzman, who serves as the Chair of
13 the JPP, the Honorable Barbara Jones, Vice
14 Admiral Retired Patricia Tracey, Professor Tom
15 Taylor, Mr. Victor Stone.

16 A biography of our Panel Members are
17 posted on the JPP website at www.jpp.whs.mil.

18 Madam Chair?

19 CHAIR HOLTZMAN: Thank you very much,
20 Ms. Fried.

21 And, good morning to everyone. Happy
22 New Year.

1 I'd like to welcome everyone to this
2 meeting of the Judicial Proceedings Panel. All
3 five Members are here today.

4 Today's meeting is being transcribed
5 and also video recorded by Army Television. The
6 meeting transcript and link to the video
7 recording will be posted on the JPP's website.

8 The Judicial Proceedings Panel was
9 created by the National Defense Authorization Act
10 for FY2013 as amended by the National Defense
11 Authorization Acts for Fiscal Years 2014 and 15.

12 Our mandate is to conduct an
13 independent review and assessment of judicial
14 proceedings conducted under the Uniform Code of
15 Military Justice involving adult sexual assault
16 and related offenses since the most recent
17 amendment to Article 120 of the UCMJ in 2012.

18 Today's meeting is devoted to
19 deliberation on issues we plan to address in our
20 February report to Congress and Secretary of
21 Defense.

22 To begin with, the Panel will

1 deliberate on Article 120 of the UCMJ. We will
2 discuss the assessment and recommendations we
3 received last month from the JPP Subcommittee to
4 determine whether and to the extent to which we
5 will accept the Subcommittee's findings and
6 recommendations and determine how to formulate
7 our report on Article 120.

8 Following our December meeting, we
9 sought comments on Article 120 and the
10 Subcommittee's report from interested individuals
11 and organizations.

12 We received an email comment from a
13 Member of the JPP Subcommittee and two
14 submissions from the Military Services, one from
15 the Deputy Assistant Judge Advocate General,
16 Criminal Law for the Navy and another from the
17 Deputy Director Community and Military Justice
18 Headquarters, U.S. Marine Corps Judge Advocate
19 Division.

20 We appreciate these submissions and
21 will consider them in today's deliberations.

22 This afternoon, the Panel will

1 continue its deliberations on the prevention and
2 response to retaliation and ostracism against
3 victims of sexual assault crimes.

4 To prepare for today, our staff
5 developed an initial draft report that summarizes
6 the information we received on retaliation. We
7 will review this draft and discuss what findings,
8 conclusions and recommendations we will include
9 in our annual report.

10 Finally, each public meeting of the
11 Judicial Proceedings Panel includes time to
12 receive comments and input from the public in
13 addition to the submissions we received on
14 Article 120, we received two written
15 contributions from Protect Our Defenders, one
16 addressing retaliation and the other addressing
17 victims access to information and privacy.

18 All written materials received by the
19 Panel Members for today's meeting and previous
20 meetings are available on the JPP's website at
21 jpp.whs.mil.

22 Thanks very much for joining us today.

1 We are ready to begin our deliberations on
2 Article 120.

3 Do we have before us the report from
4 the Panel? These are materials we received. I
5 want to make sure everybody has a copy.

6 So, I'm thinking that the way we
7 should proceed is to, unless somebody has an
8 objection, is to go through the recommendations.
9 Do we want those summarized first or should we go
10 through it recommendation by recommendation?

11 COL GREEN: Ma'am, if I could, the
12 Staff went through -- as you know, the
13 Subcommittee report last month made seven
14 recommendation for change, either to Article 120
15 through legislative change or to the Manual for
16 Courts-Martial.

17 And of the ten remaining issues that
18 the Panel had asked the Subcommittee to consider,
19 made recommendations for no change specific to
20 those recommendations, although a number of those
21 issues tie into the recommendations made by the
22 Subcommittee.

1 The Staff reviewed the Subcommittee's
2 report and summarized the recommendations that
3 the Subcommittee has made and it the Panel -- if
4 the Panel were to accept it, what would -- how
5 would that appear?

6 And so, the documents that you have
7 from 8 January 16, on the left side of your
8 folder, is a summary of those recommendations.
9 And, I mean, obviously, you know, the Panel could
10 review the Subcommittee's report and its review
11 of issues or the -- in the alternative, the
12 summary of recommendations that we built, I
13 think, covers all of the issues covered by the
14 Subcommittee as well.

15 CHAIR HOLTZMAN: Well, unless there's
16 any objection, I'm happy to proceed with the
17 summary that was prepared by the Staff. Any
18 objection?

19 HON. JONES: No.

20 MR. TAYLOR: Sounds good.

21 CHAIR HOLTZMAN: And, we could start
22 with Recommendation Number A-1. Should we do

1 this by -- Colonel Hines, do you want to
2 summarize for us? Is that how we proceed or
3 Judge Jones -- we look to you for guidance as the
4 Chair of the Subcommittee in the event you have
5 something to supplement in terms of what he's
6 going to say.

7 HON. JONES: Great. Go ahead. Go
8 ahead. Thank you, Madam Chair.

9 LTCOL HINES: So, yes, ma'am.

10 Recommendation A-1 was in response to
11 the issue with respect to whether the definition
12 of consent in Article 120(g)(8) of the UCMJ
13 should be amended.

14 And, what we've done with this chart
15 of recommendations is attempt to distill down to
16 its essence, basically, both what the JPP -- the
17 reasons that the JPP referred these issue to the
18 Subcommittee and also what the Subcommittee's
19 thought process was in support of making the
20 recommendation.

21 So, essentially, some of the witnesses
22 before you last fall and witnesses before the

1 Subcommittee stated that the definition of
2 consent can be confusing in some areas and it
3 still retains -- and this is the subject that
4 came up with the Subcommittee's deliberations
5 that the present definition, in some places,
6 contains vestiges about dated rape laws that
7 could be interpreted to require evidence that a
8 victim physically resist an attacker before a
9 fact finder could conclude that there was a lack
10 of consent.

11 And so, what the Subcommittee proposed
12 in the redlined version, it appears at page 53 of
13 the Subcommittee's report and the specific
14 recommended amended definition appears at the
15 bottom of page 54.

16 And, the Subcommittee has recommended
17 what you see there, the lined through language
18 would be removed. The underlined language in red
19 would be added to the definition.

20 And, this recommended definition
21 doesn't substantially, in my view, doesn't -- and
22 I think the Subcommittee's view, doesn't

1 substantially alter the present definition.

2 What it does is it just changes some
3 things around to clarify that resistance is not
4 required or a lack of resistance is not required,
5 but, could still be relevant evidence for a fact
6 finder to consider on the question of whether
7 there was consent or not.

8 HON. JONES: I should just say that
9 this is, in the Subcommittee's view, a modest
10 change but also one that just makes the entire
11 provision clearer.

12 It was one of the least controversial,
13 if not the least controversial, of our proposed
14 changes. And, as you stated, the point of it was
15 to just make it clearer and make certain that
16 there was no issue that resistance was required.

17 So, I don't know if anyone has any
18 questions or other comments, but that's all I
19 have to say. I agree with Colonel Hines.

20 CHAIR HOLTZMAN: Did we -- any Members
21 of the Panel have any comments?

22 Colonel, did we get any public comment

1 on this provision?

2 COL GREEN: We did, from the Marine
3 Corps. The Marine Corps was the submission
4 commenting on this and their comment said they
5 had no legal objection to the proposal but they
6 thought the change was not necessary. They
7 didn't elaborate any further.

8 CHAIR HOLTZMAN: Is there any
9 discussion on the part of the Panel?

10 MR. TAYLOR: I agree with the
11 recommendation as Judge Jones has stated.

12 MR. STONE: Yes, I agree with the
13 recommendation as well.

14 CHAIR HOLTZMAN: Okay. So, we support
15 this -- I agree and, I gather, Judge Jones,
16 you're agreeing, too?

17 HON. JONES: I certainly do, yes.

18 CHAIR HOLTZMAN: So, we have unanimous
19 support for this. Good.

20 Okay, that takes care of
21 Recommendation A-1.

22 Recommendation A-2? Colonel Hines?

1 LTCOL HINES: Yes, ma'am.

2 So, this Recommendation A-2 deals with
3 the issue that the JPP referred to the
4 Subcommittee dealing with certain defenses.

5 There was some testimony before the
6 JPP last fall and also before the Subcommittee
7 that there was some question by practitioners,
8 mostly defense counsel, as to whether under the
9 current statute consent as a defense, actual
10 consent as a defense, and mistake of fact as to
11 consent, whether either or both of those was
12 still available as defenses to an accused.

13 The Subcommittee agreed that that
14 should be clarified. The statute right now,
15 basically, is generally worded in the current
16 version, defenses are addressed at Sub F, 120(f).

17 CHAIR HOLTZMAN: Where would that be?

18 LTCOL HINES: It's on the --

19 HON. JONES: Oh, do you have one of
20 those? That'd be great. Do you have another for
21 yourself?

22 LTCOL HINES: But, essentially, it's

1 very generally worded and says an accused may
2 raise any defense available. So, it doesn't
3 specify, you know, a litany or a laundry list of
4 defenses.

5 And so, for those reasons, some of the
6 defense counsel and others came in and said we're
7 not sure whether we can raise either of these
8 defenses.

9 And so, the Subcommittee agreed that
10 there should be clarification. There was some
11 discussion on whether that should go into the
12 statute or if it could be handled in the Manual
13 for Courts-Martial.

14 The Subcommittee decided not to tinker
15 with the statute, but to clarify in Manual for
16 Courts-Martial that consent can be raised by an
17 accused as an attack on the Government's proof.
18 And that's the way it's handled now in the
19 Military Judges' Benchbook.

20 If an accused raises or if the
21 evidence raises actual consent, the military
22 judge instructs the members that it's not

1 important whether it's called a defense or an
2 attack on the proof, but essentially in practice
3 it's what we call an attack on the Government's
4 proof.

5 That should be clarified that an
6 accused can raise evidence of consent. And it
7 also should be clarified in the Manual that
8 mistake of fact as to consent is actually a
9 defense that an accused can raise where relevant.

10 And so, the Subcommittee recommended
11 that this be clarified in the Manual for Courts-
12 Martial.

13 HON. JONES: And just to put a little
14 gloss on it, there were many who didn't think
15 this was a problem at all who testified before
16 us. But, there were enough good lawyers among
17 those who testified to say that it could be
18 confusing. It was to some people and it was
19 important to make it clear that these defenses
20 were available.

21 There seemed to us to be nothing but
22 a problem that we might create if we tinkered

1 with the statute because the defense had been
2 specifically noted in the previous statute, as I
3 recall, and taken out in the current version.

4 So, were we to put it back in, that
5 could put into question whether it existed during
6 the current version which was no one's intention.

7 So, as a consequence, we decided just
8 clarify it in the Manual for Courts-Martial,
9 leave the statute as is and, again, this too was
10 very, you know, widely supported by the
11 Committee. And, we thought rather
12 noncontroversial.

13 CHAIR HOLTZMAN: Did we get any
14 comment on this, Colonel Hines?

15 COL GREEN: No, ma'am, we did not.

16 CHAIR HOLTZMAN: Colonel Green? Okay.
17 Any discussion by Panel Members on
18 this point?

19 MR. TAYLOR: I agree.

20 VADM TRACEY: I agree.

21 MR. STONE: I'm fine with it.

22 COL GREEN: Can I note for the Panel,

1 the one issue, and as I started to look at the
2 Staff's drafting in this as we're going along,
3 but the recommendation says the President should
4 amend because the report is the Secretary of
5 Defense, I believe the recommendation should be
6 worded that the Secretary of Defense should
7 propose that the President amend. So, we would
8 just change the --

9 CHAIR HOLTZMAN: Why do we have to
10 tell him that he has to propose to the President?
11 Why isn't it sufficient for us just to say the
12 President should just do it?

13 COL GREEN: Well, I mean --

14 CHAIR HOLTZMAN: It says -- I see what
15 you're saying.

16 COL GREEN: The recommendation is
17 going to the Secretary of Defense. Since the
18 report goes to the Secretary of Defense.

19 I mean if --

20 VADM TRACEY: I thought that the
21 recommendation is that the Manual for Courts-
22 Martial be amended.

1 COL GREEN: And that -- right. It's
2 just a matter of -- well, we can do that, too.

3 HON. JONES: Are you saying our
4 recommendation should go to the Secretary of
5 Defense?

6 COL GREEN: Correct.

7 HON. JONES: All of them?

8 COL GREEN: Secretary of Defense or
9 Congress, which ever --

10 HON. JONES: I see.

11 CHAIR HOLTZMAN: Right. So, it's just
12 the recommendation says the President should
13 amend it. How the President gets it is not our
14 business.

15 COL GREEN: Okay.

16 CHAIR HOLTZMAN: Congress could send
17 a statute to the President, too, for him to sign
18 just telling him to do it.

19 So, my suggestion -- I'm sorry. Your
20 proposal is that which is that you said the
21 Manual for Courts-Martial should be changed and
22 my proposal is to leave it just the way we have

1 it.

2 VADM TRACEY: I'm good with it the way
3 that it is if the Staff --

4 COL GREEN: Okay.

5 VADM TRACEY: -- finds that
6 problematic for their chain of command then just
7 take the --

8 CHAIR HOLTZMAN: Okay, so --

9 HON. JONES: Agreed.

10 CHAIR HOLTZMAN: -- we're -- so,
11 Recommendation A-2 is unanimously adopted.

12 Recommendation A-3?

13 LTCOL HINES: Yes, ma'am.

14 I believe this was Issue 3 that was
15 referred by the Panel to the Subcommittee. And,
16 the question was whether there should be a
17 definition for the term incapable of consenting
18 adopted for cases under Article 120(b) and (d).

19 The witnesses before you last fall and
20 the witnesses before the Subcommittee indicated
21 there is no definition at this time of this term
22 that is relevant in cases under Article 120(b)(2)

1 -- I'm sorry, under 120(b)(3) which says when an
2 accused commits a sexual act upon another person
3 when the other person's incapable of consenting.

4 Practitioners said this is a problem
5 because there's no instruction in the Benchbook
6 on it and there are questions from Panel Members
7 at times to the judge, "What does incapable of
8 consenting mean?"

9 And so, the Subcommittee agreed with
10 the practitioners that there should be a
11 definition of incapable of consenting.

12 And, the proposed definition appears
13 in the redline version at the top of page 55 in
14 the Subcommittee report.

15 And, the new definition would be, "A
16 person is incapable of consenting if that person
17 does not possess the mental ability to appreciate
18 the nature of the conduct or does not possess the
19 physical or mental ability to make or communicate
20 a decision regarding such conduct."

21 So, Judge Jones, I don't know if --

22 CHAIR HOLTZMAN: Did we get any

1 comments on this provision?

2 COL GREEN: Yes, ma'am.

3 CHAIR HOLTZMAN: Or on the
4 Subcommittee recommendation?

5 COL GREEN: The Marines, I believe, I
6 don't believe -- Ms. Wine-Banks commented on this
7 issue.

8 The only comment we received was from
9 the Marines and they recommended nonconcurrence
10 with this change. And, they concurred with the
11 rationale set forth in the Subcommittee Member,
12 Ms. Laurie Rose-Kepros who, in her supplemental
13 and descending commentary talked about the issue
14 with incapable of consent in the "known" versus
15 "reasonably should have known" and so she
16 highlighted that issue in the concerned raised in
17 *Alanas*.

18 And so, I think what they're saying is
19 that they concur with the rationale that she
20 talked about with that, but they didn't know an
21 alternate proposal.

22 CHAIR HOLTZMAN: Excuse me, may I ask

1 a question about that? But, that's not relevant
2 to this point right there, is it?

3 I mean Ms. Kepros' issue about
4 negligence was not relevant to this issue of
5 incapable of consenting, or am I wrong? I
6 thought that had to do with a different point.

7 COL GREEN: Yes, I'm not sure. They
8 made a recommendation specific to the proposed
9 definition of incapable of consent. How that
10 translates to what Ms. Rose-Kepros is, I'm not
11 sure, they didn't elaborate on it in their
12 submission.

13 CHAIR HOLTZMAN: Okay. Right, but Ms.
14 Kepros did not make the point about negligence
15 with regard to exactly this language that we're
16 looking at right now. Is that correct? That's
17 my only question. Okay.

18 So, we have a nonconcurrence in the
19 Marines and any Panel Members want to discuss
20 this point?

21 Judge Jones, do you want to --

22 HON. JONES: I would only say that

1 everybody seemed to want a definition with
2 respect to this -- with respect to consent. And
3 so, we thought this was an important addition or
4 change to the statute.

5 And, I think it's pretty
6 straightforward. I also recall that we were
7 guided by a recent -- was it a CAAF case? Was it
8 *Pease*?

9 LTCOL HINES: *Peace*.

10 HON. JONES: Yes.

11 LTCOL HINES: Yes, ma'am.

12 The actual Navy and Marine Corps
13 appellate case.

14 HON. JONES: Okay.

15 LTCOL HINES: It was *Peace*.

16 HON. JONES: It was actually a
17 terrifically written opinion and talked about
18 consent and we took a lot of the language from
19 that.

20 So, we also felt safe in making this
21 recommendation. We thought it was well within
22 the jurisprudence. You know, the current

1 appellate law in the military.

2 So, anyway, I certainly agree with
3 this proposal.

4 CHAIR HOLTZMAN: Any comments,
5 disagreements, questions?

6 VADM TRACEY: I'm going to agree as
7 well. But, could you just revisit for me, what
8 were the Marines' objections?

9 COL GREEN: I'll read it to you,
10 ma'am, and leave interpretation. It's hard to --
11 I don't want to overdo it.

12 But the Marine Corps concurs with the
13 rationale set forth in Enclosure 2 of the
14 Subcommittee's report supplemental and descending
15 commentary concerning Subcommittee
16 recommendations with proposed new Article 120
17 statute.

18 And, that's in her supplemental
19 commentary.

20 MR. TAYLOR: Page 74 -- 73 I mean.
21 Seventy-two, 73 she discusses it.

22 CHAIR HOLTZMAN: I was wrong, Colonel

1 Hines. I thought that Ms. Kepros' concern that
2 the "should have known" applied only to a
3 different portion, but I see she's also looking
4 at this other matter.

5 LTCOL HINES: I think what she did --
6 what she's saying, ma'am, is I think she tied
7 this question together with the Issue Number 10
8 which had to do with the mental state of an
9 accused.

10 CHAIR HOLTZMAN: Right, right.

11 LTCOL HINES: The accused should know
12 or reasonably should know.

13 And so, she, of course, she was one of
14 the three Subcommittee Members, and we'll get to
15 this in a minute, who disagreed with the majority
16 of the Subcommittee on the resolution of Issue
17 10.

18 She, in her descending comments, she
19 sort of ties those together and she doesn't like
20 the proposed definition because the greater
21 issue, she thinks, you know, that particular
22 element, that the "reasonably should have known,"

1 it's too broad and would capture a negligent
2 accused.

3 And so --

4 VADM TRACEY: She wasn't opposed to a
5 definition, she was opposed to the specific
6 definition.

7 LTCOL HINES: Yes, ma'am, correct.

8 VADM TRACEY: Okay.

9 CHAIR HOLTZMAN: And, could you
10 explain how the negligence factor creeps into the
11 proposal of the Subcommittee made? Is she
12 correct, Ms. Kepros, in her analysis?

13 I don't see that there's very much of
14 a difference on the face of it between what 18
15 USC 2242 says and what we say, what the
16 Subcommittee says.

17 LTCOL HINES: Yes, ma'am.

18 So, 2242, I think the discussion with
19 the Subcommittee was, and Professor Schulhofer
20 noted this as well, that the requirements for a
21 conviction under 2242, the Government has to
22 prove not only the act, but that the accused knew

1 of the victim's incapacity.

2 The 2242 doesn't allow conviction for
3 an accused who reasonably should have known. And
4 so, Professor Schulhofer and Ms. Kepros' point,
5 and I think Ms. Wine-Banks' now point is that our
6 statute under 120 is too broad and should be
7 substantially similar to what 2242 requires.

8 CHAIR HOLTZMAN: Okay. If you were
9 going to make it substantially to 2242, what
10 would you have to change?

11 LTCOL HINES: You'd have to get rid of
12 that language --

13 CHAIR HOLTZMAN: Which language?

14 LTCOL HINES: -- reasonably should
15 have known.

16 CHAIR HOLTZMAN: Where is that?

17 LTCOL HINES: So, that would appear --

18 CHAIR HOLTZMAN: That's what I'm
19 looking at?

20 LTCOL HINES: That would appear on --

21 VADM TRACEY: Fifty-three?

22 LTCOL HINES: Right.

1 VADM TRACEY: On page 53?

2 LTCOL HINES: Admiral Tracey's right.

3 So, 120(b) -- well, it actually
4 applies to (b)(2) and (3). So, (b)(2), commits a
5 sexual act upon another person --

6 CHAIR HOLTZMAN: Oh, knows or
7 reasonably should have known, right.

8 LTCOL HINES: -- person knows, the
9 language "or reasonably should know" in 2, she
10 would want removed, Ms. Kepros would want removed
11 and then in (3)(a) and (b), that language, or
12 reasonably should be known --

13 CHAIR HOLTZMAN: I see.

14 LTCOL HINES: -- she would want that
15 to be removed to cure that negligence problem.

16 CHAIR HOLTZMAN: Okay. And, that's in
17 essence the position of the Marine Corps on this?
18 Is that fair to say or do we just -- can't get
19 that far?

20 VADM TRACEY: I think that is what
21 they're concurring, ma'am.

22 LTCOL HINES: Well --

1 CHAIR HOLTZMAN: Okay.

2 LTCOL HINES: I mean they've limited
3 their comment, ma'am, to they concur with Ms.
4 Kepros' rationale. So, I think you could read
5 that statement and say that they agree with her
6 with respect to this proposed definition.

7 VADM TRACEY: So, is it -- I'm not
8 sure this is right, but is it correct that
9 there's the question of the definition and
10 there's a second issue of the conditions in the
11 items 2 and 3 under (b)?

12 LTCOL HINES: Yes, ma'am.

13 So --

14 VADM TRACEY: And, is it inconsistent
15 to work the definition and readdress the content
16 of --

17 COL GREEN: No, ma'am.

18 And, as a matter of fact, that's how
19 the Subcommittee did it. They made a
20 recommendation for a definition and then the
21 issues in terms of the accused knowledge of that
22 condition --

1 HON. JONES: Right.

2 COL GREEN: -- is a separate issue.

3 And the Subcommittee recommended no change to the
4 statute relevant to the second part.

5 CHAIR HOLTZMAN: So, should we do it
6 the same way here? Judge Jones?

7 HON. JONES: I don't think so. I
8 think Ms. Kepros' real concern was the negligence
9 standard that exists in the Military Statute.
10 And, had the Subcommittee gone differently and
11 agreed with her recommendation that it be taken
12 out, I don't think she would have -- I could be
13 wrong and I can't speak for her, but I'm still
14 I'm not sure that -- I don't think she would have
15 objected to this definition.

16 She might have, but I can't remember
17 her rationale alone relating to this particular
18 subject.

19 LTCOL HINES: I think you're right,
20 ma'am. I mean if you look through the
21 transcripts that are in the record, I think it's
22 clear that in the deliberations her main concern

1 was more with what was original Issue 10. But
2 I'll note, we're going to come back, Admiral
3 Tracey, to the question of Issue 10 on -- it's on
4 page 3 under the Additional Issues. It'll be the
5 first Addition Issues that we get to where the
6 Subcommittee did not recommend a change.

7 But, with that said, I agree with
8 Judge Jones, I think Ms. Kepros' primary concern
9 was on Issue 10, not so much with the definition
10 of incapable of consent.

11 VADM TRACEY: So, given that, I agree
12 with the Recommendation A-3. That's where we
13 started.

14 CHAIR HOLTZMAN: Okay, so you're okay
15 with A-3?

16 And, any other --

17 MR. TAYLOR: I just have a question.
18 I agree with A-3 as well, but this is a question.
19 Just as we recommended that the President amend
20 the Manual to clarify the defenses that qualify,
21 can you tell me a little bit about why the
22 President couldn't define consent?

1 CHAIR HOLTZMAN: You mean capable of
2 consenting?

3 MR. TAYLOR: Yes, yes. I mean, is
4 that a definition that has to go to Congress for
5 consideration or is that something that could be
6 done more easily by simply having the Executive
7 Branch define what consent means?

8 There may be some big principle here
9 that governs the answer to my question, but I'd
10 like to hear what it might be.

11 HON. JONES: I'm trying to remember
12 back because in each instance, once we decided we
13 wanted to do something, we tried to decide which
14 was the most sensible approach, like just go the
15 Manual.

16 MR. TAYLOR: Which is my question, of
17 course.

18 HON. JONES: Exactly.

19 Well, I can only say that, as I
20 recall, this is one of the very first issues that
21 we were -- we heard a lot of testimony on it.
22 Everybody wanted some clarification.

1 And, I think we were of the impression
2 that it was important to actually be in the
3 statute because it's such an important concept.

4 I honestly don't have a clearer
5 recollection of -- or of the discussion as to
6 whether to put it into the Manual. And, I'd have
7 to give that some thought and review, which I
8 probably should have done before today, what my
9 thinking was.

10 MR. TAYLOR: No, my thought on that is
11 that if you subject this definition of consent to
12 the legislative process, then it might end up
13 much different and not better than where it is
14 now. So, if that might be an option, I just
15 wanted us to think about it a bit.

16 CHAIR HOLTZMAN: My recollection, and
17 that could be wrong, maybe Colonel Hines, you
18 have a better or any of the Staff have a clear
19 recollection, but my recollection is the same as
20 Judge Jones in that there was enormous, I would
21 almost say consensus, and maybe not quite
22 consensus, but one of the few areas where almost

1 all the people who testified really felt there
2 needed to be a definition.

3 And also, this apparently issue, this
4 issue apparently comes up in a lot of cases
5 because it's a question of, you know, the
6 situation of the victim. What, you know, could
7 the victim consent? Was the victim really out of
8 it? That comes up because of an impairment by
9 drugs or alcohol is apparently an issue in many,
10 many cases.

11 So, that's all I remember and I can't
12 actually remember why we went for the statute
13 versus non-statute. But, believe me, the general
14 tenor of the Subcommittee was, if you could avoid
15 a statutory solution, that was how they went.
16 So, there must have been some pretty good reason.

17 I'm sorry not to remember, maybe you
18 can help us.

19 HON. JONES: No, I think when you just
20 look at the Section 7, Consent, period, this
21 belongs in the statute. I think it's glaring if
22 it's absent because you were talking about what

1 consent means.

2 You go into the notion of a sleeping,
3 unconscious or incompetent person can't consent.
4 And, I think this is of sufficient importance, I
5 guess, is probably what our rationale was.

6 MR. TAYLOR: Okay. Well, I accept
7 that. I was just curious.

8 COL GREEN: And, I would point out
9 that the other part of the recommendation is that
10 the President adopt guidance as to once the
11 definition is established to define circumstances
12 according to the most recent case law in *Peace* as
13 to when that definition would apply.

14 So, I think it's actually, the
15 Subcommittee's, is a two-pronged approach to
16 create that statutory definition, the
17 interpretational language then the executive
18 guidance.

19 MR. TAYLOR: That makes sense, thank
20 you.

21 MR. STONE: If I may, I kind of wonder
22 whether these recommendations either shouldn't

1 just say what the recommendation is or be
2 introduced by saying the President or Congress
3 should.

4 Because I agree with the last comment
5 that was just made that if the President wants to
6 buy these recommendations as we've had them
7 carefully looked at and worded, that'll even make
8 it easier for Congress to say, yes, we're going
9 to accept that language as it is without us
10 having to carefully thread between which one is
11 for the President and which one is for Congress.

12 So, I just wonder whether we can't --
13 whether we need to clarify it here.

14 HON. JONES: Well, I think, for
15 instance, in our first recommendation, it's an
16 actual amendment to the statute itself. So,
17 there, to the extent there are a few of those,
18 unless I'm missing your point, Mr. Stone, forgive
19 me.

20 But, those should have to -- those
21 should, for me, Congress should amend.

22 I think it's -- for the most part, I

1 don't think we thought leaving that language in
2 but trying to explain it in the Manual was
3 workable. We're trying to get rid of in the very
4 first example, for instance, the vestiges, if you
5 want to keep calling it that, of resistance.

6 So, by saying -- I mean, we could have
7 said why don't we fix this? But we decided it
8 was important to get it out of the statute. So,
9 therefore, it was an amendment.

10 Is that what you're -- in other words,
11 I don't think we can say either or for each of
12 our recommendations.

13 CHAIR HOLTZMAN: I think what we
14 should do with regard to this section,
15 Recommendation A-3, if I may, is I think, first
16 of all, we would say, number one, do we accept
17 the idea of a statutory change?

18 Number two, then I think we should
19 look at the language of the statutory change and
20 decide what we want.

21 And then, number three, go to Mr.
22 Stone's point about the last part of this

1 recommendation about the President and the
2 clarification in the -- where ever he's going to
3 clarify it.

4 So, if that's okay, why don't we start
5 first with, do we accept the Subcommittee's
6 recommendation for a statutory change?

7 MR. TAYLOR: Yes.

8 CHAIR HOLTZMAN: Any objection? Okay,
9 I --

10 MR. STONE: I have one comment, though

11 --

12 CHAIR HOLTZMAN: Okay.

13 MR. STONE: -- related to the other
14 discussion we were having a moment before we got
15 to this. And, maybe you'll correct me if I'm
16 wrong, but I think, if I -- I was trying to
17 understand the Marine Corps' concern.

18 And, I think this incapable language
19 which in the comment, we put incapable due to
20 impairment by alcohol or other intoxicating
21 substances, is what they're focusing on.

22 And, I think the comment about the

1 other part of the statute and the dissent was
2 whether the perpetrator had some impairment and
3 this one has to do with whether or not the victim
4 has some impairment.

5 And, in both cases, I understand the
6 analogy, namely that if a person, let's say in
7 hypothetical, is pretty drunk, you get closer to
8 a negligence standard, just like you would if
9 they got in a car accident, negligent homicide
10 instead of an intentional homicide, drunk driving
11 versus picking somebody out and mowing them down
12 with a car.

13 But, I think that what, if I
14 understand it, the majority has come around to
15 the point of view, and frankly, I accept this
16 point of view, that whereas, in the non-military
17 Justice setting, it doesn't appear, at least
18 generally, and I'm throwing this out there, that
19 alcohol is involved so commonly in these kinds of
20 situations or other impairment.

21 It's not -- it doesn't rise to the
22 same level of problem that it does in the

1 military both because of its frequency and
2 because the military imposes a higher standard on
3 its participants, the defendants and victims,
4 that they're there for a special purpose and the
5 standards of conduct and their obligations and
6 duties require a somewhat stricter standard than
7 generally that people have to recognize that, you
8 know, we can't have people in the general public
9 who want to be drunk a 100 percent of the time
10 and it's not a crime but in the military, there's
11 all kinds of consequences if you're not capable
12 of knowing what's going on.

13 So, therefore, even if this is a
14 slightly higher standard than the other federal
15 statutes that they're comparing them to and what
16 governs in the general public, I think it's an
17 appropriate determination for those with military
18 expertise to want.

19 And so, since it has appeared to be a
20 big problem, which is why this Committee was
21 constituted in the first place, for those
22 reasons, I go along.

1 Now, if I'm missing something, by all
2 means correct me.

3 CHAIR HOLTZMAN: No, I just -- first
4 of all, the question really was, I want to follow
5 up on your point.

6 The first question was, do we agree
7 with amending the statute?

8 Then the question was, what's --

9 MR. STONE: And, that's a yes.

10 CHAIR HOLTZMAN: And the answer to
11 that is unanimously yes.

12 The second question is, do we agree
13 with this suggestion about how to amend the
14 statute?

15 And just to follow up on your point,
16 Mr. Stone, Ms. Kepros, looking more closely at
17 the statute, Ms. Kepros' complaint is not with
18 our language. She doesn't have any attack on
19 this language in 8 on page 55.

20 Her attack is on the substance of
21 (b) (2) and (3) which we didn't touch. Even if we
22 did nothing about incapable of consent, she would

1 have a problem with 2 and 3 because 2 and 3
2 already have a negligence factor in it.

3 We did not touch that negligence
4 factor. All we did was, we defined the incapable
5 of consent, and that negligence factor is still
6 there.

7 I don't know if I made this, but
8 that's -- is that correct?

9 HON. JONES: I think that's right.

10 MR. TAYLOR: No, that's --

11 CHAIR HOLTZMAN: So, that's really
12 what we did here. We were very surgical in the
13 sense we really left the statute alone.

14 Her objection is to that statute and
15 the negligence provision which, in both 2 and 3,
16 says, you know, or reasonably should have known
17 that the person's asleep, et cetera or that the
18 condition is known or reasonably should have
19 known.

20 We didn't touch that. So, you know,
21 the Subcommittee didn't touch that.

22 Now, the Panel could say, hey, wait a

1 minute, we should have touched it. We agree with
2 Kepros but agreeing or not agreeing with Kepros
3 doesn't have anything to do with whether we
4 accept or don't accept this language. This
5 language doesn't incorporate or doesn't really
6 address the whole issue of negligence.

7 MR. STONE: It's a little bit parallel
8 to that issue. I think that's what the Marines
9 were trying to say.

10 CHAIR HOLTZMAN: Right.

11 MR. STONE: And, I agree with you, it
12 doesn't directly address it.

13 CHAIR HOLTZMAN: But it's -- right,
14 but we might want to take a look. Maybe when we
15 -- my suggestion would be when we go to the 10th
16 recommendation and look at the whole issue of
17 negligence, we may want to revisit whether we
18 want to address the negligence in 2 and 3, which
19 is really what her concern is, (b) (2) and (3) had
20 incorporated a negligence standard that the
21 Subcommittee did not address. And that's her
22 concern, not really this, you know, the incapable

1 of consent concern.

2 So, can we postpone? Is that okay?

3 MR. STONE: Sure, sure.

4 CHAIR HOLTZMAN: The negligence issue
5 until we get to 10? Is that okay with everyone?

6 HON. JONES: Yes.

7 CHAIR HOLTZMAN: Okay, so, is there
8 anything else we have to -- oh, yes, we want to
9 look at the issue about whether the President
10 should provide further executive guidance.
11 Anybody have any objection to that language?

12 The President should provide further
13 executive guidance about the circumstances to
14 consider when considering whether a victim was
15 incapable of consenting?

16 MR. TAYLOR: No objection.

17 HON. JONES: None.

18 CHAIR HOLTZMAN: Victor?

19 MR. STONE: No, that's fine.

20 CHAIR HOLTZMAN: Okay.

21 All right, so we're up to

22 Recommendation Number 4, Congress should amend

1 the definition of bodily harm in Article
2 120 (b) (1) B.

3 Colonel Hines?

4 LTCOL HINES: Yes, ma'am.

5 I believe this was Issue Number 5 that
6 was referred by the Panel to the Subcommittee.

7 And, it appears in the statute
8 presently at 120 (b) (1) B, causing bodily harm to
9 the other person.

10 The question became with some of the
11 witnesses before the Panel and before the
12 Subcommittee that -- the question was whether
13 bodily harm is confusing? Whether the
14 practitioners and the members on panels
15 understand that term?

16 The practitioners essentially said
17 there's not a big issue with this. The military
18 judges already instruct on this. Bodily harm has
19 a definition that is well developed under Article
20 128, the assault statute. And so, judges and
21 practitioners understand it.

22 There was concern with some of the

1 witnesses before the Panel and Subcommittee
2 whether panel members really understand this
3 concept.

4 And, I know, Ms. Holtzman, you
5 mentioned it as well, bodily harm to a layman
6 might connote in their mind actual physical
7 injuries as opposed to the legal definition that
8 we use which is an unconsented to bodily contact.

9 And so, the decision by the
10 Subcommittee was to just basically adopt the
11 definition that appears in 120(g)(3), bodily
12 harm, into the new redline version because,
13 essentially, what we're saying is this is an
14 unconsented touching.

15 And so, the recommendation for the
16 Subcommittee is to remove the language that
17 presently appears in 120(b)(1)B and replace it
18 with, without the consent of the other person.

19 VADM TRACEY: So, are we actually
20 amending the definition of bodily harm or are we
21 removing the concept of bodily harm as a
22 requirement?

1 LTCOL HINES: Ma'am, what we're doing
2 or what the Subcommittee's recommending is that
3 you just remove the language causing bodily harm
4 to the other person and replace it with without
5 the consent of the other person.

6 So, what you're -- I think what the
7 Subcommittee's hope is that this cures any
8 concern over the plain language bodily harm and
9 you're just -- you're importing what the legal
10 definition is. It's an unconsented to touching
11 without a question of, well, were there physical
12 injuries in addition to the unconsented to
13 touching?

14 VADM TRACEY: I agree with that. I'm
15 just suggesting that the language that we are
16 using in the recommendation is describing a
17 different act than what we're actually
18 recommending.

19 MR. STONE: We're not amending, we're
20 replacing.

21 LTCOL HINES: Yes, sir.

22 MR. STONE: Deleting and replacing.

1 CHAIR HOLTZMAN: Am I correct that
2 we're taking the existing definition of bodily
3 harm, what we have now is --

4 HON. JONES: Right.

5 CHAIR HOLTZMAN: -- the statute says
6 bodily harm -- rape is bodily -- or sexual
7 assault is bodily harm. And, what is bodily harm
8 without consent?

9 So, what the Subcommittee did was just
10 say, just take the bodily harm out so we have
11 sexual assault is without consent.

12 So, actually, we haven't changed the
13 definition, we've just taken out a middle
14 definition, quote, unquote, bodily harm, and that
15 could be confusing --

16 VADM TRACEY: That's what I'm saying.

17 HON. JONES: Yes.

18 CHAIR HOLTZMAN: It's --

19 HON. JONES: Basically, we've removed

20 --

21 VADM TRACEY: But, the writing in the
22 recommendation is --

1 HON. JONES: Doesn't fit with that.

2 MR. STONE: The blue --

3 VADM TRACEY: The blue language is
4 confusing.

5 MR. STONE: At the top.

6 HON. JONES: Right, because we're not
7 amending it --

8 CHAIR HOLTZMAN: : Right.

9 HON. JONES: -- we're actually
10 removing it.

11 CHAIR HOLTZMAN: Right, right, so you
12 want to clarify the Subcommittee -- I mean our --
13 the Staff's recommendation. Okay, fine.

14 Okay, any other -- Judge Jones, do you
15 have anything else to add or does the --

16 HON. JONES: No, I think from the
17 beginning this was one where to a bunch of,
18 certainly, lawyers, smart people, whatever, but
19 as civilians, with all due respect to the Admiral
20 and to Tom over here, we couldn't understand what
21 this meant. And it was confusing to us.

22 And it also seemed to be a change that

1 removed the confusion and, to the extent there
2 may be any, it doesn't exist anymore.

3 One other thing that I think was
4 persuasive to the Subcommittee was the fact that,
5 as we were told, this statute is used to train.
6 And, certainly, new recruits wouldn't know what
7 this meant when they read it.

8 So, it seemed to us, also, to be a
9 sensible change isn't going to cause that, we
10 don't believe, much angst and might even be much
11 more helpful in terms of training.

12 LTCOL HINES: And, I might add, ma'am,
13 one of the other things that came, I think that
14 was important to the Subcommittee, was the
15 prosecutors, the senior prosecutors, who came in
16 and talked to the Subcommittee, when the question
17 was, well, what are the fact scenarios that you
18 charge this? The majority of what they said,
19 we're charging the unconsented to sex act.

20 And so, the Subcommittee Members, well
21 then, why don't we just say that? Not so much
22 bodily harm --

1 HON. JONES: That's a very good point.
2 Thank you.

3 LTCOL HINES: -- but the way we
4 actually -- and some of the discussion was, well,
5 was this something that was actually thought
6 about when the statute was drafted or is this
7 just a backdoor that enterprising smart
8 prosecutors picked up on?

9 In fact scenarios where you have a
10 victim who has little or no recollection of the
11 incident, but could tell investigators, I
12 remember someone penetrating me or making contact
13 with me, but I can't identify the perpetrator. I
14 was intoxicated.

15 Some of the senior prosecutors said
16 this is the only subsection that we can actually
17 get at that's a crime and charge. But, we're
18 charging the unconsented to sex act. And so,
19 some of the Subcommittee Member said, well, then
20 why doesn't the statute just say that?

21 And so, that was part of the rationale
22 for the suggestion as well.

1 CHAIR HOLTZMAN: Do we have any
2 objection to this? I believe the Marine Corps
3 objected to this?

4 COL GREEN: They did. Actually, their
5 first issue they said it's not necessary to
6 replace the language. Case law and instruction
7 have defined the term bodily harm and proper
8 instructions from the military judge alleviate
9 the Subcommittee Members' concerns. The panel
10 members may be confused by the definition.

11 And, secondly, the proposed change to
12 replace the language may cause fact finders to
13 focus more on the actions of the victims than the
14 actions of the accused, which the Marine Corps
15 contends is undesirable.

16 CHAIR HOLTZMAN: I should say, by the
17 way, that in the discussion of this provision,
18 there were a couple of Members of the
19 Subcommittee who said they didn't think any
20 changes should be made in 120. And, by the time
21 we finished our discussion of this provision, it
22 was unanimous. Is that fair to say, Judge Jones?

1 HON. JONES: Yes, I think -- yes.

2 CHAIR HOLTZMAN: On this point.

3 HON. JONES: On this point.

4 CHAIR HOLTZMAN: Are we ready to --

5 Mr. Taylor, do you have any comments?

6 MR. TAYLOR: Well, the only further
7 comment I would have follows up on the point made
8 earlier which is, the staff should come up with
9 some alternative wording for that because we're
10 not really amending the definition of bodily harm
11 in that Article.

12 What we're deleting, we're deleting it
13 from a different subsection which is (g). So,
14 just coming up with a way to more elegantly
15 phrase what we're doing I would suggest.

16 CHAIR HOLTZMAN: Okay. So, we accept
17 Recommendation --

18 HON. JONES: A-4.

19 CHAIR HOLTZMAN: -- A-4? Is that
20 correct? Any objection to accepting this
21 recommendation? Okay.

22 HON. JONES: No.

1 CHAIR HOLTZMAN: We're up to A-5.

2 VADM TRACEY: Subject to being
3 rewritten, right?

4 CHAIR HOLTZMAN: Oh, yes, subject to
5 -- right. With the caveat that the description
6 of what we're doing be changed to more accurately
7 reflect what we're doing.

8 COL GREEN: I'd looked at this before
9 and so I think my proposal -- and I'm not asking
10 for -- something to the effect that Congress
11 should replace the present language of Article
12 120(b)(1)B with the words without the consent of
13 the other person.

14 CHAIR HOLTZMAN: Well, by removing the
15 term bodily harm, though. Don't you have to say
16 that?

17 VADM TRACEY: No, actually we don't.

18 CHAIR HOLTZMAN: We don't have to?

19 COL GREEN: We can just replace or --

20 VADM TRACEY: And then you will have
21 to remove.

22 COL GREEN: Correct.

1 VADM TRACEY: So, we're recommending
2 two actions?

3 COL GREEN: Correct.

4 MR. TAYLOR: Yes, that's right.

5 HON. JONES: And, we do still keep
6 previous bodily harm in there. I don't want to
7 try and confuse things.

8 CHAIR HOLTZMAN: Right.

9 HON. JONES: But, we have to be
10 careful what we -- how we say this.

11 CHAIR HOLTZMAN: Right.

12 Okay, we're up to A-5.

13 LTCOL HINES: Yes, ma'am.

14 This was Issue 9, I believe, referred
15 by the Panel to the Subcommittee and it had to do
16 with whether the definitions of sexual act and
17 sexual contact should be amended.

18 The Subcommittee felt that there were
19 some confusing things in both definitions that
20 the definition of sex act should be modified in
21 some places and that sexual contact should
22 include the use of an object.

1 While the Subcommittee was
2 deliberating and holding their meetings, the
3 Court of Appeals for the Armed Forces addressed
4 the object issue in the case of *U.S. v. Schloff*
5 and determined that the statute as written right
6 now does include the use of an object for sexual
7 contact.

8 The Subcommittee was aware of that
9 opinion. They, nevertheless, felt that the two
10 recommended changes that are on the redline at
11 page -- the top of page 54 in the Subcommittee
12 report should be recommended.

13 And so, if I could, I think the
14 transcript's pretty clear, Ms. Friel was in
15 charge of the working group that addressed this
16 issue, Lisa Friel. And her -- and that working
17 group and then the Subcommittee adopted their
18 train of thought which essentially would break
19 out the definition of sexual act from the two
20 subsections that we have now to three
21 subsections.

22 And, without getting into the actual

1 changes, the thought process was that the three
2 subsections would address the following, and that
3 is, in the suggested new subsection A, the
4 statute is targeting penetrative acts when the
5 penis penetrates one of the listed areas, B
6 targeting the use of the mouth upon one of those
7 listed areas and C targeting the penetration of
8 one of the listed areas by any other part of the
9 body or an object when done with the requisite
10 mental state.

11 So, that was the basis for those
12 recommended changes to just sort of break out
13 what the Subcommittee felt were maybe some
14 confusing definitions in A and B, just to break
15 that out, to clarify it better for practitioners.

16 And then, again, sexual contact would
17 be amended to better clarify that it's one of
18 these other touchings on one of the protected
19 areas with one of the things listed or an object
20 and also done with the requisite mental state.

21 And, I don't -- Judge Jones, I don't
22 think there was a lot of dissension with respect

1 to this recommendation.

2 HON. JONES: No, there was virtually
3 none. I think the sub-Subcommittee, Ms. Friel's
4 working group, presented it and everybody was in
5 agreement.

6 I would only add that, as you said,
7 *Schloff* did come out and made it clear that an
8 object, you know, using an object would fulfill
9 the necessary elements for this section of
10 Article 120.

11 But, I nonetheless, think it should be
12 in there so there's no debate.

13 LTCOL HINES: And, I think the thought
14 on that, ma'am, was why not just clarify --

15 HON. JONES: Right.

16 LTCOL HINES: -- the Staff's decision
17 in the statute which --

18 CHAIR HOLTZMAN: But, that's also not
19 the highest court in the military, isn't that
20 correct?

21 COL GREEN: Well, yes, ma'am.

22 CHAIR HOLTZMAN: It is?

1 LTCOL HINES: The Court of Appeals for
2 the Armed Forces is. You could request cert to
3 the Supreme Court, ma'am, but it's pretty rare
4 that military cases are reviewed by the Supreme
5 Court. So, essentially, CAAF is the --

6 CHAIR HOLTZMAN: Right, but it still
7 is not theoretically final? Right, okay.

8 LTCOL HINES: I think there may be a
9 cert petition pending right now, I'm not sure
10 about that, ma'am, to the Supreme Court. But,
11 for all intents and purposes, CAAF is the highest
12 military court of review.

13 CHAIR HOLTZMAN: Okay.

14 Did we get any comments on this?

15 HON. JONES: I think the Navy.

16 CHAIR HOLTZMAN: The Navy commented
17 and the Marines?

18 MR. STONE: The Marines did because of
19 the decision. They didn't think it was really
20 necessary. That's on their page 3.

21 HON. JONES: As I recall, the Navy had
22 a lot of comments on this.

1 COL GREEN: The Navy's comments spoke
2 specifically to (g)(1)C, the proposal from the
3 Subcommittee for (g)(1)C which is the penetration
4 however slight of the vulva.

5 And, the Subcommittee recommended the
6 addition of or penis or anus by any part of the
7 body or object.

8 And so, the Navy's comment refers to
9 the unusual circumstances or lack of any
10 recognizable circumstances in which a penis may
11 be penetrated. And, I think that was a point
12 that was raised as well by the Marines.

13 This gets into the Subcommittee's
14 discussion on these issues, but I mean the
15 Subcommittee did consider this and I think Ms.
16 Friel talked with the Subcommittee, although,
17 obviously, the penetration of a penis and the
18 circumstances is not something that's likely, but
19 there are circumstances which may occur and I
20 think she just felt that the gender
21 neutralization of the statute and that the
22 circumstance does exist. I think that was their

1 reasoning for adding that language specifically.

2 CHAIR HOLTZMAN: Colonel Green, do you
3 think it's because she's a New York prosecutor?
4 And you know New York values? Or should I remove
5 that comment?

6 MR. STONE: I'm glad you said that,
7 coming from New York, the rest of us would admit
8 to being locally biased.

9 HON. JONES: I think Ms. Friel has
10 seen it all in her career.

11 CHAIR HOLTZMAN: So, do we have any --

12 HON. JONES: It was valuable input.

13 CHAIR HOLTZMAN: -- further comment on
14 this?

15 COL GREEN: The other issue that we
16 would note is that there is the Military Justice
17 Review Group which we provided the Panel a
18 summary of their recommendations.

19 Deferred much of its analysis on
20 Article 120 recognizing that the JPP was doing
21 its work on Article 120.

22 However, the MJRG did make one

1 proposal relative to the definition for a sexual
2 act and they basically aligned the definition of
3 sexual act in accordance with the federal
4 definition in Title 18 and made a recommendation
5 that the definition from Title 18 be carried over
6 to Article 120.

7 And so, that is a, if you will, a
8 competing recommendation. However, I would note,
9 and I mean Colonel Hines can say the Subcommittee
10 used Title 18 as the baseline for its own
11 template when it created its recommendation.

12 So, as a Staff, we did look at where
13 these definitions differ in terms of the two
14 proposals.

15 Glen, do you want to talk about that?

16 LTCOL HINES: In my view, ladies and
17 gentlemen, was that the MJRG, and this is the
18 only recommendation that the Military Justice
19 Review Group made with respect to 120, but that
20 the recommendation that they put up, to bring
21 this definition in line with what's in Title 18,
22 it's really a distinction without a difference.

1 It's just the federal definition is
2 more of what I would say generally worded. So,
3 they talk about the genitalia or the genital
4 opening as opposed to Ms. Friel's recommended
5 definition was very specific.

6 Instead of using, you know, an all-
7 encompassing phrase like genitalia, she was very
8 specific to list, well, what are these areas that
9 we're talking about?

10 And, there was a lot of discussion in
11 at least one or two Subcommittee deliberation
12 sessions about, well, should it be more generally
13 worded or should it be specific? And, the
14 Subcommittee decided to go with specifically
15 listing out these protected areas rather than
16 using a more all-encompassing terminologies in
17 Title 18.

18 CHAIR HOLTZMAN: So, Colonel Hines,
19 are you saying that, basically, the definitions
20 would be exactly the same except for some
21 wording? I mean that the federal statute and
22 what the Committee has recommended, Subcommittee

1 has recommended are, in essence, the same?

2 There'd be no difference in outcome?

3 LTCOL HINES: That's what I would say,
4 ma'am. It's a distinction without the
5 substantial difference. And, even the proposal
6 that the MJRG has sent up in Sub C talks about
7 the penetration, however slight, of the anal or
8 genital opening of another, well the genital
9 opening of a man is, you know, the penis and
10 that's what, you know, we've been having this
11 discussion about, well, does that fact pattern
12 really occur in real life?

13 Well, arguably, the government could
14 charge it under their definition as well.

15 CHAIR HOLTZMAN: Okay. So, I think we
16 should probably break this down too, number one
17 is, do we -- the first question should be, do we
18 accept a recommendation for changing this?

19 And then, secondly, do we accept these
20 changes?

21 Or, I don't know, maybe that's not an
22 appropriate way to do it. But, let's try that.

1 Okay, are we in favor of adopting
2 basically the Subcommittee's recommendation
3 deferring from the question of whether we would
4 disagree with the substance as opposed to the
5 MJRG's proposal? Any disagreement with adopting
6 this at this point? No? I don't hear any.

7 HON. JONES: No.

8 CHAIR HOLTZMAN: Second, do we want to
9 consider whether to adopt the Military Justice
10 Review Panel's approach as opposed to the
11 Subcommittee's approach or should we just leave
12 this to Congress to figure out?

13 I mean, we haven't really studied --
14 I mean I --

15 HON. JONES: I'd just -- I'll confess,
16 just looked at this morning, so I couldn't say
17 I'd studied it and just made a decision ours was
18 better. I think ours is very good but I wouldn't
19 -- I haven't thought about the MJRG proposal.
20 Maybe it doesn't require much thought, I don't
21 know, Colonel.

22 COL GREEN: Well, if you want to look

1 at the words, there's a copy of the -- on the
2 right side of your folder, the Article 120,
3 there's an excerpt from the MJRG report. And,
4 the last -- the back page of the -- it's a four-
5 page document -- their legislative proposal, the
6 exact language that they have there is there.
7 And, again, I mean if you just would like to make
8 a comparison.

9 CHAIR HOLTZMAN: Well, here's my
10 suggestion which is that I never like to adopt a
11 statute without giving it some study. And, the
12 Subcommittee took a long time to develop this.

13 And, it may be that they're exactly
14 the same, but maybe they're not. I would not
15 like to be in the position of making a
16 recommendation without really having had a chance
17 to think about it.

18 So, we could say that -- so, I would
19 propose not addressing the alternative approach
20 and, at least not now.

21 MR. TAYLOR: Well, yes, excuse me,
22 Madam Chair.

1 CHAIR HOLTZMAN: Oh, please.

2 MR. TAYLOR: I totally agree with
3 that. I mean what we're asked to do by Congress
4 is to make our own independent evaluation and our
5 own independent recommendation.

6 A lot of time and effort has gone into
7 doing that. The recommendation makes sense to
8 me. It seems like it's well researched and well-
9 reasoned and I think we should stick with this
10 recommendation and not feel as if we need to
11 comment on what someone else has said or
12 recommended.

13 CHAIR HOLTZMAN: Good.

14 Okay, that's my suggestion, but how do
15 the other Panel Members feel?

16 VADM TRACEY: I agree.

17 HON. JONES: I agree.

18 MR. STONE: I'll defer to the others.

19 I would have been interested to see if the
20 Subcommittee thought there was no substantive
21 difference whatsoever between their
22 recommendation and the federal language, in which

1 case, I probably would have gone with the
2 language that was out there.

3 But, if none of the other Panel
4 Members -- in other words, if you want to leave
5 that comparison to the people to whom we're
6 sending our recommendation, I could live with
7 that, too.

8 VADM TRACEY: Actually, the position
9 would appear to -- their position would appear to
10 be that the definition as it was originally
11 stated, not as modified, obviously, by the
12 Subcommittee, described things that were not
13 sexual acts. So, there's a really significant
14 logical difference, I would think.

15 CHAIR HOLTZMAN: Well, the point is
16 that we came up with the definition without the
17 benefit of their view and they came up with their
18 definition without the benefit of our view.

19 So, I think that, you know, they would
20 have deferred to us had they had the opportunity.
21 And, maybe they will be asked about that by
22 Congress.

1 So, I understand your hesitation, Mr.
2 Stone, because I like, you know, using existing
3 statutes if we can, saves a lot of heartache for
4 judges and everybody else.

5 But, at this point, I think since both
6 were developed independently and going along
7 essentially the same track, I don't know that we
8 need to reconcile this right now. Maybe later at
9 a later point, we could try to reconcile it.

10 MR. STONE: Well, I was wondering if,
11 in terms of what we're suggesting, and I don't
12 mean to make it overly cumbersome, because I
13 wasn't in that drafting process, maybe we just
14 want to use the word genital opening and then say
15 including, but not limited to and then give our
16 terms.

17 So, somebody who would look at it
18 would say, oh, yes, right, when it got charged,
19 they recognize that this was the same conduct
20 that was being captured.

21 COL GREEN: Yes, I mean, Mr. Stone,
22 the -- I mean, obviously, the Panel can do that.

1 I would just in terms of the Subcommittee's
2 deliberation on that issue, there was a lot of
3 discussion about whether to leave it general or
4 to --

5 MR. STONE: Okay.

6 COL GREEN: -- make it specific and I
7 think the Subcommittee's choice to make it
8 specific was intentional.

9 MR. STONE: Okay.

10 HON. JONES: Well, that was what I
11 remembered when I did have the chance to glance
12 over the objections with -- and, I don't have
13 your see Navy or the Marine Corps, but they were
14 upset about specifying genitalia. And, I recall
15 that we very strongly wanted to do that.

16 And, their argument was, well, maybe
17 there'll be some portion of the body that you
18 haven't specified that could be considered
19 genitalia and I think we even discussed that.

20 But, in any event, so, look, I'm very
21 strongly in support of this and I merely, you
22 know, say that, you know, if I were going to try

1 to choose between the two, I would like to take a
2 further look at theirs.

3 But, I agree, this is our
4 recommendation and we spent a lot of time on it
5 and I think it's good. And, with respect to that
6 one issue, I think we're right.

7 MR. STONE: That last comment
8 satisfies my concern. I think we just need to --
9 I would just ask that in what we send in our
10 explanation of this, we say this -- with respect
11 to comparing this to the Military Review Group
12 and federal definition, we believe that the
13 specification here is the same as using genitalia
14 opening and we don't intend any different thing,
15 that's all.

16 Just so that we have some commentary
17 there on the record that it's meant to be the
18 same and that, itself, would help if there's ever
19 a question and the judge wants to know whether to
20 use the comparable case law because he can see
21 that the draft is, you know, intended it --

22 HON. JONES: Or oppose it.

1 MR. STONE: -- in that narrow aspect
2 to be essentially the same. That would satisfy
3 me, if that's all right.

4 CHAIR HOLTZMAN: Any objection to
5 that? Okay.

6 HON. JONES: No.

7 CHAIR HOLTZMAN: So, without hearing
8 any further objection, then we accept
9 Recommendation A-5 with Mr. Stone's suggestion.

10 Okay, A-6?

11 LTCOL HINES: All right, A-6 --

12 CHAIR HOLTZMAN: Oh, yes, sure, sorry.

13 Can we take a five minute break?

14 Excellent.

15 (Whereupon, the above-entitled matter
16 went off the record at 10:14 a.m. and resumed at
17 10:28 a.m.)

18 CHAIR HOLTZMAN: Thank you, everybody.
19 I guess moving right along to Recommendation A-6.

20 LTCOL HINES: Yes, ma'am.

21 So, Recommendation A-6, the
22 Subcommittee sort of wrapped several issues into

1 this recommendation having to do with not only
2 the current practice of charging inappropriate
3 sexual relationships in a training environment,
4 whether that current practice was effective,
5 whether the definition in the statute of
6 threatening or placing another person in fear and
7 threatening wrongful actions, whether those
8 definitions needed to be amended or not.

9 And, the Subcommittee essentially,
10 after discussing those issues, came up with the
11 decision to propose a new subsection under
12 Article 120. In the redline version, that
13 appears on page --

14 CHAIR HOLTZMAN: Fifty-three.

15 LTCOL HINES: -- 53, thank you, ma'am.

16 And it would be a new Article
17 120(b)(1)E which would target an accused
18 committing a sexual act upon another person by
19 using position, rank or authority to secure
20 compliance by the other person.

21 I think one of the main points of
22 discussion with the Subcommittee, ma'am, was

1 whether the current subsection that the majority
2 of these types of fact scenarios are charged,
3 which is 120(b)(1)A, by threatening or placing
4 the other person in fear.

5 The testimony from some -- from the
6 majority of the prosecutors was that it was very
7 difficult to try to charge a case on these facts,
8 whether it arises in a training environment or
9 elsewhere where someone has used their rank to
10 overcome the victim's consent.

11 Whether the government could prove
12 that by having good evidence of an express or
13 implied threat and also a victim would/could say
14 that they were placed in fear of whatever the
15 purported wrongful action is.

16 And, in that analysis, the
17 Subcommittee turned and looked back to 120(g)(7),
18 threatening or placing that other person in fear,
19 which means a communication or action that is of
20 sufficient consequence to cause a reasonable fear
21 that noncompliance will result in the victim or
22 another person be subjected to the wrongful

1 action contemplated by the communication.

2 I think the Subcommittee's concern
3 was, what does that mean? What is threatening
4 wrongful action? Can the members understand
5 this?

6 One of the things considered was the
7 prior statute actually gave in the Judges'
8 Benchbook, and I believe in the statute as well,
9 it gave the example of someone abusing their rank
10 and authority.

11 That disappeared from the current
12 version. And so, the takeaway, I think, for the
13 Subcommittee was, there needs to be a new
14 subsection that would better encompass and state
15 in more plain terms that the evil that the
16 statute is targeting here is someone abusing
17 their rank, position or authority in order to
18 obtain a sexual act or sexual contact.

19 And, that this wouldn't just be
20 limited to training environment cases, it could
21 be used anywhere else where someone, officer on
22 officer, and enlisted on enlisted, outside the

1 training environment uses their rank or authority
2 to coerce, compel or secure compliance in a sex
3 act by the victim.

4 Those fact patterns could all be
5 charged under the new 120(b)E.

6 CHAIR HOLTZMAN: Did we get any
7 commentary about this?

8 COL GREEN: Yes, ma'am, we did.

9 The Navy advised -- indicated that
10 they don't understand the addition of the
11 proposed additional theory to offer a workable
12 prosecution option to offenses.

13 I'll just read, as drafted, this
14 proposal introduces a novel concept in the arena
15 of sexual assault prosecution, secure compliance,
16 which is not defined by the Subcommittee and
17 seemingly has no history outside the realm of
18 regulatory compliance.

19 And, they note that, in their belief,
20 it will lead to confusion or lack of use by
21 prosecutors because those other avenues offer
22 greater likelihood of conviction.

1 And the Marine Corps submitted a
2 similar recommendation or comment noting, again,
3 that these cases are charged and dealt with
4 effectively through other means in the UCMJ by
5 the Services according to Service regulations.
6 And, that they also raised the concern about the
7 use of the words secure compliance and reiterated
8 the same point made by the Navy.

9 CHAIR HOLTZMAN: Judge Jones?

10 HON. JONES: I would echo what Colonel
11 Hines said at the beginning and sort of catalyst
12 for our very lengthy discussions on this was our
13 inability to figure out what fear actually meant
14 in its definition.

15 And, I believe there were also cases
16 where, you know, the individual who was claiming,
17 you know, a sexual act had been committed wasn't
18 able to say, well, I was afraid. And so, we
19 weren't sure that that was adequate.

20 We did look at the, I guess it was the
21 2007 statute, the previous statute, which seemed
22 to have a section like this.

1 I don't remember that we learned a
2 lot. I think we tried to about why it had been
3 removed before the 2012 statute came in.

4 But, we were influenced, one, by the
5 -- what we thought was not helpful in the fear
6 definition.

7 And, two, by the fact that it is a
8 unique -- it may not be uncommon, but it's a
9 unique situation where a position or rank or
10 authority is used and you're trying to define
11 what makes that unlawful.

12 And here, again, we were trying to get
13 to the point where we could say a person who
14 commits a sexual act upon another, and we don't
15 think that threatening or placing that other
16 person in fear is the most obvious or the best
17 way to describe this type of nonconsensual
18 attack, if you want to call it that.

19 We have the straight out, without the
20 consent of the other person, the fraudulent
21 representation is in there, inducing a belief by
22 any artifice pretense. Those seem to be accepted

1 and people sort of think they understand those or
2 do understand them.

3 But, there is this using of a position
4 of rank or authority and we heard testimony from
5 at least one victim and read about a number of
6 other victims who were in situations where they
7 were put in positions upon the order of the
8 person in authority over and over again until
9 they were worn down and down and down.

10 And, whether you described it as fear
11 or compulsion, ultimately, they were abused
12 whether it went to a complete rape or was just
13 sexual abuse, it happened and it was hard.

14 We believe it was -- it would be
15 important to have a Section E that would describe
16 the, you know, using power, which is really what
17 we're talking about, the power of one person over
18 another because of position, rank or authority to
19 obtain that sexual contact.

20 Everyone understands being threatened
21 with, you know, death. People understand when
22 you're lied to. All these others are a little

1 bit more understandable.

2 Without the consent of the other
3 person, of course, is general but it covers the
4 incapable of consenting situation, for instance.

5 This specifies something that is
6 obviously a cause of concern in the military and
7 we think it's important to put it back in there
8 as a much more specifically than just hoping that
9 it will be caught up in the threatening or
10 placing that other person in fear.

11 I think -- well, it was Congresswoman
12 Frankel who came in and spoke to this. She
13 didn't suggest this particular language, as I
14 recall. But, she raised front and center,
15 particularly with the testimony of the victim
16 that she brought just how difficult these
17 positions are and situations are and how
18 difficult it is to describe sometimes.

19 But, the bottom line is, if by your
20 position, your rank or your authority that you
21 are able to commit a sexual act, then that should
22 be no different than lying to somebody or

1 threatening them.

2 I don't know, you know, where placing
3 that other person in fear -- we think that it's
4 a, you know, it's a specific way to describe a
5 pretty, what I think people believe is, you know,
6 is a situation that's occurring with some
7 frequency.

8 And, it does what law is supposed to do, it
9 makes a statement about what you can and cannot
10 do. So, I think that's essentially why the
11 Subcommittee thought it was important to have
12 this.

13 Now, I will say that when I saw, I
14 don't remember if -- Was it the Navy who's asking
15 what is secure compliance? I will say that that
16 gives me pause. And, I would welcome suggestions
17 or discussion about that.

18 And, of course, people may disagree
19 completely with whether we should have Section E
20 in here. But, in any event, it took us a long
21 time. We ultimately decided as a Subcommittee
22 that this was an important section to have in

1 here.

2 CHAIR HOLTZMAN: Thank you, Judge
3 Jones.

4 I just want to ask one question. Does
5 the -- did the Military Justice Review Committee
6 take any actions that would affect this section?

7 LTCOL HINES: Ma'am, they are
8 proposing the adoption of a new -- and, you have
9 this in your materials, too -- a new Article
10 93(a) which would be entitled Prohibited
11 Activities With a Military Recruit or Trainee by
12 a Person of Position of Special Trust.

13 So, Article 93 is Maltreatment and
14 their proposal, we don't know what the
15 recommended maximum punishment for this offense
16 is going to be yet. That part of the report
17 hasn't been submitted.

18 But, their recommendation is this
19 adoption of new Article 93(a) which would -- I
20 see it as more narrowly targeted than the
21 Subcommittee's proposal.

22 So, it targets on the accused's side,

1 it targets trainers or recruiters. And, the
2 victims have to be basically in the training
3 environment or they have to be recruits in the
4 pipeline going into training.

5 So, and it would cover consensual
6 sexual offenses.

7 This is not a sex offense. It doesn't
8 -- consent is not a defense, that's not an issue.

9 So, it's more narrowly tailored and it
10 wouldn't cover the Subcommittee's proposal
11 because, as I said, the proposed 120(b)(1)E isn't
12 limited to that group of perpetrators or that
13 group of victims. It's, as I said, wide enough
14 to capture anything that happens outside the
15 training environment.

16 So, that's what the MJRG's proposal
17 is, ma'am.

18 COL GREEN: And, the Services all have
19 Service regulations that are specific to the
20 training environment and to the recruiting
21 environment that somewhat mirror the proposal of
22 the MJRG Article 93(a).

1 Those are general orders and are
2 prosecuted currently under Article 92. So, I
3 think what the MJRG proposal does is it creates
4 an enumerated offense specific to those same
5 policies that are now covered under Article 92
6 but it does not deal with the circumstances of
7 sexual offenses where consent has been overcome
8 by the use of rank, position or authority.

9 CHAIR HOLTZMAN: Any of the Members of
10 the Panel have any comment?

11 VADM TRACEY: I think I agree with
12 Judge Jones description of whether not to make
13 this change and if there's a way to address the -
14 -

15 HON. JONES: Secure --

16 VADM TRACEY: -- underlying secure
17 compliance --

18 HON. JONES: Yes.

19 VADM TRACEY: -- with it. That would
20 be beneficial.

21 MR. STONE: And, I'd like just to say
22 for the record that when the Panel sent me down

1 to observe the Special Victims' Counsel's
2 training in Charlottesville the summer of 2014,
3 one of the last presentations we had that I
4 listened to was a panel of victims who spoke to
5 the whole group.

6 And, one presentation by a victim that
7 stands out, and I won't forget, is a young woman,
8 a very attractive woman, who never made an
9 allegation because she didn't think that it would
10 go anywhere but her career was ruined because the
11 person to whom she was attached as a clerical
12 assistant and worked with every day was
13 repeatedly making advances to her.

14 And, she wound up giving into those
15 advances even though she did not wish to have a
16 relationship with that person. And, there was
17 never an overt threat. The person would have
18 said, oh, she consented. There was no fraudulent
19 representation. There was no bodily harm to her.

20 It was hard to say fear but she wanted
21 to get out of the military because she was placed
22 in this situation where that was the person above

1 her who would determine all of her future and she
2 did not know how to say no to his advances other
3 than the way she tried which was relatively
4 polite but got her nowhere.

5 And, it was a very frustrating
6 situation for her and she believed, she actually
7 only came forward to talk to us about it when her
8 replacement wound up making -- bringing a sexual
9 assault case and nobody believed her replacement.
10 And then, she came forward because she said, I
11 previously worked for that person and suffered
12 exactly the same treatment. And, she said it was
13 totally frustrating to her.

14 And, I can't recall off hand if the
15 replacement's case went anywhere, but that would
16 be covered by a person using position, rank or
17 authority to secure compliance.

18 And, at the time, she described it
19 and, I guess, currently, there wasn't a good way
20 to legally address that bad behavior.

21 And so, I think this is a very good
22 solution to that problem. I don't think it is

1 addressed right now and it's certainly going to
2 make a lot of people in that woman's position
3 feel better about staying in the military. So, I
4 support it.

5 CHAIR HOLTZMAN: Let me ask -- be a
6 little devil's advocate here.

7 What this situation is addressing,
8 aside from the secure compliance -- and I agree,
9 I'm troubled about that language, too, as is
10 Admiral Tracey.

11 What this deals with is a situation
12 where there is theoretically consent. Or, is
13 there not consent?

14 VADM TRACEY: It's giving in.

15 HON. JONES: It's not consent, in my
16 view. And, that's the whole problem that when
17 you have to stop and think, well, as we listened
18 to that testimony. After you're ordered in to be
19 the house mouse or whatever they called it in the
20 testimony 17 times in a row and, you know, every
21 time more offensive remarks and then later
22 conduct occurs and you're frozen, if you will,

1 that's not consent.

2 I don't think we're -- nothing --

3 CHAIR HOLTZMAN: Okay, so --

4 HON. JONES: There's no consent.

5 CHAIR HOLTZMAN: Okay. But, if that's
6 the case, I'm not disagreeing with you, why isn't
7 that covered under (b)? Why do we need E?

8 HON. JONES: Because I think people
9 think unless you -- we're still going back to
10 unless you resist or you say something or there's
11 force, then they -- then, you know, it's not a
12 situation that you immediately decide, well, that
13 must be nonconsensual.

14 And, again, I think it's -- it makes
15 it clear that it's not okay to use your power in
16 this fashion.

17 MR. STONE: To get what, to an
18 objective observer, might look like consent.

19 HON. JONES: What might look like
20 consent, yes.

21 MR. STONE: Exactly.

22 CHAIR HOLTZMAN: Okay, so --

1 HON. JONES: Thank you, Mr. Stone.

2 CHAIR HOLTZMAN: All right, so but my
3 concern here is with, let's take the case where
4 there is real consent.

5 And then, whoever the consenting
6 party, for whatever reason, changes his or her
7 mind and brings a charge.

8 HON. JONES: Right.

9 CHAIR HOLTZMAN: What's the --

10 HON. JONES: A jury. I think that's
11 -- I mean they could -- that victim, alleged
12 victim, could certainly go in and make a
13 complaint and say, you know, I was forced to do
14 this. He imposed upon me. He was my, you know,
15 he was the ranking officer in my unit or
16 whatever.

17 And then, if that were true, that
18 would violate this. If it weren't true and a
19 jury decided she was making it up because -- or
20 he -- because they once had a consensual
21 relationship and they just don't believe them,
22 then it's not -- he or she won't be convicted and

1 it wouldn't be a violation.

2 CHAIR HOLTZMAN: Would -- I don't
3 remember the discussion on this. Was there a
4 conversation about -- in the Subcommittee about
5 the use of the word using position, rank --

6 Also position, to me, is a little bit
7 ambiguous. I don't know what that means a 100
8 percent. I mean, I know what rank or authority
9 is, but I'm not sure what position a 100 percent
10 means.

11 But, anyway, would abusing position,
12 rank or authority --

13 HON. JONES: We went back and forth on
14 that. You're right, you're right.

15 CHAIR HOLTZMAN: All right, so let's
16 maybe --

17 HON. JONES: And, I think the
18 discussion --

19 CHAIR HOLTZMAN: -- go over that.

20 HON. JONES: Yes. I think the
21 discussion about abusing, as I recall, I mean you
22 could be using your authority in the sense that,

1 yes, you have the authority to order someone to
2 do a particular duty and you wouldn't be abusing
3 it to have that person do that particular duty.

4 As opposed to giving them an order
5 that you had no authority to give and which would
6 be an abuse of your authority.

7 We thought it just started to get too
8 complicated and it was easier to just say using
9 your authority, period, to, you know, to erode
10 consent or whatever you want to call it.

11 We were just worried about, if people
12 would start getting into an analysis of, well,
13 wait a minute, is this an abuse of his authority?
14 Did he or she have the authority? Or didn't they
15 have it?

16 So, abuse in that sense, so we just
17 decided to go with using.

18 This was a very long deliberation on
19 our part and some of this is tough. We went back
20 and forth between abuse and between abusing and
21 just saying using.

22 LTCOL HINES: I think on that point,

1 ma'am, one of the -- a lot of the discussion, and
2 I think Professor Schulhofer was one of them, was
3 the question of, well, how much authority does a
4 trainer or anyone else have to order a putative
5 victim into a situation.

6 And so, the discussion was, well, yes,
7 a trainer can order a recruit to come to his or
8 her office. And, there's a whole litany of
9 things that are within their authority to order a
10 recruit or anyone else to do.

11 And so, where -- so that's not an
12 abuse of authority. And so, the question becomes
13 where --

14 HON. JONES: In the sense that the
15 order itself is not the abuse of authority.

16 LTCOL HINES: Right.

17 HON. JONES: Yes.

18 LTCOL HINES: You could order a
19 recruit to your office for any number of lawful
20 purposes, to counsel them, to have them clean up
21 the office, whatever. So, the question was,
22 well, where does the line -- where is the line

1 between lawful orders and where does that stop?

2 And, I think the Subcommittee decided
3 -- because abusing was initially there, I think,
4 in one of the drafts.

5 HON. JONES: Yes, it was.

6 LTCOL HINES: And so, they decided,
7 well, let's remove all those questions and make
8 it more general. Any use, whether it's for a
9 lawful or illegal purpose, any use of your
10 position or abuse is a violation of the statute.

11 MR. STONE: And, correct me if I'm
12 wrong, Judge Jones, but I actually think this is
13 sort of a compromise position between the
14 proposal that's either in the regulations or in
15 this 93(a) that new Commission proposal that is
16 where this strict liability for trainers and
17 recruiters.

18 This is not strict liability but it is
19 a slightly higher standard than faced by someone
20 who is not in a superior position, rank or
21 authority. And that, basically tells the
22 military services, you're going to have to

1 recognize that this is a sensitive subject.

2 So, if you're going to get in a
3 relationship with someone who is in an inferior
4 position, rank or authority, this is something
5 you better keep your eye on. So it doesn't
6 prohibit it, but it warns them that this is a
7 sensitive topic.

8 It's open and above board about that
9 and I think that is a good compromise between
10 strict liability and not covering this subject at
11 all.

12 CHAIR HOLTZMAN: Yes, but we're
13 talking about -- what's the prison sentence for
14 this?

15 HON. JONES: This is not rape, so
16 it's, what?

17 CHAIR HOLTZMAN: It is rape. Sexual
18 assault, okay.

19 COL GREEN: Maximum punishment is 30
20 years.

21 HON. JONES: And, we also talked about
22 that. Look, you either think that abusing

1 someone by using your power and which has them,
2 however you want to put it, acquiesced to a
3 sexual assault, is a sexual assault or is not a
4 sexual assault.

5 This is just a different variety of
6 sexual assault and I think it's important that it
7 be specified.

8 Mr. Stone, you're right. This has
9 nothing to do with consensual act. They are
10 taken care of and consensual acts can be strict
11 liability where we're not talking about a
12 criminal statute where you're going away for 30
13 years. And, it's important to, you know, good
14 order and discipline.

15 This is about nonconsensual sex when
16 there are two people, one of whom really forces
17 it on the other person by position, rank or
18 authority. And, it's different from what most
19 people, I think, typically think about when they
20 think about rape or sexual assault and it's
21 actually a problem throughout the statute and in
22 people's minds that there has to be force. There

1 has to be, you know, a slap or a threat of force.

2 And so, that's what this is intended
3 to cover very specifically. And, it is broad
4 because it doesn't have to -- it can be a
5 civilian. So, it doesn't necessarily have to be
6 rank.

7 And so, that was why we put in
8 position, rank or just simply authority.

9 I don't know if there was a question,
10 but I was trying to respond to your comments, Mr.
11 Stone.

12 CHAIR HOLTZMAN: Mr. Taylor, do you
13 have something to say?

14 MR. TAYLOR: Well, I'm in favor of
15 this. I think this is a necessary addition and,
16 at one point, some may recall that I was actually
17 more in the camp of some sort of a strict or
18 absolute liability, particularly in the training
19 environment for initial entry training
20 environment.

21 So, Article 93(a) has some appeal to
22 me for that reason. But, I think this is a very

1 useful and helpful way to approach the problem.

2 There's always been this idea in our
3 jurisprudence of constructive force when it comes
4 to the use of rank and authority in order to
5 secure some sort of sexual act without the real
6 consent of the person.

7 So, I'm in favor of this and I suggest
8 we start thinking about to secure compliance and
9 what might work there unless there's something
10 else.

11 I'm thinking, for example, on this one
12 that you might think about tying it back into the
13 other statutes to perform or have a sexual act or
14 sexual contact with another person. Go back and
15 use that language because that's the kind of --
16 that's the compliance we're talking about. Is
17 that right?

18 HON. JONES: Yes, so --

19 VADM TRACEY: Or is it to overcome a
20 lack of consent.

21 HON. JONES: I'm sorry, I just didn't
22 hear you.

1 VADM TRACEY: To overcome a lack of
2 consent by the other person.

3 MR. STONE: That adds another element.

4 MR. TAYLOR: Yes.

5 MR. STONE: Why does it have to -- why
6 can't it just stop after by using position, rank
7 or authority?

8 HON. JONES: Commits a sexual act upon
9 another person by using position, rank or
10 authority.

11 That was my first thought. I don't --
12 but I hadn't heard these other suggestions yet.

13 MR. TAYLOR: Well, I like that.

14 HON. JONES: It's neat.

15 MR. TAYLOR: I like that.

16 HON. JONES: And, I mean that in a
17 good way in terms of tight and sends you right
18 back to commits a sexual act.

19 MR. TAYLOR: Right.

20 HON. JONES: I would accept that as an
21 amendment. I don't know how everybody else
22 feels. I like that, Mr. Stone.

1 MR. TAYLOR: I would be in favor of
2 it.

3 MR. STONE: And, I might add I think
4 having it phrased -- the whole idea of this is
5 very good because there were suggestions among
6 the -- in the testimony that we got a long time
7 ago.

8 What happens if a superior officer
9 decides to get engaged to someone in his command
10 or marries them, are we going to have a problem?
11 And, the answer is you won't have it under this
12 language.

13 CHAIR HOLTZMAN: And, why is that?

14 MR. STONE: Because it's not strict
15 liability. It's not like the trainer situation
16 where they may not have, you know, any sexual act
17 upon the person that they're training.

18 CHAIR HOLTZMAN: But, you could have
19 a prosecution. You may not have a conviction,
20 but you could have a prosecution.

21 MR. STONE: Well, you could always
22 have a prosecution.

1 CHAIR HOLTZMAN: Not always.

2 MR. STONE: But, I mean the idea is to
3 recognize that it's not meant to cover a
4 situation where there are people who've had a
5 preexisting relationship and that it continues.
6 I mean, that would -- they wouldn't be using
7 position, rank or authority if the relationship
8 is either before one of them had the position,
9 rank or authority or --

10 CHAIR HOLTZMAN: In fact, they might
11 not be, but the allegation might be that they
12 were. That's the difference here and that's my
13 concern here.

14 I completely agree with what you're
15 saying. But, I'm just troubled about the case in
16 which there is a false accusation and it's very
17 broad language and we're talking about, you know,
18 enormous penalties.

19 The standard situation that you're
20 talking about, the ones that we heard,
21 Congresswoman Frankel's victim, I think that's a
22 very clear case. I have no problem with that.

1 But, how do you differentiate it?
2 Maybe when we try to get the language about
3 securing compliance, maybe that will solve my
4 problem. That's my concern.

5 HON. JONES: I'm not sure.

6 CHAIR HOLTZMAN: Right, it may not,
7 but maybe it would take me a little bit closer to
8 your --

9 LTCOL HINES: Ma'am, if I could just
10 make two --

11 CHAIR HOLTZMAN: Yes?

12 LTCOL HINES: -- two notes?

13 Two of the things that came up in the
14 Subcommittee's deliberations now with respect to
15 the extra language that Mr. Stone is talking
16 about, I think the language about the other
17 person was put in there to make it consistent
18 with the other theories of liability that almost
19 always talk about the other person.

20 So, for consistency's sake, you know,
21 if you go up to a rape, it's using unlawful force
22 against the other person, cause grievous bodily

1 harm to any other person.

2 And so, that's sort of consistent
3 throughout the statute and so I think the
4 Subcommittee felt, well, just for sake of
5 consistency, we're going to say -- we're going to
6 put -- we're going to talk about the other
7 person.

8 But, the other discussion that took
9 place with respect to secure compliance, there
10 were discussions about what should go in there,
11 compel or coerce which both have a well-developed
12 case law under the UCMJ and other areas, for
13 instance, Article 31(b), the question of whether
14 an accused statement is voluntarily given or he
15 or she was coerced or compelled.

16 That was part of the discussion and I
17 think some of the Subcommittee Members, there was
18 sort of a split on whether the compel or coerce
19 was the appropriate language.

20 And, I think we arrived at -- I think
21 the Subcommittee arrived at this secure
22 compliance because it was better tied it back to

1 the accused using the position, rank or authority
2 in order to secure the act.

3 HON. JONES: And I think that --

4 COL GREEN: So, that's just background
5 as to what discussions went on in the
6 Subcommittee.

7 HON. JONES: As I recall, I think
8 people were worried about using compel because,
9 again, it seemed to connote some sort of force.
10 And so, we went around and round on this and came
11 up with something very neutral but possibly not
12 understandable in terms of any previous, you
13 know, use and jurisprudence.

14 I have to say, I'm not concerned about
15 situations where, you know, this would -- might
16 promote false allegations. I think to the extent
17 that there are false allegations can be done in
18 any of these issues, with any of these subparts
19 to (b) (1).

20 MR. STONE: I agree and I would point
21 out that the alternative is to start talking
22 about coerced consent and trying to prove a very

1 difficult topic.

2 And that's exactly what the female
3 victim that I heard at the presentation in
4 Charlottesville explained was just something
5 that, you know, her whole life was going to be
6 turned upside down and she didn't think she could
7 prove coerced consent because there weren't any -
8 - there was no evidence of it being coerced other
9 than the fact that this was a boss and it was a
10 job she wanted to get out of and she saw her
11 entire career on the line.

12 And then, she saw it happen again
13 after she left that position.

14 And, to some extent, this, you know,
15 one way to prevent this, of course, is strict
16 liability. And, I know a lot of universities
17 have prohibitions on faculty having any
18 relationship with a student. And that's, you
19 know, they don't always necessarily have
20 authority over that student, but they know that
21 it leads to, you know, in the mind of the victim,
22 the victim doesn't think that they can refuse.

1 And, it's a serious problem.

2 And, it seems to me, this is a good
3 compromise here because the victim is still going
4 to have to prove, they're still going to have to
5 be proof of a sexual assault. That's no
6 question.

7 So now, the question is, where it
8 happens between somebody who has --

9 CHAIR HOLTZMAN: The sexual act.

10 MR. STONE: -- position, rank or
11 authority over them, you know, how cautious have
12 they been? And, they're going to have to be
13 cautious and that's as it should be.

14 CHAIR HOLTZMAN: Well, I think I'm --
15 with the language about securing compliance,
16 though I have a problem with the language. I
17 mean I think they're -- you have to show the
18 causality here.

19 So, that is more comforting to me in
20 terms of the rest of the statute. I feel more
21 comfortable with language like that. I don't
22 feel comfortable about using position, rank or

1 authority. Just --

2 HON. JONES: You'd rather underline,
3 bringing it back to the --

4 CHAIR HOLTZMAN: Right.

5 HON. JONES: -- sexual act.

6 CHAIR HOLTZMAN: Right. So, it's
7 secures, that it's -- there's a relationship
8 between the authority and it does suggest --
9 secure doesn't suggest compulsion. I think
10 compulsion is too strong a term. But, it's a
11 little bit more than just -- it suggests
12 something a little more than nothing in terms of
13 getting compliance.

14 So, I feel comfortable with the
15 language as it is, actually. If we have a
16 different term that suggested a more elegant way
17 that tracks legal history or other case law,
18 that's fine with me, too.

19 MR. STONE: Actually, you just used
20 other language. I don't know if you like it
21 better. You said to bring about the sexual act,
22 that we say the sexual assault. Do you like that

1 better by using the position, rank or authority -

2 -

3 CHAIR HOLTZMAN: To bring about the
4 compliance?

5 MR. STONE: To bring about -- no, I
6 dropped the compliance, to bring about --

7 CHAIR HOLTZMAN: The what?

8 MR. STONE: The sexual assault.

9 CHAIR HOLTZMAN: The sexual act.

10 MR. STONE: Sexual act, sexual
11 assault, yes, whichever one.

12 HON. JONES: So, to bring about --

13 MR. STONE: In other words, to bring
14 about rather than secure compliance.

15 HON. JONES: -- the sexual act --

16 MR. STONE: That's a causation word.

17 HON. JONES: -- upon the other person?

18 CHAIR HOLTZMAN: No, you just leave
19 that out.

20 MR. STONE: Yes, I left out the other
21 person.

22 HON. JONES: Oh, just bring about the

1 sexual act?

2 MR. STONE: Yes. I don't know if you
3 like that better. I'm fine with any of these
4 options.

5 CHAIR HOLTZMAN: Admiral, we haven't
6 heard from you yet. I'm sorry to put you on the
7 spot.

8 VADM TRACEY: I'm not sure I
9 appreciate what the difficulty is with using to
10 secure compliance in the prosecution or defense.
11 But, I don't appreciate how -- why that's a
12 challenge, other than it's never been in the
13 language before.

14 COL GREEN: Yes, ma'am.

15 And, what I would say in the terms of
16 the statute, one of the things the Subcommittee
17 looked at in terms of definitions and where
18 definitions were required or not required.

19 And we did look to some of the
20 legislative drafting principles. And, I mean,
21 although I think there's comfort in practitioners
22 to have a definition that's in the statute or in

1 the regulations that establishes what it is, it
2 also sort of begs the continual analysis of if
3 you look at that definition and say, well, what
4 do those words mean?

5 And so, I think one of the things and
6 the themes of the Subcommittee's review was to
7 avoid going down those roads and to deal with the
8 common meanings of words.

9 And so, I think this was one of the
10 areas where, you know, the Subcommittee I believe
11 said the common meanings and the understanding is
12 what you think it means is probably what it
13 means.

14 CHAIR HOLTZMAN: Are we ready to --

15 MR. STONE: I would just add, I think
16 that as a former prosecutor, I could see a lot of
17 objections to the word secure. Did they secure
18 it? What does secure mean?

19 In other words, that's a word that we
20 don't use every day in common parlance and I
21 could see that being an issue.

22 HON. JONES: Yes, I was trying --

1 CHAIR HOLTZMAN: Obtain? You can use
2 obtain.

3 HON. JONES: Obtain is what comes to
4 my mind as well.

5 MR. STONE: Then use obtain.

6 CHAIR HOLTZMAN: With that amendment,
7 are we ready to vote? Is there any -- all in
8 favor of accepting this recommendation, say aye.

9 (CHORUS OF AYES)

10 CHAIR HOLTZMAN: Any opposed?

11 Unanimously accepted.

12 Okay, now, Recommendation A-6?
13 Colonel Hines, please? Oh, that was A-6, I'm
14 sorry, right.

15 Additional issues for discussion, the
16 -- we'll go to the middle of page 3. Colonel
17 Hines, do you want to --

18 LTCOL HINES: Yes, ma'am.

19 So, with respect to this
20 recommendation, or non-recommendation, if you
21 will, now we're moving into some issues where the
22 Subcommittee does not recommend a change.

1 And so, this first one deals with what
2 was Issue 10 that the JPP referred to the
3 Subcommittee with respect to whether the
4 accused's knowledge of a victim's incapacity to
5 consent should be an element of sexual assault
6 under 120(b)(2) and (3).

7 The Subcommittee heard testimony on
8 this. There wasn't really anyone from the
9 witnesses or practitioners who advised there to
10 be a change in the way the statute's constructed
11 here.

12 The Subcommittee recommended that this
13 not be changed but there were three -- three now
14 to include Ms. Wine-Banks -- Subcommittee Members
15 who felt like that the reasonably should have
16 known language was over broad and would maybe
17 sweep in some accused who were acting
18 negligently.

19 And so, they would actually do the
20 opposite, I think, of what the original question
21 was which was, should we even require any mental
22 state on the part of an accused?

1 They would remove that language to
2 bring it more in line with Title 18 which would
3 require that an accused knows, not reasonably
4 should have known, but that the act occurred and
5 the accused actually knew of the incapacity by
6 the victim.

7 And so, the recommendation from the
8 Subcommittee is, don't change, but there are --
9 we just wanted to make sure that the Panel knows
10 that there were three Subcommittee Members who
11 felt strongly enough about this, Professor
12 Schulhofer, Ms. Kepros and now Ms. Wine-Banks
13 that they recommended the Panel consider removing
14 that language so that it wouldn't be so over
15 broad for an accused.

16 CHAIR HOLTZMAN: Did we have any other
17 comment about this what we call a recommendation
18 for non-recommendation? No?

19 COL GREEN: No, ma'am.

20 CHAIR HOLTZMAN: Judge Jones, do you
21 want to comment about this?

22 HON. JONES: I just remember that this

1 was not completely, but somewhat prompted by the
2 Supreme Court's case *Alanas* And, I just -- I've
3 gone back and forth on this once, I'm now back.

4 And, I think we should leave the
5 statute as Congress has written it which, in this
6 military context, permits or reasonably should
7 have known.

8 *Alanas* really is about a statute that
9 does not give you a standard for mens rea. And,
10 then there's a lot of dicta about when willful
11 negligence or egregious behavior, but not
12 intentional and willful, can become the mens rea
13 in a criminal statute.

14 But, it doesn't bear on this and I
15 think -- I was concerned that Congress may have
16 been moving in that regard with some recent
17 congressional activity. I think it was Senator
18 Hatch and I forget who the other sponsor might
19 have been, but those two proposed bills actually
20 didn't relate to this issue at all.

21 And, I'm content to leave this the way
22 Congress wrote it. And, yes, it's a harsher

1 position for the military is what it amounts to.

2 In reality, I don't know if it makes
3 much difference when a jury hears all the facts
4 and has to decide whether the person actually
5 knew which they're never going to be able to tell
6 by -- because they can't read minds, or
7 reasonably should have known.

8 But that's just a practical comment.
9 So, I would leave it.

10 MR. STONE: By leaving it, that means
11 it still will say reasonably should have known?

12 HON. JONES: Yes, yes.

13 CHAIR HOLTZMAN: Any discussion from
14 the Panel?

15 VADM TRACEY: I actually found the
16 discussion fairly compelling that we're holding,
17 in many cases, very young people to a higher
18 standard than they would be.

19 I absolutely agree with the argument
20 that an officer or a commander or a senior member
21 of the Service, either enlisted or officer, does
22 get held to a very higher standard.

1 But, this could apply to a Naval
2 Academy midshipmen. It could apply to a recruit
3 at boot camp. And, we would criminalize behavior
4 that might actually be negligence.

5 And, what's the logic there?

6 MR. STONE: Well, I guess your comment
7 makes me think about what did happen at the Naval
8 Academy? And, the fact that I would assume, at
9 least for Naval Academy recruits, that, from the
10 outset, they have to know what reasonably is
11 expected of them if they want to be in the
12 military, that this is not just a casual job
13 they're taking, it's an entire lifestyle that
14 they're embarking on a career of.

15 And so --

16 VADM TRACEY: But, this is reasonably
17 should have known something about the other
18 person. So, help me with -- I got it that
19 they're held to a higher standard, but how is
20 that exactly the same as what this is addressing?
21 That they reasonably should have known something
22 was true or not true, depending on how you look

1 at it, about the other person.

2 MR. STONE: Well, this is reasonably
3 should have known as a reasonable man standard
4 and that's what a reasonable person should know.
5 But, what it really means is, they can't close
6 their eyes. They can't say, oh, I'm at a party
7 and this woman is so completely drunk she can
8 barely sit up, but I don't have to pay attention
9 to that.

10 A reasonable person would say, you
11 know, I'm not holding them to a reasonable
12 commander standard, I'm holding them to a
13 reasonable person standard.

14 VADM TRACEY: Why doesn't that apply
15 to a college student?

16 CHAIR HOLTZMAN: Yes, let me see if I
17 can give you an example.

18 Suppose the -- or maybe this is not a
19 good example -- but, suppose the alleged
20 perpetrator is very, very drunk, too? What
21 happens in that case?

22 So, that, you know, what a reasonable

1 person not drinking might be aware of, maybe this
2 person is not.

3 I just throw that out as an example.
4 I am not sure how I stand on this subject.

5 HON. JONES: No, I think that is the
6 example and probably the most frequently
7 presented.

8 MR. STONE: And, that's the jury
9 question. That's the question for the jury.
10 That's what gets thrown out to them, that they
11 have to decide what was going on there and was
12 that reasonable behavior?

13 LTCOL HINES: Ma'am, I might try to
14 answer your question.

15 So, the first point, I think, in
16 response is, I think Dean Anderson gave a pretty
17 eloquent response at last month's meeting. And,
18 what she was focusing on was, these two
19 subsections under 120(b)(2) and (3) are aimed at
20 protecting, arguably, the most vulnerable victims
21 in this situation, someone who's asleep or by
22 physical or mental infirmity, incapacitate or so

1 intoxicated by a drug of alcohol that it's
2 probably arguably the most vulnerable victim,
3 other than children, under the law.

4 So, that was one point where you would
5 allow the statute to go a little bit further an
6 encompass the reasonably should have known or a
7 reasonable person standard.

8 The second point made by practitioners
9 and under the law is that, when these cases are
10 typically prosecuted, an accused can raise
11 mistake of fact as to consent.

12 And so, the way that this would play
13 out in the courtroom, if you didn't have the
14 reasonably should have known language, an accused
15 could arguably just take the stand and say, I was
16 so drunk I didn't realize that she was
17 incapacitated.

18 If you didn't have this language in
19 the statute, there's an argument the government
20 couldn't come back and attack that with other
21 evidence to disprove that.

22 And so, the reasonably should have

1 known language allows the government to attack
2 the accused's claim of mistake of fact under the
3 law, mistake of fact is not based on
4 intoxication, involuntary intoxication, it's
5 viewed through the eyes of a reasonably sober
6 person.

7 So, if this is raised by the evidence,
8 the judge gives an instruction and says, the
9 mistake of fact is based on a reasonable person
10 standard, not an intoxicated person standard.

11 So, the judge instructs the panel,
12 you've got to view his claim of mistake of fact
13 through the eyes of a reasonably sober person,
14 which would bring in all those other facts and
15 circumstances, ma'am, from maybe other witnesses
16 who would come and say, this is why the victim
17 was incapacitated.

18 And so, that is relevant evidence for
19 the government to come back and say, okay, well,
20 he's saying he was so intoxicated, he didn't
21 realize that she was incapacitated but listen to
22 what all these other witnesses said.

1 A reasonably sober person observing
2 all of those circumstances would know that, or
3 reasonably should know, that she was
4 incapacitated.

5 HON. JONES: This is really penalizing
6 somebody who knowing, by getting drunk beyond
7 being able to realize what's going on, takes the
8 risk. It's like when somebody's incredibly drunk
9 gets behind the wheel of a car and kills people.
10 And, that's homicide under certain circumstances.

11 They don't have to -- it doesn't have
12 to be, you know, knowingly. Just, it's a
13 negligent homicide theory.

14 MR. STONE: And, I think this
15 addresses what was maybe the most important
16 problem we heard in the first few meetings where
17 we had various officials testify in front of us
18 that the vast majority of the sexual assaults and
19 rapes that are going on are happening among, you
20 know, in these parties where alcohol is flowing
21 way too freely and when it's banned on base,
22 they're hiring a room or finding some friend's

1 room off base.

2 And, nobody has been addressing it and
3 the result is the rapes and the sexual assaults
4 are happening and --

5 VADM TRACEY: But, am I right that the
6 people who are found guilty are going to be on
7 the sex offender list?

8 LTCOL HINES: Yes, ma'am.

9 CHAIR HOLTZMAN: Yes, and how many
10 years of prison are they exposed to? Thirty?

11 LTCOL HINES: Thirty, yes, ma'am, for
12 sexual assault it's 30.

13 CHAIR HOLTZMAN: But it could be rape.
14 Couldn't it be rape, too or not?

15 LTCOL HINES: No, ma'am.

16 These prosecutions would take place
17 under 120(b)(2) and (3) and then also by
18 application of --

19 CHAIR HOLTZMAN: So, we're talking
20 about a substantial prison sentence and sex
21 offender for life is a very substantial -- I mean
22 I think that's the point --

1 LTCOL HINES: That's the point.

2 CHAIR HOLTZMAN: -- that Kepros is
3 making and that, you know, two other Members of
4 the Panel agree with and I'm really kind of in
5 the middle on it because I can see both sides of
6 this argument.

7 In a way, there's a big unfairness.
8 It's not quite the same, Judge Jones, if I may,
9 with all due respect, getting into a car. One
10 knows that a car is dangerous. But, another
11 human being, if you're so drunk, you may not even
12 know you're that drunk that you can't perceive
13 correctly what that person is doing. It's not
14 the same kind of awareness of the danger because
15 it's a big issue of perception.

16 And so, I think there is a very grave
17 risk of unfairness we didn't hear. But, on the
18 other hand, you know, people are putting
19 themselves, as you well noted, into this
20 situation to begin with.

21 And so, should they bear the risk?
22 Maybe if they're told about it, you know, and

1 educated about it, I'd feel better.

2 HON. JONES: And, you know, how did
3 this come up, this issue? I think it was from
4 the Subcommittee itself?

5 LTCOL HINES: Yes, ma'am, so --

6 HON. JONES: It was never a question
7 that was actually put to --

8 LTCOL HINES: Right. I think the
9 original issue that the Panel put to the
10 Subcommittee was should -- essentially, should
11 there even be a mental state other than the
12 implied knowingly engaging in the sex act?
13 Should there be an additional mental state by the
14 accused about the accused has to know the --
15 about the incapacity?

16 So, I would say that first issue was
17 should we make the statute more, to use probably
18 a bad phrase, more victim-friendly.

19 And, Professor Schulhofer, I think,
20 before the Panel and then later in the
21 Subcommittee raise the opposite issue of what the
22 statute as drafted is too victim-friendly and

1 that generated the opposite discussion which was
2 really, I don't think anyone had any issue with
3 considering, well, yes, should we make this more
4 government-friendly as the issue was put to the
5 Subcommittee.

6 The majority of the discussion ended
7 up being about Professor Schulhofer's concern
8 about maybe this is too broad and would capture
9 too many accused for negligence.

10 MR. STONE: And, did he or any other
11 person offer examples where, since that's the
12 current language, it has resulted in -- did they
13 have examples for us from case law that showed
14 that it's working badly?

15 I mean we're here to help fix up the
16 statute and we're looking at problems. And the
17 question I have is whether he's telling us that
18 that's a problem or not.

19 LTCOL HINES: I don't believe there
20 was any anecdotal discussion about any cases
21 either from practitioners in the case law, Mr.
22 Stone.

1 The one case, Judge Jones, is right,
2 the case Professor Schulhofer raised was this
3 Alanas case from the Supreme Court which came
4 down targeting 18 USC 875, the Interstate Threat
5 Statute that was silent about a mental state all
6 together.

7 CHAIR HOLTZMAN: Did we have any
8 testimony from defense counsel on this point that
9 this was an issue?

10 HON. JONES: I don't remember.

11 COL GREEN: Dean Schenk is the one who
12 originally raised this issue and she really did
13 it as just a comparison of the statute against
14 the Title 18 statute.

15 CHAIR HOLTZMAN: Right.

16 COL GREEN: There were no presenters
17 before the Panel when it reviewed this issue that
18 raises an issue.

19 So, it was referred to the
20 Subcommittee and there were no presenters before
21 the Subcommittee who suggested amending this
22 section. There was one former Marine prosecutor

1 and civilian defense counsel who said that the
2 government should have to prove the accused had
3 some knowledge that the victim was incapable of
4 consenting. That was the only discussion.

5 But, Mr. Spillman did not relay any
6 specific cases or issues. I think, again, he was
7 looking it more just as a theory.

8 CHAIR HOLTZMAN: But, would this be --
9 here's a thought. Maybe this is -- and shoot me
10 down for sure on this.

11 Would it be -- make any sense to ask
12 either the Subcommittee or the Services or others
13 whether this is a problem as opposed to a
14 theoretical issue?

15 HON. JONES: Well, I was going to say,
16 no one came in -- no one from the Services came
17 to us and said they thought it was a problem.
18 But, I --

19 COL GREEN: To the contrary, ma'am, I
20 think a number spoke about exactly what Colonel
21 Hines summarized in terms of the issue with
22 mistake of fact and whether this -- without this

1 provision that an accused can raise something
2 that can then not be contradicted or would
3 preclude prosecution in particular cases where --
4 without that reasonably should have known, it
5 would be prosecutable with that, but would not be
6 if that were to be removed.

7 There were a number of presenters
8 recommending that and supporting the statute as
9 is. There were nobody -- there was no one
10 testifying before the Panel initially or before
11 the Subcommittee that spoke otherwise.

12 CHAIR HOLTZMAN: Except this one.

13 COL GREEN: Except Mr. Spillman as to
14 just the theoretical issue and then Dean Schenk
15 talking about it just from a comparative
16 standpoint with the federal statute.

17 VADM TRACEY: Is it possible to ask
18 the defense counsels just to address this
19 specific issue?

20 MR. STONE: And, whether or not they
21 have cases to cite to us?

22 HON. JONES: Are we not all that

1 quickly? Is that the problem?

2 MR. STONE: We could ask for written
3 follow up within a week of this hearing. We're
4 going to meet again next week.

5 LTCOL HINES: We certainly, we could
6 do anything the Panel wants. We could send out
7 that question to see if they've had any cases
8 that have come through where this has been a
9 problem and tell them they have to get us their
10 answer.

11 CHAIR HOLTZMAN: Because, if it's not
12 a problem, then my concern is, you know, I'll
13 withdraw my concern. But, if it is a problem, I
14 mean we all know what maybe the best solution
15 would be but if it's just theoretical, I don't
16 know that I have a big objection to what we're
17 doing.

18 COL GREEN: And, I think relative to
19 the other issue that, in terms of the analysis of
20 the Alanas case is that Congress spoke
21 specifically on this issue and established the
22 standard.

1 And so, I guess the question before
2 the Panel is whether the Panel wants to make a
3 recommendation to Congress to amend the statute
4 to relax that standard relative to this issue.

5 And, again, to this point, the Panel
6 has not heard from any witnesses that have
7 identified cases and all the presenters -- there
8 were no presenters that highlighted this issue
9 nor any submissions to the Panel or Subcommittee
10 that highlighted this issue as a particular
11 concern.

12 And to the contrary that heard from a
13 lot of practitioners who argue how it establishes
14 a standard that creates enforcement of issues in
15 situations of intoxication that enables them to
16 prosecute cases more effectively.

17 VADM TRACEY: How long has the sex
18 offender standard been in play here? How long
19 has it been true that anyone convicted under this
20 is going to be put on the sex offender list for
21 life?

22 COL GREEN: Well, I mean Article 120

1 convictions have always been registrable offenses
2 according to the DoD standard.

3 This standard was adopted as part of
4 the 2012 statute. So, it's really since then.

5 CHAIR HOLTZMAN: Wait. So, before
6 2012, there wasn't a negligence standard?

7 VADM TRACEY: My concern is that I
8 don't know if there's enough time that's elapsed
9 since this combination of things were in play to
10 know.

11 HON. JONES: Well, and part of the
12 problem, no one really raised this. And, so then
13 the Subcommittee started to be concerned because
14 of a couple of Members who were seriously
15 concerned about it.

16 But, I think to stop at this point
17 could be quite an adventure for us for trying to
18 finish this.

19 I'm actually -- I've always -- my
20 strongest feelings about this were, I didn't
21 realize Congress had just drafted it this way
22 with the reasonable should have known as recently

1 as 2012.

2 But, knowing that only makes me feel
3 more strongly that this is not the time, you
4 know, a couple of years later to go back and say,
5 we think you should amend this and take it back
6 out, especially without any groundswell raising
7 the issue to us.

8 CHAIR HOLTZMAN: But, I mean another
9 possibility might be, if it's true that there was
10 no negligence standard before 2012? Is that what
11 you're saying? Is that true? We don't know?

12 COL GREEN: I don't know, not before
13 --

14 CHAIR HOLTZMAN: Well then, try to
15 figure it out.

16 COL GREEN: Yes, ma'am.

17 CHAIR HOLTZMAN: Well, we might ask --

18 MR. STONE: You know, I'd like to make
19 a point while they're looking to see if they can
20 answer your question.

21 Going back to the example of have you
22 controlled drunken driving? As an analogy, the

1 answer is, as a practical matter, most of, the
2 state have come up with standard where they take
3 a blood alcohol test and they tell you what the
4 level is. And, if it's above 0.08 or whatever it
5 is and various things, you're going to get
6 yourself prosecuted and probably convicted. And,
7 if it's below, they won't.

8 Well, how do we do that in the
9 military? When I heard that testimony at our
10 first few meetings about how drunken parties get
11 out of hand and there's lots of offenses that are
12 really committed that have the effect of causing
13 a lot of women to leave the military who we would
14 do a lot better to keep in the military and to
15 leave damaged.

16 I was walking around thinking, is the
17 only solution here to ban alcohol in the
18 military? Which, of course, I realized was way
19 over the top.

20 And, it seems to me this standard is
21 sort of an analog to having a you can only have
22 so much of a blood alcohol level. You will be on

1 notice that, if you get yourself to that point,
2 you may be held responsible for what you should
3 have known.

4 I mean, absent this, I think the
5 problem, instead of getting better, only gets
6 worse.

7 CHAIR HOLTZMAN: But, are they told
8 that? Do they understand that? That's the
9 question.

10 COL GREEN: Panel Members, the
11 question as to whether this existed in the
12 previous statute, the actual language itself is a
13 new addition to the statute. However, I mean the
14 entire framework of the statute is new, so I
15 don't know that that tells us anything.

16 The previous statute did include a
17 specific mistake of fact as to consent. And,
18 I'll just read the final statement or the final
19 part of that.

20 The accused state of intoxication, if
21 any, at the time of the offense is not relevant
22 to mistake of fact, a mistaken belief that the

1 other person consented must be that which a
2 reasonably careful, ordinary, prudent, sober
3 adult would have had under the circumstances at
4 the time of the offense.

5 CHAIR HOLTZMAN: And, how long does
6 that statute --

7 COL GREEN: And, that's from the 2007
8 version of this statute.

9 CHAIR HOLTZMAN: And, how far back
10 does that go?

11 COL GREEN: 2007 is when it was
12 enacted.

13 CHAIR HOLTZMAN: And, what was before
14 that? Was there a negligence standard then?

15 MR. MARSH: There was not, no, ma'am.
16 The pre-2007 --

17 CHAIR HOLTZMAN: I see. So --

18 MR. MARSH: -- standard is --

19 CHAIR HOLTZMAN: -- it started in
20 2007?

21 Well, the other possibility, since we
22 do have a time issue here, is just to ask. Say,

1 this issue was not raised by any practitioners,
2 defense counsel, but that perhaps Congress would
3 want to review this at a later time.

4 Or, maybe we could review this at a
5 later time and just say that we don't have enough
6 information right now to make a decision on this.

7 I mean --

8 VADM TRACEY: I mean to explicitly
9 call out the fact that there's some questions
10 raised that meant -- I think I would be satisfied
11 that our report called that out as something
12 which has some implications we haven't fully --

13 CHAIR HOLTZMAN: Right, that there are
14 theoretical concerns about this, but we haven't
15 heard any actual concerns raised about --

16 HON. JONES: That's a good point,
17 right.

18 CHAIR HOLTZMAN: Right, that there's
19 been injustice in any case and that's something
20 that either the Panel will examine or that others
21 should examine at some point.

22 Mr. Taylor, you're frowning. Are you

1 okay with that?

2 MR. TAYLOR: No, I am. I was okay
3 with the original measure. So, I mean for a lot
4 of the reasons that have been hashed and
5 rehashed, except for one, perhaps, and maybe a
6 slightly different take.

7 And, that is, that I think in the
8 military culture from which people are coming and
9 we're talking about here, there might be a higher
10 obligation, a more special relationship that they
11 should assume.

12 I think it should be part of the
13 training. I totally agree, but I'm pretty much
14 okay with the original recommendation.

15 I'm also okay by saying others have
16 flagged this and have questions about it and
17 Congress might want to look at it or we might
18 want to look it, depending.

19 CHAIR HOLTZMAN: Or and that possibly
20 the training should focus on it so that it's very
21 clear that if you get yourself really drunk,
22 you're not going to have an excuse, oh, I didn't

1 know what I was doing or I didn't see or
2 whatever. I don't know.

3 VADM TRACEY: I would agree with that,
4 you know, that may be additional recommendation
5 that we might want to tie to this that that
6 awareness be established early in the career,
7 especially in the training.

8 HON. JONES: I think I would say, sort
9 of to incorporate all of this, we see this --
10 this issue's been flagged to the Subcommittee and
11 now the JPP late in the game, however we may want
12 to say that more elegantly, that I think
13 everybody agrees that with this, if you want to
14 call it, more relaxed standard, it's certainly
15 something that everyone who comes into the
16 military should be given a heightened awareness
17 of.

18 I would not add there that we would be
19 making -- we were going to be thinking about or
20 making a recommendation to Congress, not at this
21 stage.

22 I would just say those first two

1 things and that we may -- and so, we intend to
2 look at it further, something along those lines.

3 CHAIR HOLTZMAN: So, we should not say
4 --

5 HON. JONES: Because I would not put
6 Congress into this yet.

7 CHAIR HOLTZMAN: Yes, okay, all right.

8 HON. JONES: For a lot of reasons.

9 LTCOL HINES: What I was thinking,
10 ma'am, was we could -- we have a draft report and
11 we could certainly beef up what we have right now
12 to address this discussion for the Panel to
13 notify Congress this is a concern that was raised
14 by -- a theoretical concern raised by some of the
15 Subcommittee Members.

16 You've looked at it, highlight Admiral
17 Tracey's point that this is arguably criminalizes
18 another group of people in the military that
19 arguably isn't elsewhere.

20 But, that needs to be part of initial
21 training, entry level training or training on
22 sexual assault that this is what the law is and

1 you're not going to be able to come back in and
2 claim --

3 HON. JONES: I just want it -- I guess
4 I just want it to be clear that there is no
5 recommendation at this point --

6 CHAIR HOLTZMAN: Right.

7 HON. JONES: -- that we remove or
8 amend.

9 CHAIR HOLTZMAN: Correct.

10 MR. TAYLOR: Yes, I don't know that
11 it's accurate to say that this criminalizes a
12 group of people that aren't criminalized
13 elsewhere because we don't know what all the 50
14 states' statutes might say about this. So, I
15 would not even go that far.

16 MR. STONE: And, I think I would want
17 it to acknowledge that you previously, in effect,
18 since 2007, have demanded this and some of the
19 discussion about the statute highlighted that,
20 and then whatever you're going to say.

21 CHAIR HOLTZMAN: So, anyway, if you
22 circulate a draft for us, I think we can have a

1 chance to look at it.

2 LTCOL HINES: Yes, ma'am.

3 CHAIR HOLTZMAN: But, I'd be satisfied
4 with somebody that flags this issue, flags the
5 issue of training and also reflects that the
6 issue was not raised by anybody to us.

7 HON. JONES: Right.

8 CHAIR HOLTZMAN: That's really what --
9 we had no complaints about this.

10 HON. JONES: Right.

11 CHAIR HOLTZMAN: Which is one of the
12 reasons we're not taking any action because we
13 don't know whether this is any, you know, in any
14 way has there been any injustice.

15 HON. JONES: And, I don't think that
16 we've found the defense part reticent in the
17 testimony before us.

18 CHAIR HOLTZMAN: Okay, does this
19 finish our --

20 MR. STONE: No, there's one more.

21 CHAIR HOLTZMAN: I'm sorry. Okay.

22 MR. STONE: Next page.

1 CHAIR HOLTZMAN: Wait a minute. Okay,
2 sorry. We have the last recommendation on page
3 4. Colonel Hines?

4 LTCOL HINES: Yes, ma'am.

5 I'll just tee this one up and I think
6 Mr. Marsh is going to take the discussion on
7 this.

8 But, this was Issue 11 referred to the
9 Subcommittee by the Panel. And, the issue was
10 whether an enumerated offense for indecent acts
11 should be put back into the UCMJ.

12 So, I'll hand it over to Kirt.

13 MR. MARSH: Thank you, sir. And, good
14 morning, ladies and gentlemen.

15 I'd like to briefly just go through
16 three issues presented to you in determining a
17 course of action for indecent acts and that's,
18 number one, this first question of whether an
19 enumerated offense should be added.

20 The Subcommittee examined two, if not,
21 should an Article 134 offense be added to the
22 Manual for Courts-Martial to address indecent

1 acts?

2 And then, number three, if so, if
3 there should be an Article 134 offense, is the
4 offense that was presented to the Subcommittee on
5 the October 22nd meeting that the offense they'd
6 like to see here, would you like to comment on
7 that and potentially suggest some revisions?

8 So, speaking to the first issue the
9 Subcommittee looked at, the Subcommittee
10 recommended that enumerated statutory offense not
11 be added to the UCMJ.

12 In its report, the Subcommittee
13 recognized that for over 50 years of the UCMJ,
14 indecent acts was punishable under Article 134.
15 And Article 134 contains the requirement of the
16 terminal element which is, that conduct be
17 prejudicial to good order and discipline or that
18 it be of a nature to discredit the Armed Forces.

19 It was only during that 2007 to 2012
20 iteration of Article 120 that indecent acts was
21 included as an enumerated offense. But, it was
22 removed again in 2012.

1 Currently, it's nowhere in the Manual.
2 It's not an enumerated offense, it's not an
3 Article 134 offense.

4 The Subcommittee concluded that adding
5 it back as an enumerated offense is a little too
6 broad. This is typically in states. In the
7 District of Columbia, this is a misdemeanor level
8 conduct.

9 It's pretty broad, the classification
10 of what is indecent and adding that additional
11 criterion that it violate the terminal element is
12 useful.

13 And, the Subcommittee recommended that
14 an enumerated offense would not be appropriate.

15 With respect to the second issue,
16 should an Article 134 offense be added, and this
17 was mentioned in a memorandum that the Staff
18 prepared for you earlier.

19 And, the history of the offense
20 demonstrated that low level indecent acts haven't
21 been a recurring type of misconduct in the Armed
22 Forces.

1 And, an Article 134 offense has
2 overall been in effect and that it addresses that
3 misconduct.

4 Moreover, as that memorandum mentions,
5 all 50 states and the District of Columbia have a
6 comparable offense in the books. Sometimes it's
7 --

8 HON. JONES: Have what, Mr. Marsh?

9 MR. MARSH: I'm sorry, ma'am, have a
10 comparable offense in their statutes.

11 Sometimes it's called indecent
12 conduct, other times it's called something like
13 lewd and lascivious acts. There's a couple of
14 different phrases for it. But, there's some
15 version of that everywhere.

16 So, this is already a crime throughout
17 the United States and restoring it to Article 134
18 is not subjecting those that are subject to the
19 Code to a novel type of offense.

20 So, the Subcommittee concluded that an
21 Article 134 offense did seem reasonable.

22 So, those are the first two issues.

1 This then brings up the third issue
2 which is, if there is an Article 134 offense,
3 what should it look like?

4 The Department of Defense has proposed
5 one and it was presented to the Subcommittee at
6 their October 22nd meeting.

7 But, some of the Subcommittee Members
8 shared some concerns that that proposal was too
9 broad as written.

10 One of the components that is
11 recurrent in indecent conduct type offenses
12 throughout the United States and that was present
13 in the old Article 134 is that there be a third-
14 party present. That would be a notorious --
15 something besides private conduct between
16 consenting adults.

17 And, there were some concerns by some
18 of the Subcommittee Members that conduct between
19 consenting adults could be criminalized under
20 this.

21 Furthermore, there are a few cases
22 where, under the old 134 offense, it was applied

1 pretty broadly.

2 There was a 2001 Coast Guard Court of
3 Criminal Appeals case that upheld a conviction
4 for a video tape of sexual activity between an
5 engaged couple. And, that tape was put on the
6 shelf, it was never shown to anyone, it was never
7 intended to be shown to anyone, but the act of
8 videotaping it, the Court concluded it met the
9 criterion for indecency. So, that's a pretty
10 broad application.

11 There's also a 2005 Marine Corps
12 Criminal Appeals case where there was an accused
13 made encouraging comments in a hotel room to
14 another couple that was engaged in sexual
15 activity and that was enough. The Court found it
16 to meet that nexus for indecency.

17 So, I think if a 134 offense is
18 brought back into the Manual, that it definitely
19 bears close scrutiny whether it could be applied
20 too broadly.

21 So, the draft proposal you provided
22 just recently, the second one, and I don't know

1 if you have it handy in front of you, it might be
2 handy to look at.

3 CHAIR HOLTZMAN: Where is it?

4 MR. MARSH: It's the January 8th
5 memorandum.

6 COL GREEN: It's on the left side of
7 your folder, ma'am.

8 CHAIR HOLTZMAN: Oh, okay, possibly
9 revised -- all right.

10 MR. MARSH: And, what this memorandum
11 tried to quickly do is present its version one,
12 the proposal that DoD has presented and it's in
13 the Federal Register. It's dated October 25,
14 2012 and that's that first version.

15 And then, we've also crafted a second
16 version to show what a revised version might look
17 like.

18 And then, on the third page there's a
19 narrative of the changes that were made to the
20 description.

21 CHAIR HOLTZMAN: So, the Subcommittee,
22 just to make sure I understand, the Subcommittee

1 made no recommendation with regard to version
2 one?

3 MR. MARSH: Yes, ma'am, that's
4 correct.

5 CHAIR HOLTZMAN: But, did express --
6 some Members of the Subcommittee expressed a
7 concern about over broad?

8 MR. MARSH: That's correct. Yes,
9 ma'am.

10 CHAIR HOLTZMAN: Okay. And, you've
11 drafted a version two?

12 COL GREEN: Yes, ma'am.

13 CHAIR HOLTZMAN: Did the Subcommittee
14 consider version two?

15 COL GREEN: No, ma'am. There's a
16 subsequent to that report.

17 CHAIR HOLTZMAN: Oh, so this is a
18 version for us to consider? Because we're not
19 obliged to consider it because this wasn't -- I
20 mean, we don't have to. This would be brand new
21 for us to decide whether or not we want to give
22 an alternative to the DoD's proposal?

1 COL GREEN: Yes, ma'am.

2 The issue that was presented to the
3 Subcommittee was specific to, should an
4 enumerated offense be established?

5 CHAIR HOLTZMAN: Right.

6 COL GREEN: And so, the Subcommittee
7 limited it's analysis to that question and,
8 therefore, didn't comment on the 134 offense that
9 has been proposed by DoD.

10 However, obviously, that question and
11 the Subcommittee's question was referred by this
12 Panel. And so, I think the issue that Staff has
13 brought to you is, I mean, the Panel is not
14 restricted to saying whether it should be
15 enumerated or not and if the Panel wishes to make
16 comment or wishes to make alternate proposals
17 regarding the offense in 134, now would be the
18 time potentially to do it. Obviously, not
19 obligated to do it, but something for you to
20 consider.

21 CHAIR HOLTZMAN: Where is the language
22 that's different? I'm trying to understand.

1 Where is the language that you're proposing?

2 MR. MARSH: There's a version two is
3 the proposed --

4 CHAIR HOLTZMAN: Right, but where's
5 the -- I don't see a --

6 MR. MARSH: And, then instead of a
7 markup, there's a narrative on the third page of
8 the changes that have been made, ma'am.

9 CHAIR HOLTZMAN: Well, I'm sorry --

10 COL GREEN: The actual elements of the
11 offense are the same.

12 MR. STONE: But, if you look in the
13 explanation, if I'm correct, on mine, one, two,
14 three, four, five -- the fifth line talks about -
15 - and the fourth line, a person publically
16 engages in sexual acts with another person or a
17 person publically engaging in masturbation. I
18 don't think that's in the language of version
19 one.

20 MR. MARSH: No, no, no, sir. And, I'd
21 be happy to draw in some of those changes.

22 CHAIR HOLTZMAN: And, where are you

1 reading from?

2 MR. STONE: I'm reading the
3 explanation C, paragraph C of version two is
4 different than paragraph C of version one.
5 Language in the text is the same, but the
6 explanation is different.

7 I would have changed it in the --
8 somehow I would have changed it in the text as
9 well.

10 CHAIR HOLTZMAN: Correct.

11 HON. JONES: Obviously then, version
12 one gives under 134 would give commanders a broad
13 power to charge you with an offense under 134.

14 This is a -- version two is a more
15 specific, more restrained set of factors that
16 you'd have to look at. Is that fair?

17 MR. MARSH: That's a fair assessment.

18 COL GREEN: Also correct some drafting
19 issues with the proposal in version one. I mean,
20 Kirt's gone through this and I think they've used
21 some words incorrectly. Just formatting issues,
22 so I mean, it does that but then, in addition,

1 creates some substantive changes in accordance
2 with Subcommittee concerns.

3 MR. MARSH: The two main substantive
4 changes are that language that talks about --

5 CHAIR HOLTZMAN: You mean that you've
6 made?

7 MR. MARSH: Yes, ma'am.

8 CHAIR HOLTZMAN: Okay.

9 MR. MARSH: And then proposed offense
10 would be to add some language about examples that
11 would be publically engaging in these sexual
12 acts. And, that's taken directly from a
13 comparable provision in the D.C. Code, District
14 of Columbia.

15 MR. STONE: Let me ask you a question
16 getting back to what I think was our original
17 mandate which was to worry about sexual offenses
18 in the military and not just lewd acts.

19 I guess what I want to know is, if
20 this occurs in a set of facts where it is a
21 hostile work environment because a group of
22 military members of one sex want to basically

1 drive the other person of the other sex out of
2 that unit, they want to create a hostile work
3 environment for that person which is the
4 atmosphere that sometimes leads to the worst
5 behavior, too.

6 Is there another Article that would
7 cover that as not being good order and
8 discipline? Is there any place else it would be
9 covered in the UCMJ?

10 MR. MARSH: Potentially a hazing comes
11 to mind. The Services all have hazing
12 instructions that could be punished as an Article
13 92. A sexual harassment, depending on the facts,
14 as well. All the Services have general orders
15 that cover sexual harassment and that could also
16 be prosecuted under Article 92.

17 MR. STONE: So, sexual harassment
18 might potentially --

19 MR. TAYLOR: Maltreatment --

20 MR. MARSH: Potentially maltreatment
21 as well.

22 MR. TAYLOR: I think maltreatment

1 might also work.

2 But, I have a clarifying question. In
3 the handout you gave us, you said a recent draft
4 Executive Order proposed by DoD which has not yet
5 been signed by the President would create this
6 Article 134 offense.

7 So, what is the status of that? Is it
8 at the White House or is it still in staffing
9 within the Pentagon? Or, in other words, has
10 this train left the station on this issue?

11 COL GREEN: It was published in
12 October and it's in, as our understanding, it's
13 in the executive review process. So, it's gone
14 for public comment. Public comment has been
15 received and it's now back with the Executive
16 Branch.

17 Whether it's internal to DoD or
18 whether it's within the Joint Agency review
19 process right now, we don't know.

20 CHAIR HOLTZMAN: Is this strictly
21 within our jurisdiction?

22 COL GREEN: You mean to look at this

1 issue, ma'am?

2 CHAIR HOLTZMAN: Yes.

3 COL GREEN: Well, the -- okay, the --
4 and I think Mr. Stone raised it. I mean,
5 obviously, the issue is to deal with sexual
6 assault crimes.

7 The issue raised to the Panel was that
8 certain types of sex crimes that were prosecuted
9 formerly under indecent acts, under Article 134,
10 under the revision to Article 120 made in 2012
11 are no longer prosecutable.

12 So, the question is, I mean I think
13 tied back to analyzing the changes made to the
14 2012 version of the statute, can the Panel
15 comment?

16 I mean I think the Panel could fairly
17 comment on that and could comment on the type of
18 offense that might be warranted or the Panel
19 could chose to simply not make comment regarding
20 any specific proposals as well.

21 MR. STONE: Could you foresee this
22 being used as a lesser included offense to avoid

1 sexual registry of a Soldier who was completely
2 drunk and had sex with another Soldier who was
3 completely drunk at a party? Could this be a
4 lesser included offense? Do you think it could
5 be construed that way and that one prosecutor
6 decides, yes, he doesn't want to put the guy on
7 the sexual registry for life?

8 MR. MARSH: Yes, sir, I think probably
9 not a lesser included offense pursuant to some
10 military case law that talks about the terminal
11 element.

12 But also, in these -- in terms of
13 registration, that is a state by state issue.
14 And, Ms. Kepros actually raised it at the last
15 meeting, there's a comparable provision in
16 Colorado and it's case by case. And, that's true
17 around the country.

18 MR. TAYLOR: So, what would --

19 MR. MARSH: It really depends on what
20 kind of indecent act occurred.

21 MR. TAYLOR: Yes, so what would DoD do
22 with something like this? Is it conceivable that

1 under the DoD directive that you mentioned
2 earlier that, if, in fact, the indecent act arose
3 to a certain level that that person could then
4 end up on the registered sex offense?

5 COL GREEN: The DoD registration
6 instruction currently does not include any 134
7 offenses. It only includes Article 120 offenses.

8 The Subcommittee didn't hear, and I'm
9 not aware of anything in terms of what DoD plans
10 to do if the President signs this, whether they
11 will advise that a 134 offense for indecent acts
12 is now registrable.

13 MR. TAYLOR: I see.

14 LTCOL HINES: Mr. Stone, was your
15 question aimed more at not necessarily a lesser
16 include offense, but could a prosecutor use 134
17 to deal something out the back door?

18 MR. STONE: Yes.

19 LTCOL HINES: Okay. And, I would
20 answer that and say yes. I mean, I've got to be
21 honest with you, I think in practice, if that was
22 available, you could certainly fashion a pre-

1 trial agreement where the accused wasn't going to
2 plead to the 120 charge, but was going to plead
3 to the 134 because the facts of a sexual offense,
4 short of whatever those 120 elements are could be
5 crafted in a 134 indecent acts charge.

6 MR. STONE: But, could it also be
7 dealt with by charging with sexual harassment?

8 LTCOL HINES: Yes.

9 MR. STONE: And then, also would not
10 require, at least under the military's view, it's
11 not one of the offenses that requires a sexual
12 registration?

13 LTCOL HINES: Right. An Article 92
14 for sexual harassment would not be reported out
15 as a sex offense.

16 MR. STONE: Okay.

17 CHAIR HOLTZMAN: But, without this
18 statute, or the proposal that's being made here,
19 there would still be alternatives to prosecution
20 under Article 120 in the existing Code of
21 Military Justice, isn't that correct?

22 LTCOL HINES: Yes, ma'am. I mean if

1 you --

2 CHAIR HOLTZMAN: So, if you wanted to
3 fashion a plea agreement that was less than 120,
4 are there options now?

5 LTCOL HINES: Yes, ma'am.

6 CHAIR HOLTZMAN: I mean, we're not
7 saying that this would create --

8 LTCOL HINES: Right.

9 CHAIR HOLTZMAN: -- options that don't
10 exist?

11 LTCOL HINES: Right, and you would --

12 CHAIR HOLTZMAN: In the sense that we
13 couldn't prosecute these cases?

14 LTCOL HINES: You wouldn't need 134 to
15 plead this to an Article 92 if it arose in a
16 training environment.

17 CHAIR HOLTZMAN: Right.

18 LTCOL HINES: An Article 93 if it
19 arose anywhere else.

20 CHAIR HOLTZMAN: Right.

21 I mean, I feel uncomfortable. I
22 haven't really read the -- or studied the

1 explanation of the proposal for a statute. I
2 don't feel comfortable myself in making a
3 recommendation. I don't know how the other
4 Members of the Panel feel.

5 HON. JONES: I don't either.

6 MR. STONE: I agree with you.

7 MR. TAYLOR: I'm fine.

8 CHAIR HOLTZMAN: So, I think maybe we
9 just skip over and make no recommendation with
10 regard to -- I mean or accept the recommendation
11 that the Subcommittee made which is that Congress
12 should not adopt an enumerated offense for
13 indecent acts under 120.

14 MR. MARSH: Yes, ma'am.

15 HON. JONES: And, at the same time, we
16 said we definitely didn't want it incorporated --

17 CHAIR HOLTZMAN: Right.

18 HON. JONES: Yes, right. Okay, got
19 it. He just said that, sorry.

20 CHAIR HOLTZMAN: Okay, so --

21 COL HINES: And so, I guess that's the
22 first question.

1 The second question that Kirt noted,
2 does the Panel wish to make a recommendation
3 regarding establishing an offense under Article
4 134 --

5 CHAIR HOLTZMAN: I thought that was
6 just my question right then.

7 COL GREEN: I'm sorry.

8 Well, the three question being the 120
9 offense and I understand the Panel to say no, we
10 don't want to make -- we don't want to recommend
11 that.

12 Two being, do we want to make a
13 recommendation that the President establish
14 something under 134?

15 HON. JONES: Put it back in?

16 COL GREEN: Right.

17 HON. JONES: Yes.

18 COL GREEN: And then, third being, do
19 you want to comment specifically on the language.

20 I just want to make sure that we are
21 clear on the Panel's position on all three of
22 those issues.

1 HON. JONES: Do we know why it came
2 out? You probably told us, Kirt, a million
3 times.

4 MR. MARSH: No, actually.

5 HON. JONES: We don't?

6 MR. MARSH: I'm not sure why it came
7 out.

8 MR. STONE: But, the old original one
9 was not limited to either any kind of public
10 exhibition, is that right? So, it could have
11 reached private consenting conduct?

12 MR. MARSH: In the old one, it was
13 limited to that if there was a third-party
14 present. But, the new one, the new 134 offense
15 version one says, the requirement of the third-
16 party is no longer there.

17 Which the intent with that, as it was
18 explained to the meeting was to better encompass
19 technology.

20 HON. JONES: Right.

21 MR. MARSH: What if, you know, this is
22 committed with a knife or whatever?

1 But, the way it's written there were
2 some concerns expressed at the meeting that it
3 was a little too broad.

4 CHAIR HOLTZMAN: So, perhaps a better
5 solution is that we basically adopt a
6 recommendation -- the two recommendations set
7 forth by the Subcommittee we agree with, point
8 one and point two.

9 And we might note that some Members of
10 the Subcommittee expressed some concern about the
11 vagueness of the proposed Article 134 if we want
12 to go that far. Or we don't have to even say
13 that.

14 HON. JONES: I think, well,
15 ultimately, we just decided not to comment on its
16 content at all.

17 CHAIR HOLTZMAN: Right. Okay, I think
18 that's better.

19 MR. STONE: And say that at this time
20 because we're going to have more meetings. Maybe
21 they'll do something that we'll want to comment
22 on in the next eight, nine months. Why can't we

1 just say at this time no comment at this time.

2 CHAIR HOLTZMAN: Okay. Is there
3 agreement on that? Any disagreement?

4 HON. JONES: No.

5 CHAIR HOLTZMAN: So, the question is,
6 should we take a break now for lunch?

7 COL GREEN: Let me just ask before we
8 leave Article 120, the additional -- and we can
9 do it after if the Panel wants a break -- but the
10 remaining recommendations to take no action that
11 the Subcommittee made, I mean, we're not
12 reflecting -- I mean, if the Panel has issues
13 with those and disagree with the Subcommittee's
14 conclusion, but otherwise, is the Panel in
15 agreement with the Subcommittee as to not making
16 --

17 CHAIR HOLTZMAN: On what?

18 COL GREEN: On the remaining issues?

19 CHAIR HOLTZMAN: Oh, where are they?

20 Do we have them in front of us?

21 COL GREEN: Well, we haven't
22 summarized -- I mean, we talked about just two of

1 them.

2 HON. JONES: Oh, I see, you're talking
3 about all the ones where we said we are not going
4 to make any -- we've only got two places where we
5 suggested amendments, et cetera. I got it.

6 CHAIR HOLTZMAN: Okay. So, I think we
7 should take a break now for lunch. I'm sorry.
8 Or we could just take a break for ten minutes and
9 then come back and consider the --

10 COL GREEN: We can break for lunch,
11 ma'am.

12 CHAIR HOLTZMAN: We can break for
13 lunch. Okay, let's break for lunch and when we
14 come back, we'll consider -- the Staff will get a
15 list of the other recommendations that we can
16 agree or not agree with and then we'll go through
17 retaliation.

18 Great, thank you.

19 (Whereupon, the above-entitled matter
20 went off the record at 11:57 a.m. and resumed at
21 1:00 p.m.)

22 CHAIR HOLTZMAN: So, we still have the

1 areas where the Subcommittee recommended no
2 action. Can we review those quickly?

3 LTCOL HINES: Yes, ma'am. And we
4 touched on some of them but I will try to go
5 through this as quickly as I can.

6 So, the first one was issue --

7 CHAIR HOLTZMAN: Where would we find
8 this?

9 LTCOL HINES: Okay, ma'am, the list
10 would be page four of the Subcommittee Report.
11 That's what I'm going off of.

12 CHAIR HOLTZMAN: Okay, Subcommittee
13 Report. Got it.

14 LTCOL HINES: Starting on page four.

15 CHAIR HOLTZMAN: Okay.

16 LTCOL HINES: So, with Issue 4, the
17 question was, is the definition concerning the
18 accused administration of a drug or intoxicant
19 over broad? The Subcommittee looked at that and
20 believed that it wasn't over broad. The
21 practitioners said this is a rarely used theory
22 and the Subcommittee recommended no changes for

1 Issue 4.

2 CHAIR HOLTZMAN: Any disagreement with
3 the Subcommittee decision? Hearing none, we
4 accept it.

5 Number 6.

6 LTCOL HINES: Yes, ma'am, we touched
7 briefly on this Issue 6, which is the definition
8 of threatening willful action, ambiguous or too
9 narrow. The Subcommittee looked at this in the
10 context of not just the definition but along with
11 Issues 13 and 15 with respect to the new
12 subsection that we have already discussed that
13 you are recommending.

14 And the Subcommittee's recommendation
15 was or answer was no, that definition doesn't
16 need to be amended, with the caveat that if its
17 recommendation for the new subsection is adopted,
18 then this definition would not need to be amended
19 in any way.

20 CHAIR HOLTZMAN: Any disagreement with
21 this Subcommittee recommendation? Hearing none,
22 it is accepted. Issue 7.

1 LTCOL HINES: Issue 7, ma'am, was how
2 should fear be defined to acknowledge subjective
3 and objective factors. The question here was the
4 present definition requires that -- well, the
5 framework requires that the fear have to be not
6 only the victim's subjective actual fear but that
7 has to be objectively reasonable. The
8 Subcommittee recommended that there be no changes
9 with respect to Issue 7.

10 CHAIR HOLTZMAN: All right, is there
11 any objection to recommending -- accepting the
12 Subcommittee's recommendation? Hearing none, it
13 is accepted. Number 8.

14 LTCOL HINES: Yes, ma'am. The
15 question on 8 is, is the definition of force too
16 narrow? The Subcommittee decided, in light of
17 its recommended changes with respect to the
18 definition of consent, that they recommended no
19 change to the definition of force.

20 CHAIR HOLTZMAN: Any objection to
21 recommending this Subcommittee recommendation --
22 to accepting the Subcommittee recommendation?

1 Hearing none, it is accepted.

2 Number 10.

3 LTCOL HINES: Well, ma'am, we have
4 covered 10 and 11, I think. So, I am going to
5 move down to 12.

6 CHAIR HOLTZMAN: Okay.

7 LTCOL HINES: Is the current practice
8 of charging inappropriate relationships or
9 maltreatment under Articles of the UCMJ, other
10 than 120, appropriate and effective when sexual
11 conduct is involved?

12 And I think we have addressed this to
13 some extent with our discussion of Articles 92
14 and 93 and the new subsection. The Subcommittee
15 determined that yes, when consensual sexual
16 conduct is involved, charging that under 92 and
17 93 can be appropriate. And so the Subcommittee
18 recommended no change on Issue 12.

19 CHAIR HOLTZMAN: Any objection to
20 adopting the Subcommittee recommendation on Issue
21 12? Hearing none, it is accepted.

22 Issue 14.

1 LTCOL HINES: Issue 14, ma'am was,
2 should the definition of threatening or placing
3 that other person in fear be amended to ensure
4 the course of sexual relationships or those
5 involving abuse of authority are covered under an
6 existing Article 120 provision, with the caveat
7 that the new subsection under 120(b)(1)(E) be
8 adopted? The Subcommittee recommended no changes
9 to this definition.

10 CHAIR HOLTZMAN: Is there any
11 objection to accepting Subcommittee
12 recommendation on Issue 14? Hearing none, it is
13 accepted.

14 Issue 16.

15 LTCOL HINES: Yes, ma'am, 16 was,
16 should sexual relationships between basic
17 training instructors and trainees be treated as
18 per se illegal or strict liability under 120? And
19 we have already discussed that but, again, the
20 Subcommittee felt that as long as the new
21 subsection was adopted, as Mr. Stone I think has
22 indicated, this was sort of a middle ground that

1 was adopted. And so, with a caveat that if this
2 subsection was adopted, the Subcommittee did not
3 recommend that these offenses be treated as
4 either per se illegal or strict liability
5 offenses.

6 MR. STONE: Did that discussion come
7 before we saw what the Military Review Group said
8 about proposing a new subsection?

9 LTCOL HINES: Yes, sir. We didn't get
10 the MJRG's proposed new subsection officially
11 until after the final Subcommittee meeting. We
12 knew that they were potentially working on that
13 but it wasn't officially released until after the
14 Subcommittee had deliberated.

15 MR. STONE: Well, I guess this is a
16 question for the Chair, rather than you, is do we
17 need to comment on what the Review Group did or
18 you think we don't need to?

19 CHAIR HOLTZMAN: We could mention that
20 this was prepared before the Review Group's
21 determination but I don't remember what the
22 Review Group determined.

1 HON. JONES: I was going to ask.

2 CHAIR HOLTZMAN: Did they determine
3 strict liability or not?

4 MR. TAYLOR: They did.

5 COL GREEN: Well, under a 93(a)
6 violation.

7 CHAIR HOLTZMAN: Okay, well, then the
8 Subcommittee disagreed. I mean you know, the
9 Subcommittee, in my view, the Chair can disagree
10 with me, very seriously and thoroughly reviewed
11 the question of strict liability and decided no.
12 So, this is just another voice for strict
13 liability but that decision was very carefully
14 reviewed.

15 VADM TRACEY: But that is strict
16 liability under a different article, right?

17 LTCOL HINES: Yes, ma'am, exactly.

18 MR. STONE: Well, the new one.

19 COL GREEN: And not under Article 120
20 and not with all of the sexual registration
21 parameters that I think the Subcommittee noted as
22 problems or concerns.

1 MR. STONE: No, I'm just saying that
2 because I think I would like to see the report
3 have a little footnote that says we did not
4 consider the Review Group's recommendation
5 because that came out after our deliberations
6 were conducted. I don't know, something like
7 that, just so it is clear that we are not
8 endorsing it but we are also not rejecting it
9 because it was not in front of us.

10 HON. JONES: Well, did we reject it,
11 then, I mean without knowing they were going to
12 make that?

13 CHAIR HOLTZMAN: The difference is
14 that that would have been -- the Military Review
15 Group would not be under Article 120.

16 HON. JONES: Right.

17 CHAIR HOLTZMAN: So, there wouldn't be
18 any sexual offender registration for that.

19 HON. JONES: Right.

20 VADM TRACEY: Isn't that consistently
21 what the Subcommittee recommended?

22 (Simultaneous speaking.)

1 MR. STONE: I just didn't want to
2 totally ignore what they did. I don't want to be
3 ships passing in the night. We should have some
4 --

5 LTCOL HINES: I think what I hear you
6 saying, Mr. Stone, is just as long as we can
7 reflect in the report that the subcommittee
8 didn't have this available but the Panel has
9 because we provided the 93(a) today and the Panel
10 has considered it. So, the readers of the report
11 know that the Panel knows that the MJRG's
12 proposal is out there.

13 VADM TRACEY: I didn't think the Panel
14 was making any comment on 93(a), and 93(a) isn't
15 affecting the Panel's recommendation with regard
16 to 120. So, whatever note we make ought to be
17 clear that existence of that change doesn't
18 change the Panel's recommendation.

19 MR. STONE: Right.

20 CHAIR HOLTZMAN: Exactly. So with
21 that suggested footnote, is there any objection
22 to accepting the recommendation for number 16,

1 Issue 16? Hearing none, it is accepted.

2 Issue 17.

3 LTCOL HINES: Yes, ma'am, finally, the
4 question on 17 was as an alternative to further
5 amending Article 120. Should coercive sexual
6 relationships currently charged under Articles be
7 added to DoD's list of offenses that trigger sex
8 offender registration? And that was under
9 Articles 92 or 93. And the Subcommittee
10 recommended not adding those to DoD's list of
11 offenses that would be reported out as a sex
12 offense.

13 CHAIR HOLTZMAN: Is there any
14 objection to accepting this recommendation of the
15 Subcommittee? Hearing no objection, it is
16 accepted.

17 And that concludes our consideration
18 of the Subcommittee's Report. Thank you Members
19 of the Panel.

20 Now, I guess we are up to retaliation.

21 COL GREEN: Yes, ma'am. We will
22 transition the Staff members and do it for

1 retaliation.

2 As we are transitioning the Staff,
3 just to orient you on some materials that we
4 have, the Staff distributed last week, mid-last
5 week a draft copy of a summary of recommendations
6 and a full copy of the draft report on
7 retaliation. This was taken from the Panel's
8 meetings on this issue, going back to the spring
9 of 2015 and then on the multiple sessions of
10 deliberations that you have held on this topic.

11 We received some comments back on
12 those from Panel Members. And so the copies that
13 are in your folder of these, both the draft
14 summary recommendations and the draft report
15 incorporate the comments that we received from
16 the Panel as well as just some Staff
17 non-substantive edits, which were just edits, you
18 know modifications to the report itself, based on
19 our continuing review of that. So, those are the
20 documents that we have.

21 In addition, we have received public
22 comments from Protect our Defenders on

1 retaliation issues. That is in your folder. So,
2 we have incorporated that into a couple of places
3 within the document as well.

4 CHAIR HOLTZMAN: So, Kyle, how do you
5 suggest we approach this? Do we have a series of
6 recommendations that we should review, as well as
7 the report? I'm not seeing the recommendations.

8 COL GREEN: Yes, ma'am.

9 CHAIR HOLTZMAN: It's the right hand
10 side.

11 LTC MCGOVERN: It should say draft 14
12 January 2016 up top.

13 COL GREEN: No, those are MJRG
14 proposals.

15 HON. JONES: So, this is one, right,
16 new provisions?

17 LTC MCGOVERN: That's the MJRG.

18 HON. JONES: And this is?

19 LTC MCGOVERN: That's the draft
20 report.

21 HON. JONES: And what else am I
22 missing?

1 LTC MCGOVERN: That's it.

2 HON. JONES: That's it? Okay.

3 LTC MCGOVERN: Yes, ma'am.

4 HON. JONES: Right there?

5 LTC MCGOVERN: If that is what is on
6 top.

7 HON. JONES: Oh, the back of that.

8 LTC MCGOVERN: Right, under Protect
9 our Defenders.

10 HON. JONES: All right, thank you.

11 LTC MCGOVERN: So really, I think the
12 only two things you all need in front of you for
13 this discussion right now is just the
14 recommendations and the draft report.

15 CHAIR HOLTZMAN: Okay, so we will
16 start with Recommendation 1?

17 LTC MCGOVERN: Yes, ma'am.

18 CHAIR HOLTZMAN: Do you have any
19 objection to that?

20 LTC MCGOVERN: No, ma'am.

21 CHAIR HOLTZMAN: Okay.

22 LTC MCGOVERN: The only change we have

1 made since last week is that we added a third
2 bullet, based on Ms. Holtzman's recommendation.

3 CHAIR HOLTZMAN: Okay. So, do you
4 want to read the recommendation?

5 LTC MCGOVERN: Sure. And I can just
6 explain generally the thought process through
7 these.

8 CHAIR HOLTZMAN: Yes.

9 LTC MCGOVERN: These are the main
10 points that we were able to pull from the reports
11 and then the supporting bullets were the -- the
12 bullets were the supporting observations and
13 findings for that recommendation.

14 So, Recommendation 1 is about the
15 overall retaliation strategy. It says: In the
16 Department of Defense strategy addressing
17 retaliation against sexual assault victims, the
18 Secretary of Defense specify 1) channels where
19 victims can report retaliation; 2) the
20 responsibility for collection and monitoring of
21 reports; and 3) mechanisms for tracking
22 retaliation complaints and outcomes.

1 The first two sub-bullets give some
2 background information and the third sub-bullet
3 was added to prepare the reader that the details
4 of those three points are in the recommendations
5 below.

6 CHAIR HOLTZMAN: Is there any
7 objection or discussion of this recommendation?

8 MR. STONE: I have a couple -- two
9 comments and you can tell me if we maybe covered
10 them elsewhere. The first is in talking about
11 item number 1, channels. Do we need to say
12 somewhere including an optional independent
13 alternate channel? In other words, for people
14 who are afraid to report it because the
15 harassment or whatever the retaliation is coming
16 directly from the channel that is the normal
17 channel.

18 I mean we say channels but I presume
19 it means it will be the regular channel and there
20 will be some kind of alternate.

21 LTC MCGOVERN: Yes, sir, I think we
22 addressed that in the report and for the

1 recommendations that just like sexual assault,
2 there are multiple channels and one of the other
3 recommendations is that they maintain all of
4 those channels but then directly report to the
5 SARC. So here, when we say channels, they are
6 talking about multiple, not just the command
7 channel.

8 MR. STONE: All right, so you think it
9 is okay because we are going to cover it in
10 detail.

11 LTC MCGOVERN: Yes, sir, I really do.

12 MR. STONE: And the second question
13 was, and I guess this relates a little bit to the
14 new bullet down at the bottom, too. I am
15 wondering if it should say on the first and
16 second line, to effectively address and respond
17 to retaliation the Services must develop better
18 processes for -- I wanted to say uniformly
19 reporting across all Services, then, comma,
20 monitoring and tracking, blah, blah, blah.

21 Because I think we have had that
22 problem all along that the Services feel, absent

1 a specific direction, that they can tailor the
2 reporting to what works best for them. And I
3 understand that it works best for them. It's
4 just that trying to monitor it later is a
5 nightmare when what works best for them doesn't
6 line up with the other Services.

7 So, I just would like to see maybe
8 uniformly reporting across all the Services so
9 that there is no question that is what we mean.
10 I don't know if the Panel Members agree with me.

11 CHAIR HOLTZMAN: I have no objection

12 HON. JONES: No, me neither.

13 CHAIR HOLTZMAN: May I just make two
14 suggestions, Lieutenant McGovern? One is,
15 instead of just specify, I would like to say
16 specifically name or specifically designate. And
17 I think we should have multiple channels, not
18 just leave it channels. So, it is clear what we
19 are saying, even though this is an umbrella
20 recommendation.

21 LTC MCGOVERN: You want that in the
22 overall recommendation at one?

1 CHAIR HOLTZMAN: Right.

2 LTC MCGOVERN: Okay.

3 CHAIR HOLTZMAN: Unless anyone
4 objects.

5 MR. TAYLOR: No objection.

6 CHAIR HOLTZMAN: Okay. So, do we
7 accept Recommendation 1?

8 HON. JONES: Yes.

9 CHAIR HOLTZMAN: All right, hearing no
10 objection, we are up to Recommendation 2,
11 Lieutenant McGovern -- I mean Colonel McGovern
12 sorry. Whoops.

13 LTC MCGOVERN: This is a
14 recommendation to support --

15 CHAIR HOLTZMAN: Excuse me. I meant
16 to say General.

17 LTC MCGOVERN: Thanks for the
18 promotion, ma'am.

19 (Laughter.)

20 LTC MCGOVERN: The second
21 recommendation is your proposal that they develop
22 a standardized form. It states the Secretary of

1 Defense and Service Secretaries develop a
2 standardized form for reporting retaliation.
3 This form should be linked to the DD Form 2910 in
4 the Defense Sexual Assault Incident Database and
5 should provide victims with the option to request
6 a formal investigation or informal processing of
7 a retaliation complaint.

8 CHAIR HOLTZMAN: May I just ask a
9 question?

10 LTC MCGOVERN: Yes, ma'am.

11 CHAIR HOLTZMAN: Are we also going to
12 talk about a form that tracks what happens to the
13 complaint, once it is made or is this form going
14 to be not only used for making the complaint but
15 for tracking whatever happens to the complaint?

16 LTC MCGOVERN: This would be the
17 initial form to --

18 CHAIR HOLTZMAN: Right.

19 LTC MCGOVERN: -- input it into DSAID
20 and the further recommendations require that the
21 SARC continue to maintain that information at the
22 monthly --

1 CHAIR HOLTZMAN: And would it be on
2 this same form?

3 LTC MCGOVERN: It could be. We can
4 add that into the report.

5 CHAIR HOLTZMAN: Because it seems to
6 me that if we are asking for a single form, it
7 should be the form that is used until the whole
8 issue of retaliation is resolved one way or
9 another so that we just don't start off with a
10 form that reports the retaliation but then there
11 are other little pieces of paper that are
12 tracking the follow-up. So, somehow to suggest
13 --

14 LTC MCGOVERN: Yes, ma'am.

15 CHAIR HOLTZMAN: I don't know if it
16 belongs here or somewhere else.

17 MR. TAYLOR: Well, could we do
18 something like in the second sentence of the
19 bullets, say a standardized form should include
20 the tracking, so it is clear that you want it all
21 to go back to that same form?

22 CHAIR HOLTZMAN: I mean, does anyone

1 object to putting it all on the same form? It
2 should be on the same form.

3 You know, Mr. Taylor, let them figure
4 out the language here because maybe it is a
5 little more complicated than what you are
6 suggesting. But I think the point is an
7 important one and I appreciate your support on
8 that.

9 LTC MCGOVERN: Oh, absolutely, ma'am.
10 I think when you all have talked about it in past
11 meetings, that is the way it was envisioned is
12 that this piece of paper that goes from the SARC
13 to the MCIO or the monthly CMGs, it is going to
14 be the basis and continue to update it in DSAID,
15 like you would a sexual assault report.

16 HON. JONES: So, this would be one --
17 I'm sorry.

18 CHAIR HOLTZMAN: Go ahead.

19 HON. JONES: This is going to be one
20 -- there is already an underlying sexual assault.

21 LTC MCGOVERN: Yes, ma'am, on the
22 2910.

1 HON. JONES: Right. The retaliation
2 report could come either from the victim of the
3 sexual assault or someone else. Correct?

4 LTC MCGOVERN: Correct.

5 HON. JONES: But regardless, it would
6 all get linked to the sexual assault incident
7 that caused the retaliation.

8 LTC MCGOVERN: As an attachment to the

9 --

10 HON. JONES: So, we are talking about
11 two forms.

12 LTC MCGOVERN: Yes, ma'am.

13 HON. JONES: But we are linking all
14 the retaliation forms together under the umbrella
15 of the sexual assault that relates to them.

16 LTC MCGOVERN: And that was based on
17 the concern within the Services --

18 HON. JONES: I think that is fine.

19 LTC MCGOVERN: -- in their RFIs that
20 2910 is really an intake form and then the SARC
21 is done with it. And then that sexual assault
22 investigation takes on a life of its own.

1 But what you all are proposing is that
2 this separate form be linked to that and you
3 would like to see it be continued to be updated
4 with progress notes or something.

5 CHAIR HOLTZMAN: Whatever happens on
6 that case.

7 LTC MCGOVERN: Yes, ma'am.

8 CHAIR HOLTZMAN: You should be using
9 that form so that the military has a complete
10 record in one place on one form of what has
11 happened.

12 LTC MCGOVERN: Okay.

13 HON. JONES: Thank you.

14 CHAIR HOLTZMAN: I think we are on the
15 right track.

16 MR. TAYLOR: I agree.

17 CHAIR HOLTZMAN: So, we are accepting
18 Recommendation 2. Any other comment?

19 VADM TRACEY: We were taking out the
20 last bullet?

21 LTC MCGOVERN: It's actually moved to
22 talk later under another recommendation.

1 COL GREEN: The next recommendation.

2 VADM TRACEY: Okay. And that's the
3 MCIOs.

4 COL GREEN: Yes, ma'am.

5 VADM TRACEY: Just I am concerned that
6 we are automatically turning a retaliation report
7 over to the criminal investigators. I understood
8 the argument for how that would help in the midst
9 of the sexual assault investigation to know the
10 tenor of the climate. I understood that.

11 We heard a lot about the kind of
12 retaliation that takes place after the trial is
13 over, whether a guilty or not guilty verdict was
14 the outcome. And I don't understand why those
15 things should be handed over to a criminal
16 investigator right away. If it is being referred
17 for investigation other than an informal process,
18 okay, but I didn't understand why we thought it
19 was right that troops who wind up with their
20 buddy and ostracized the victim should get
21 reported to the criminal investigators as the
22 first thing that we did.

1 So, when you get to that section, that
2 is my -- I object to that.

3 LTC MCGOVERN: That is a very a good
4 consideration. Yes, ma'am.

5 I developed a checklist as you go
6 through these recommendations to address a few
7 corresponding changes within the report, so that
8 we can address each topic all at once.

9 There was one issue I just wanted to
10 close the loop that Admiral Tracey had raised
11 when we discussed the standardized form informal
12 report, which appears in the blue recommendation.

13 Currently, it states that I think
14 Admiral Tracey, my understanding was it was very
15 important for you that the victim understand if
16 they are going to take this informal filing
17 option, that they are aware that that could
18 become a formal report, if the commander thought
19 that the underlying conduct was so egregious that
20 it needed to be a formal investigation. And that
21 is how it is written in the current
22 recommendation.

1 VADM TRACEY: To be clear, I thought
2 that it was important that the commander had the
3 right to --

4 LTC MCGOVERN: Had the authority, yes.

5 VADM TRACEY: -- and others thought
6 that was the process was that you had to be sure
7 the victim knew that.

8 LTC MCGOVERN: Right. And so I went
9 back and looked at the EO process, which is
10 different because you are reporting to an equal
11 opportunity advisor. You are not first going to
12 the command.

13 And when a victim decides to file an
14 informal report, it can only turn into a formal
15 report if she is appealing the findings of that
16 informal report. That is the channel they chose.

17 So, another way to propose it that
18 they file an informal report of retaliation to
19 have their allegations but if a commander
20 identifies significant misconduct, they could
21 open a separate investigation, which they do for
22 EO, rather than saying they are changing the

1 informal to a formal.

2 VADM TRACEY: So, rather than applying
3 it to that victim, they would open an
4 investigation of underlying issues.

5 LTC MCGOVERN: I just wanted to get
6 your opinion which process you felt more
7 comfortable using for this.

8 CHAIR HOLTZMAN: Well, suppose the
9 commander finds out the information from the
10 informal process?

11 LTC MCGOVERN: Right.

12 CHAIR HOLTZMAN: Would he or she do --
13 would that happen?

14 LTC MCGOVERN: Right. So, rather than
15 saying I'm now turning your informal complaint
16 into a formal investigation of your allegations,
17 it would be okay, I learned that there was this
18 big party, there was all this going on. I am
19 going to initiate, in the Army it is an AR 15-6
20 investigation into this entire thing.

21 MR. STONE: My own investigation.

22 LTC MCGOVERN: Yes.

1 VADM TRACEY: And I'm good. That is
2 where I was headed.

3 LTC MCGOVERN: Okay.

4 VADM TRACEY: That is what I was
5 actually looking for was that kind of a solution.

6 CHAIR HOLTZMAN: I mean and how will
7 victims respond to that? Suppose they don't want
8 a formal investigation? Then what happens? They
9 have no option at this point is what you are
10 saying?

11 LTC MCGOVERN: Well, for the informal,
12 their specific allegation that they did this to
13 me would be resolved. But the commander, they
14 need to know the commander reserves the right to
15 conduct a separate investigation if they find
16 more egregious conduct.

17 HON. JONES: So, that is different
18 from filing a restricted report in a sexual
19 assault case.

20 LTC MCGOVERN: Right, because the
21 commander would never learn about that.

22 HON. JONES: Right. Right and we are

1 not giving him that protection in a retaliation
2 context.

3 LTC MCGOVERN: No but a little more
4 protection by saying it is going to be a separate
5 investigation instead of we are going to turn
6 your informal to a formal.

7 CHAIR HOLTZMAN: And I think maybe I'm
8 wrong here but the answer really to the point you
9 have raised, Judge Jones, is that we don't really
10 know what impact this is having. And so if we
11 have more information about whether victims are
12 concerned about this, then maybe the military
13 would take some action to give the victim the
14 right to close everything down. Maybe. But we
15 don't even know that that would have any impact.
16 Right now we know very little about the
17 retaliation. So, it seems to me that --

18 HON. JONES: No, I'm content with
19 that.

20 CHAIR HOLTZMAN: I'm okay with going
21 forward at this point because we just simply have
22 no way of knowing whether this is something that

1 is going to adversely affect victims or not.

2 LTC MCGOVERN: And based on the
3 Services' responses, as Mr. Taylor pointed out
4 before, this pretty much happens, since they
5 don't have a standardized form. If it is
6 informal, they kind of do an informal
7 investigation. If it is more egregious, they do
8 a formal.

9 It is just now that you have a form,
10 there will be a box. Do you want this to be an
11 informal or formal report?

12 CHAIR HOLTZMAN: And so it seems to
13 that the language on Recommendation R-2 should be
14 a standardized form not only for reporting
15 retaliation but reporting retaliation and
16 tracking the handling of retaliation complaints.

17 LTC MCGOVERN: Yes, ma'am.

18 CHAIR HOLTZMAN: Colonel McGovern,
19 before you say yes, you should make sure you
20 agree with me.

21 (Laughter.)

22 LTC MCGOVERN: I do! That is exactly

1 what you were saying before. I absolutely do.

2 CHAIR HOLTZMAN: All right, thank you.

3 So, are we finished with
4 Recommendation 2? We accept Recommendation 2 now
5 with the various changes?

6 HON. JONES: Yes.

7 CHAIR HOLTZMAN: Hearing no objection,
8 that is done. We are up to Recommendation 3,
9 Colonel.

10 LTC MCGOVERN: This is addressing the
11 SARC's responsibility formalizing that
12 responsibility to make them the central point of
13 data collection.

14 The Secretary of Defense and Service
15 Secretaries provide multiple channels for victims
16 to report retaliation and task installation
17 Sexual Assault Response Coordinators, SARCs, with
18 collecting any information from reports on
19 retaliation, recording information on retaliation
20 allegations in DSAIDs and tracking, monitoring
21 information on the investigation and resolution
22 of retaliation claims. So, they are responsible

1 for the form we just spoke of.

2 CHAIR HOLTZMAN: Do we want to give
3 them more responsibility in terms of making sure
4 that there is follow-up or they were just dealing
5 with the form?

6 LTC MCGOVERN: I don't think -- here,
7 we are saying that they are responsible for
8 collecting that information from the various --

9 CHAIR HOLTZMAN: Right, but if we
10 wanted to give them responsibility for making
11 sure that there is somebody who is following up
12 or that someone is supposed to do whatever they
13 are supposed to do, that comes in a different
14 place or that is here?

15 HON. JONES: No, they are --

16 LTC MCGOVERN: I don't think that is
17 within their authority, ma'am.

18 CHAIR HOLTZMAN: Oh, okay.

19 LTC MCGOVERN: That is what the Chair
20 of the Case Management Group would be doing.

21 CHAIR HOLTZMAN: Oh, I see. Okay.

22 HON. JONES: But they do track and

1 monitor the investigation, right?

2 LTC MCGOVERN: They track it, yes.

3 HON. JONES: Information --

4 CHAIR HOLTZMAN: Suppose they find
5 that something is not happening that is supposed
6 to happen?

7 LTC MCGOVERN: They raise that at the
8 CMG.

9 MS. GUPTA: Right, we added -- sorry.
10 We added that language to the second bullet
11 underneath, that SARCs should be responsible for
12 ensuring retaliation reports are addressed at the
13 monthly CMGs. So, they are ensuring some
14 follow-up through that.

15 LTC MCGOVERN: Because right now at
16 the CMGs, there is no specific requirement who
17 does the minutes, who presents the agenda. And
18 so by placing that responsibility with the SARC
19 --

20 CHAIR HOLTZMAN: My only question is
21 should some of that language be in the blue
22 bullet, the blue form, as opposed to being in the

1 bullet underneath or is it agnostic?

2 LTC MCGOVERN: Unless you wanted to
3 add the word ensuring to tracking and monitoring,
4 ma'am.

5 CHAIR HOLTZMAN: Sorry?

6 LTC MCGOVERN: If you wanted for the
7 last clause, if you wanted to add in ensuring the
8 tracking and monitoring information.

9 CHAIR HOLTZMAN: I leave it up to you.

10 Okay, any objection now to
11 Recommendation 3 as amended? Hearing no
12 objection, it is approved.

13 Recommendation 4.

14 LTC MCGOVERN: This continues with the
15 theme for tracking. The Secretary of Defense and
16 Service Secretaries track retaliation reports and
17 disposition information and publish the data in
18 the Department's Annual Report to Congress on
19 Sexual Assault Prevention and Response.

20 Currently, what goes in the SAPRO
21 report is dictated by Congress. Congress doesn't
22 require this. So, this is saying there should be

1 that requirement.

2 CHAIR HOLTZMAN: Good. Wait a minute.

3 LTC MCGOVERN: Now did you want to
4 address the --

5 CHAIR HOLTZMAN: Excuse me. May I ask
6 one question?

7 So, Congress requires what goes into
8 the SAPRO report? Should we make a
9 recommendation that Congress require that this be
10 done here? We haven't done that. Should we?

11 Do you want to give it more thought?

12 LTC MCGOVERN: No, I don't. I'm just
13 deferring to Colonel Green.

14 COL GREEN: That is a good point,
15 ma'am. And one of the things we hear
16 consistently from SAPRO in discussions is that
17 what goes into their annual report is that, is
18 what is required by Congress.

19 CHAIR HOLTZMAN: Maybe we should say
20 -- maybe we should demand this.

21 COL GREEN: Maybe we create a moral
22 obligation.

1 HON. JONES: It really belongs in the
2 SAPRO report.

3 CHAIR HOLTZMAN: Okay. So, somehow,
4 somewhere, suggest that Congress needs to require
5 that this be done.

6 I mean unless someone disagrees.
7 Hearing no disagreement --

8 LTC MCGOVERN: That way you will
9 guarantee it was done.

10 CHAIR HOLTZMAN: Okay, great. Are
11 there any other comments about Recommendation 4?
12 Hearing none and hearing no objection, it is
13 approved.

14 Recommendation 5.

15 LTC MCGOVERN: This bullet gets to the
16 heart of the investigative authority for
17 professional retaliation. So, specifically,
18 making sure there is an independent body to do
19 the investigations and that those folks have
20 specialized training.

21 The recommendation reads, "The
22 Secretary of Defense clarified which organization

1 has authority to investigate allegations of
2 professional retaliation against victims of
3 sexual assault and ensure that investigations are
4 prioritized and conducted by personnel with
5 specialized training on investigating such
6 retaliation complaints."

7 The reason clarification is needed is
8 because there is confusion between DoD, IG, and
9 the Service IGs as to whether the investigating
10 authorities withheld to DoD or not.

11 CHAIR HOLTZMAN: I guess my question
12 on this is where, does the info on this get
13 tallied and reported? In other words, we have
14 Victim A, sexual assault. All of that is
15 reported. Victim A reports retaliation of a
16 professional nature. This then goes to IG. Who
17 has got the responsibility for writing down on
18 March 12th this report went to IG? And then, who
19 writes down that IG here we are April, May, June,
20 or a year later and nothing has happened? Who
21 has got responsibility for following up on any of
22 that stuff?

1 So, I have got two questions for you.
2 One is who tracks when it goes to IG and then who
3 follows up when IG doesn't do anything as they
4 have or want to do?

5 LTC MCGOVERN: Apparently, the IGs
6 track and report to commanders. What we proposed
7 is that professional retaliation complaints be
8 addressed at the Case Management Groups so the
9 IGs have a requirement to either attend or
10 provide monthly updates to the SARC.

11 CHAIR HOLTZMAN: And that is going to
12 be recorded on this form that we have?

13 LTC MCGOVERN: Yes, ma'am.

14 CHAIR HOLTZMAN: On our master form.

15 LTC MCGOVERN: It all comes back to
16 the form.

17 CHAIR HOLTZMAN: Colonel, this is
18 great. You made me smile.

19 MR. STONE: I guess I'm going to ask
20 that at least in the report each time we say IG,
21 we specify Service IG or DoD IG because that has
22 been where there is a slip between cup and lip

1 and I think it is so important that we do it.

2 So, even when you respond to us, if
3 you can, tell us when you mean Service IG and
4 when you mean DoD IG because that really is where
5 we are trying to head off for other problems.

6 LTC MCGOVERN: Right. So, based on
7 the background information we receive, if you are
8 going to ask that these specialized trained
9 investigators in sexual assault trauma, there are
10 so few cases the IG and Services didn't think
11 that they would really likely establish a
12 subgroup specifically for the sexual assault.
13 But that doesn't mean that you had to agree with
14 them. And in fact, the report doesn't.

15 It says we recommend first that you
16 establish a withholding policy at DoD IG and then
17 of those then they would be specially trained,
18 whether or not they call it a subgroup but they
19 at least are specially trained. So, I believe
20 the way the report reads, it does get it up to
21 DoD IG, rather than the Service IGs, just to have
22 better visibility and control over those cases

1 that do occur.

2 CHAIR HOLTZMAN: And Colonel McGovern,
3 when we write our report, I think it should be
4 clear when we say tracking, that this is going to
5 track the retaliation complaint, no matter where
6 it goes in the military for investigation,
7 whether it is the IG, the MCIO, the local
8 whatever it is called, the command group. So, it
9 is very clear that what we are expecting and what
10 Congress should demand is that this reporting
11 actually take place so we really have a much
12 better handle on what is going on.

13 LTC MCGOVERN: Yes, ma'am.

14 CHAIR HOLTZMAN: Okay, great.

15 LTC MCGOVERN: Do you have concerns,
16 sir?

17 MR. TAYLOR: No.

18 CHAIR HOLTZMAN: Those are perpetual
19 frowns.

20 LTC MCGOVERN: The one question we did
21 have, then, was it was still a little vague --

22 CHAIR HOLTZMAN: Where are we, on

1 Recommendation 5 or 6?

2 LTC MCGOVERN: Recommendation 5, the
3 second bullet, whether or not you all want to
4 specify that you would like a separate unit at
5 the IG to investigate these or do you just want
6 to ensure that it is investigators with the
7 specialized training.

8 The way it works now is, it is
9 supposed to work, according to the DoD IG
10 testimony, if it is a sexual assault case that
11 comes into Service or DoD IG, they withhold it.
12 Then, it goes to the Whistleblower Reprisal
13 Investigation Section. So, they do have several
14 sections but it goes to the Reprisal
15 Investigation. And among those investigators who
16 investigate reprisals, that section will
17 investigate sexual assault-related reprisal
18 complaints.

19 Would you like a subgroup established
20 or do you just want to ensure that those folks
21 have specialized sexual assault trauma training?

22 CHAIR HOLTZMAN: I'm okay for the

1 moment. I mean I think we should say that they
2 have advised us this is how they handle it. If
3 they don't handle it that way, then yes, it has
4 to have a separate group. But if they are going
5 to send it already to a separate group, then the
6 people in that group who are going to be handling
7 these cases need to be trained, as well as the
8 supervisor.

9 I don't know. Do you disagree? Does
10 anybody disagree?

11 MR. STONE: Does the Staff have a
12 recommendation between the two options or do you
13 think that they equally could work well?

14 MS. FRIED: It's probably not
15 something the Staff should comment on.

16 COL GREEN: Well, but I will say what
17 the response is from the Services. We asked the
18 Services for our responses in terms of resolving
19 these cases. And I think they all said that they
20 treat reprisal complaints based on sexual
21 assault, which again, amounts to an extremely
22 small number -- so, there was one issue that they

1 noted, that creating a specialized subgroup to
2 deal with these when the case numbers are so
3 small is not efficient. So, there is that issue.

4 And then there is a separate issue
5 where, in their view, any reprisal complaint
6 deals with a sensitive topic and there is no
7 specialized training or management of that that
8 is needed.

9 CHAIR HOLTZMAN: Okay and I completely
10 disagree.

11 LTC MCGOVERN: And we noted that in
12 the report.

13 COL GREEN: Yes, ma'am, we noted that.

14 CHAIR HOLTZMAN: Okay. That is
15 ridiculous. And you wouldn't have any
16 specialists. Just the same thing with the
17 prosecution; why would you have a Special Sex
18 Crimes Unit?

19 MR. STONE: I agree.

20 CHAIR HOLTZMAN: That is just absurd.
21 But --

22 MR. STONE: And a subgroup could be

1 one investigator.

2 CHAIR HOLTZMAN: Yes, but I think that
3 there should be designated people. I mean you
4 don't have to have a unit but you could
5 designate. I don't know how many people are in
6 their Whistleblower Unit. Let's say there are
7 ten. You could designate four or five of them
8 for this specialized training. Not everybody has
9 to be trained. Because they have such a handful
10 of cases because nobody wants to send it to them.

11 But assuming that they did a better
12 job after being monitored, you know -- but I
13 think at the moment, I am happy with just having
14 -- they can designate some people in that
15 Whistleblower Unit and make sure that they have
16 the specialized training, as well as the
17 supervisor.

18 LTC MCGOVERN: So, just to confirm
19 your recommendation --

20 CHAIR HOLTZMAN: I mean that would be
21 my recommendation.

22 MR. TAYLOR: Well, let me just ask a

1 clarifying question. This sort of gets to my
2 look I was giving, I guess, and that is, are we
3 clear that DoD IG still is on the fence about
4 whether they will always or sometimes withhold
5 these professional reprisal investigations from
6 the Services?

7 LTC MCGOVERN: DoD IG, Ms. Tolek, told
8 you all in her live testimony that they handle
9 them and then after the 2015 GAO report came out
10 in May, and she is describing April, it revealed
11 the Services were doing some of these
12 investigations. So, they came back, revised
13 their numbers and their language and said well,
14 we will investigate all of those which we are
15 made aware.

16 So, that is why the proposal of the
17 report says it is clear in FY12 through 14,
18 Services and DoD IG were both investigating it.
19 DoD IG has presented to you all, that they are
20 withholding these cases but there is no written
21 policy.

22 MR. TAYLOR: Yes, so I think one of

1 the comments I made about the report itself was
2 that we need to, at some point, and maybe it is
3 teed up in one of these other recommendations,
4 say they ought to say on the record that that is
5 the case because, otherwise, they can create
6 let's say a team of two or three people within
7 the Whistleblower Investigation but if they
8 continue to allow Services to do the
9 investigations, then we won't know whether we
10 have really improved the process or not, unless
11 we make this apply to all the Service IGs, not
12 just the DoD IG, as we are thinking about it.

13 LTC MCGOVERN: Would you like to
14 recommend to withhold?

15 CHAIR HOLTZMAN: Yes, I think it
16 should be a recommendation to withhold and if
17 they don't withhold, that any Service IG person
18 who handles such a case must have been trained
19 and the supervisor must have been trained.
20 Otherwise, they should not be permitted to handle
21 these cases.

22 MR. STONE: Specially trained.

1 CHAIR HOLTZMAN: Specially trained.

2 MR. TAYLOR: That is exactly my

3 concern.

4 CHAIR HOLTZMAN: Right.

5 MR. TAYLOR: Because we may not be

6 solving the problem, although we think we are.

7 CHAIR HOLTZMAN: Correct.

8 LTC MCGOVERN: Yes, sir.

9 CHAIR HOLTZMAN: And if they send it
10 to the Service IG, they have to notify whoever is
11 keeping track of this.

12 LTC MCGOVERN: It is within ten days
13 of receiving a reprisal complaint, they have to
14 tell DoD IG. And if DoD IG, in a general
15 reprisal case, they may say -- say it is credit
16 card fraud, and they reported it so they think
17 they are being professionally retaliated against.
18 They will have the Service IG investigate that
19 but then the Service IG has to continue to
20 provide -- DoD has oversight responsibility. But
21 if DoD IG were investigating it, nobody has
22 oversight over DoD IG's time line. So, that is

1 why --

2 CHAIR HOLTZMAN: Well, but they have
3 to report it. I don't care what it is. But
4 whoever is keeping track of our universal form,
5 somebody has to be reporting, whether it is a DoD
6 IG, or a Service IG, or MCIO, or anybody, anybody
7 who is handling one of these cases has to report
8 that they are handling and where it is.

9 LTC MCGOVERN: And then it would be
10 tracked in DSAIDs.

11 CHAIR HOLTZMAN: Yes, so that we can
12 have statistics on it. I think that that is
13 vital. And if they sent it to some other agency,
14 I mean if they sent it to the Service IG, that
15 has to be noted on the report, too --

16 LTC MCGOVERN: Yes, ma'am.

17 CHAIR HOLTZMAN: -- so, it is very
18 clear what is going on here. And then maybe we
19 will get a handle so that somebody can figure out
20 why they are not handling more of these cases and
21 why nobody wants to give it to them or what else
22 needs to be done.

1 MR. STONE: And right there, I would
2 like a sentence that says and any investigator or
3 supervisor handling these cases shall previously
4 have completed whatever you want to call it,
5 sexual assault/retaliation training.

6 CHAIR HOLTZMAN: Correct.

7 MR. STONE: I won't tell them what the
8 training is or where they have got to take it but
9 at least it will insist that they have some
10 training so that they are focused on some kind of
11 training they will come up with, even if it is a
12 computer course that they sit down and do at
13 their desk.

14 CHAIR HOLTZMAN: Right because without
15 the training, they could just assume all the
16 stereotypes that we have been talking about this
17 morning that you have to resist, you had to do
18 this, or whatever. I mean, we have got to get
19 past that one.

20 LTC MCGOVERN: Yes, ma'am.

21 CHAIR HOLTZMAN: Okay, so are we okay
22 with Recommendation 5? Any objection?

1 Hearing none, we are accepting that
2 and we are up to Recommendation 6.

3 LTC MCGOVERN: In the order of the
4 report, we had the MCIO investigation, the IG
5 investigation, command investigation, IG
6 investigation, and then talk about the CMGs
7 monitoring those investigations.

8 On the draft you all received from
9 January 6th, it had some bullet comments as to
10 things that we had pulled from your transcript
11 that we thought you might want to comment on.

12 So, there isn't a separate
13 recommendation that stands alone about CMGs.
14 Instead, it is worked into what the SARC's
15 responsibilities are or that the IG is going to
16 add the report to the SARC so that it can be
17 updated each month at the CMG.

18 But I just want to draw your attention
19 that we have developed that proposed language for
20 you and you will see that in the next draft
21 report about the CMG. Specifically, it is
22 talking about defining the responsibilities for

1 the SARCs, that you are aware of the limitations
2 based on privilege, that it is up to the victim,
3 and that you believe the IG should have the
4 requirement to report to the CMG as well.

5 So, I just wanted to make everybody
6 aware of that before we moved on, since we were
7 going in sequence of the report and its
8 recommendations.

9 So, Recommendation 6 is about when
10 there is a command investigation, that they are
11 training for those investigators about
12 retaliation.

13 The Service Secretaries ensure that
14 personnel assigned by commanders to investigation
15 retaliation complaints are sufficiently trained
16 on issues regarding retaliation against sexual
17 assault victims.

18 CHAIR HOLTZMAN: Instead of
19 sufficiently, what about properly?

20 Any objection to Recommendation 6?

21 HON. JONES: No.

22 CHAIR HOLTZMAN: Hearing none --

1 MR. STONE: Can I ask a question?

2 CHAIR HOLTZMAN: Go ahead, sure.

3 MR. STONE: And maybe I'm just asking
4 for my information. Since the commander assigns
5 the personnel, is there any question about
6 whether commanders who do the assigning need to
7 have looked at the training or does this happen
8 in all kinds of areas, they just have too many
9 things that you can't subject them to training,
10 too?

11 I mean when we did sexual harassment
12 training at the Department of Justice, they made
13 everybody do that on their computer. It maybe
14 took three hours but there was no exception, even
15 up, I don't believe, to politically appointed
16 people.

17 So I mean I don't know if this is
18 something that shouldn't come to the commander
19 because they assigned the people or that that
20 would be overkill.

21 COL GREEN: Well, number one,
22 commanders get a lot of specialized training in

1 dealing with this anyway. So, I think there is
2 other training that orientation towards these
3 issues is inherent in commanders' training
4 through all the Services. But probably, more
5 importantly, the commander is really, it is a
6 ministerial act to appoint someone. They know
7 there is a problem and so they want to appoint a
8 properly trained person to deal with it. And at
9 that point, the issue really becomes more the
10 investigator than the commander.

11 MR. STONE: Okay.

12 CHAIR HOLTZMAN: But you know, my view
13 is that when we start getting information about
14 this, maybe you will be right. And that occurred
15 to me, too. Your very question occurred to me.
16 But maybe we will just see how this plays out.

17 And maybe you are right, Colonel
18 Green, that everyone, all the commanders are
19 properly trained. And maybe it will turn out
20 that that is fine. Who knows?

21 Okay, so we have no objection to
22 number 6, Recommendation 6. So, that is

1 accepted.

2 Recommendation 7.

3 LTC MCGOVERN: Suggests expedited
4 transfers. The Secretary of Defense and Service
5 Secretaries expand the expedited transfer program
6 to include job retraining for Servicemembers who
7 belong to small specialty branches and to be made
8 available on a case-by-case basis to bystanders
9 and witnesses of sexual assault who experience
10 retaliation.

11 CHAIR HOLTZMAN: Any objections or any
12 comments? Hearing none, it is accepted.

13 Recommendation 8.

14 LTC MCGOVERN: This recommendation
15 addresses the information that should be provided
16 to the complainant at the end of an investigation
17 or the disposition of a case.

18 The Secretary of Defense established
19 guidelines clarifying what information about
20 discipline imposed on an offender can be released
21 to a sexual assault victim who experiences
22 retaliation.

1 CHAIR HOLTZMAN: Well, this was an
2 issue that was raised with us, wasn't it, by
3 Protect Our Defenders? So, I'm glad we are
4 addressing it here.

5 Any objection? Any questions? Any
6 comments?

7 MR. STONE: Yes, I would like the
8 recommendation at the end of the first line,
9 Secretary of Defense established guidelines
10 clarifying what information and in there I would
11 insert in addition to the final disposition about
12 discipline imposed. I think the final
13 disposition is not protected, should be
14 protected, can't be protected. A person is
15 entitled to no final disposition.

16 LTC MCGOVERN: Whether their
17 allegation was substantiated or unsubstantiated,
18 sir?

19 MR. STONE: Whether action was taken
20 or no action was taken.

21 HON. JONES: So you are saying whether
22 or not action was taken but not necessarily what

1 the action was.

2 MR. STONE: What the action was. They
3 may not have a right to know if it was a
4 reprimand --

5 HON. JONES: Right.

6 MR. STONE: -- or they lost pay. But
7 they have a right to know if action was taken or
8 no action was taken.

9 CHAIR HOLTZMAN: Right whether any
10 punitive action was taken against the
11 complainant.

12 MR. STONE: Because if no action is
13 taken, then they have to believe they weren't
14 believed. And if they want to go further, they
15 can. And if action was taken, then they don't
16 have a right to decide what the action was or to
17 complain about it but at least they know they
18 were believed.

19 CHAIR HOLTZMAN: They may not be able
20 to know the nature of the action. Does anybody
21 disagree here that they should know whether some
22 or any disciplinary action was taken?

1 MR. TAYLOR: Well, how did you propose
2 to word that, again, Liz?

3 LTC MCGOVERN: Would you be
4 comfortable with that being a sub-bullet, sir,
5 under this broader that they need to establish
6 these guidelines?

7 MR. STONE: No. No, I don't want to
8 leave it to guidelines. It has to be in addition
9 to the final disposition that needs to be
10 up-front. A final disposition has to be able to
11 get out there. Then, they can have guidelines
12 about how much more or less they want to do. But
13 I mean they could say allegation substantiated or
14 allegation not substantiated. Or they can say
15 action or no action but there is a final
16 disposition. They have a right to know that
17 much. Just like when somebody brings a complaint
18 in to a prosecutor's office, they know whether or
19 not they have declined to go forward or they are
20 going forward. They won't necessarily know for a
21 long time whether they are going forward on it.
22 But they will know if they are going forward or

1 not going forward.

2 LTC MCGOVERN: So, the Secretary of
3 Defense established a requirement that the
4 complainant be informed of a final disposition,
5 whether action was taken, as well as guidelines
6 clarifying what information about the discipline.
7 Would that work?

8 CHAIR HOLTZMAN: Well, you could put
9 that, the last part first. I mean you don't have
10 to put this business that just was raised by Mr.
11 Stone first. It could be at the end. But I
12 think something. Why don't you give us language
13 and then we can look at it for the next meeting?

14 LTC MCGOVERN: Yes, ma'am.

15 CHAIR HOLTZMAN: Is that okay, Mr.
16 Stone?

17 MR. STONE: That's fine with me and
18 they can even find out from the Services which
19 variation of what I just said works best, whether
20 it is action, no action --

21 HON. JONES: Yes, complaint
22 substantiated or not substantiated.

1 MR. STONE: Or unsubstantiated. But
2 you know you can find out what they prefer to
3 hear but it has to be something like that.

4 LTC MCGOVERN: But those are separate.
5 You can substantiate but take no action.

6 MR. STONE: Well, that would mean that
7 the discipline imposed was very light. That's
8 right. But they still have a right to know if
9 they were substantiated or not.

10 CHAIR HOLTZMAN: Any objection, Judge
11 Jones?

12 HON. JONES: My only point was I think
13 -- remember from the last time -- and it sort of
14 says it in the first bullet is that it is very --
15 it is up in the air what can be disclosed,
16 period.

17 I mean, so maybe what we need to say
18 is we recommend that a victim should always be
19 told X, Y, or Z but because of the problems with
20 the Privacy Act and everything else, I think we
21 have to leave it to the Secretary of Defense to
22 establish guidelines. That is the point, I

1 think.

2 In other words, at the moment, I don't
3 know and I couldn't tell you what you can tell a
4 victim.

5 MR. STONE: No.

6 HON. JONES: No?

7 MR. STONE: Here is where we are
8 getting confused.

9 HON. JONES: Okay.

10 MR. STONE: Substantiated or
11 unsubstantiated has to do with what the victim
12 told -- reported. It has nothing to do with the
13 perpetrator.

14 LTC MCGOVERN: Right, the
15 investigation.

16 MR. STONE: So, there is no Privacy
17 Act issue involved.

18 HON. JONES: Yes, okay. No, I'm
19 talking about the disposition, once it is
20 substantiated.

21 MR. STONE: Well, that's what I meant.
22 In other words, so that is what I'm saying. They

1 can play with the language and see which works
2 but whether the allegation is substantiated or
3 not substantiated has no privacy implications
4 whatsoever.

5 HON. JONES: Okay, good. All right.

6 CHAIR HOLTZMAN: Well, as long as you
7 agree with that, Staff, then it's fine. Do you
8 agree that there is no privacy implication with
9 that?

10 LTC MCGOVERN: The way that the
11 regulations read now is that information be
12 released to victims to the greatest extent
13 possible under the law.

14 HON. JONES: So, it doesn't
15 specifically say yes, we substantiated what you
16 told us or no, we haven't.

17 LTC MCGOVERN: My understanding from
18 the testimony is that people were told
19 substantiated or not substantiated. It was what
20 then happened that wasn't being told.

21 COL GREEN: I think there is different
22 issues involved here. I mean if you make a

1 complaint to an Inspector General, I think you
2 already are entitled by regulation to know the
3 outcome of your complaint. So, that is probably
4 already established within DoD and/or Service
5 regulations.

6 If I make a less formal complaint, the
7 formality of it, am I entitled to know the
8 outcome of that, may not be as clear.

9 MR. STONE: Not the outcome.

10 COL GREEN: I'm sorry, the outcome of
11 the investigation. The consideration of my
12 complaint.

13 MR. STONE: Okay.

14 COL GREEN: Not any consequence that
15 results from that but the outcome of the
16 investigation.

17 CHAIR HOLTZMAN: Well, I think you
18 should check that first. I think it is not the
19 same as it is. Although, normally, with regard
20 to what you say, Colonel Green, I mean it is.
21 But we should definitely confirm that.

22 But I think the other thing is that to

1 the extent -- maybe we should say to the extent
2 permitted at present under law, the disposition,
3 whether a disciplinary punishment, whether some
4 penalty was imposed on the alleged retaliator
5 should be disclosed, to the extent permissible
6 under law.

7 MR. STONE: And it may just be yes or
8 no, or it may be in more detail. But I think
9 that is where the Protect our Defenders were
10 going with their comments, as I understood them.
11 And I agree with them, that if the Service has
12 done a fair evaluation, it shouldn't be afraid to
13 communicate it to the person who made the
14 complaint.

15 HON. JONES: Well, I mean, again, the
16 only thing is, I couldn't tell you whether you
17 were making a correct or an incorrect decision
18 about what you were disclosing under the Privacy
19 Act because I haven't looked at the Privacy Act
20 and don't understand it.

21 So, I'm only worried that we are sort
22 of trying to direct them to do something that --

1 MR. STONE: That is exactly what I
2 worry about, that there officials at all levels
3 of government, not just in the military, who say
4 oh, it gave me my discretion under the Privacy
5 Act; I had better not disclose anything because I
6 don't want to be sued. And that is why you have,
7 even if they are just anecdotal examples, people
8 who are very upset because the person they were
9 dealing with wouldn't disclose anything because
10 the person was so afraid. That is why it needs
11 to say what they can get. They need to be able
12 to come back later and say I'm entitled to know
13 whether I was believed or whether my complaint
14 was found to be substantiated. At least to get
15 that much.

16 LTC MCGOVERN: And anything other than
17 that DoD established guidelines to clarify so it
18 is standard.

19 MR. STONE: Yes, fine.

20 HON. JONES: Right.

21 LTC MCGOVERN: Are you comfortable
22 with that?

1 MR. TAYLOR: Yes, I'm okay with that.
2 I do think it is not quite as well settled as
3 others think it might be but I think that much is
4 probably okay.

5 But disposition, I think goes too far.

6 HON. JONES: That goes too far.

7 MR. TAYLOR: But I think
8 founded/unfounded, substantiated/unsubstantiated,
9 it seems to me like that is reasonable.

10 CHAIR HOLTZMAN: Are we okay now with
11 Recommendation 9?

12 LTC MCGOVERN: That was 8.

13 HON. JONES: That was 8.

14 CHAIR HOLTZMAN: Okay, hearing none,
15 we accepted 9 with the --

16 MR. STONE: Eight.

17 CHAIR HOLTZMAN: -- 8, sorry, with the
18 changes.

19 Okay, Recommendation 9.

20 LTC MCGOVERN: This is addressing the
21 flag officer, the general officer review of
22 involuntary separations of sexual assault

1 victims, to ensure that they are not retaliatory.

2 The Secretary of Defense will begin
3 tracking implementation by the Services in the
4 fiscal year 2013 NDAA requirement that the
5 general or flag officer review proposed
6 involuntary separation of the Servicemembers who
7 made an unrestricted report of sexual assault
8 within the preceding year.

9 MR. TAYLOR: I think this is something
10 that DoD SAPRO has already agreed, basically, is
11 a good idea. I remember asking that question
12 during the course of the testimony.

13 HON. JONES: Yes, right.

14 MR. TAYLOR: I said, don't you think
15 you ought to be tracking this? And they said,
16 yes, probably should.

17 HON. JONES: Then we might know
18 whether it was working, right?

19 MR. TAYLOR: So --

20 HON. JONES: No problem.

21 MR. STONE: Well, I don't understand.
22 Does the 2013 NDAA require them to do that or

1 only on request?

2 LTC MCGOVERN: It requires them to do
3 the review. They are not required to track it.

4 MR. STONE: To, in other words, keeps
5 track of all the numbers and report it to
6 anybody.

7 LTC MCGOVERN: Right. So --

8 MR. STONE: So, this would require
9 them not only to review it but make a record of
10 their review and keep those statistics somewhere.

11 LTC MCGOVERN: Yes, sir.

12 MR. STONE: Okay, so do we say for
13 annual reporting? In other words, I would like
14 it to say and just what you just said to me.
15 That, in addition to their review, which is
16 mandatory, that they keep the records and report
17 it in an annual report to the, I don't know, the
18 Secretary or whomever you want to report it to.

19 CHAIR HOLTZMAN: Is this going to be
20 on the form, the sexual assault reporting form?

21 LTC MCGOVERN: No, ma'am.

22 CHAIR HOLTZMAN: Why not?

1 LTC MCGOVERN: So, this occurs when
2 someone --

3 CHAIR HOLTZMAN: I know but why
4 shouldn't it be on that form? Would that be a
5 good place for it to be?

6 I file an unrestricted report.
7 Everything happens on that report, investigation,
8 blah, blah, blah. Everything happens on the
9 report on that. I mean to me, the investigation
10 is on that report. And all of a sudden, I am
11 involuntarily separated. That doesn't get on the
12 report. Why not? Should it? I mean, just a
13 question.

14 MR. STONE: Should it be the last
15 thing, in case it happened?

16 LTC MCGOVERN: Well, it could take its
17 own form of a retaliation complaint, saying I am
18 being retaliated because they are involuntarily
19 separating me for a personality disorder when
20 really it is because I am a sexual assault
21 victim. They are misdiagnosing me.

22 CHAIR HOLTZMAN: So that is how it

1 would then get on the report. Okay, if the
2 victim then decides this was retaliation, then it
3 would then get attached to the report. I got it.
4 Okay, thank you.

5 MR. STONE: I thought you were asking
6 a slightly different question. I thought you
7 were asking whether or not the person reviewing
8 it is not really in a good position to review it,
9 unless he has looked at that report that
10 everything was on and so, therefore, he is
11 knowledgeable and he is not giving it a quick
12 once over with a summary from the group that
13 discharged the person. He has to look -- oh, by
14 the way, I have got to read this thing. Hmm,
15 this is different than I thought. Looking at a
16 one-paragraph summary is not the same as looking
17 at the record that was there.

18 CHAIR HOLTZMAN: Would that person
19 have the access to that whole record?

20 COL GREEN: The general officer that
21 is requesting the review? I mean I am certain
22 the general officer requesting review would have.

1 When a case is brought to them for review, the
2 underlying concern would be part of the review
3 process.

4 CHAIR HOLTZMAN: Okay, but since we
5 are not tracking the whole retaliation report, it
6 still might not be there.

7 COL GREEN: Right.

8 LTC MCGOVERN: Right but currently, if
9 someone was sexually assaulted and asks for this
10 flag officer review, the general would have, at
11 their disposal the sexual assault investigation.

12 CHAIR HOLTZMAN: Right, but they
13 wouldn't have the retaliation because we don't
14 have that.

15 COL GREEN: Right, nothing is tracked.

16 CHAIR HOLTZMAN: Should we mention
17 anything about that? No? Yes?

18 COL GREEN: I think if you begin
19 tracking through the other processes, all of that
20 information is then going to be incorporated into
21 --

22 CHAIR HOLTZMAN: Okay. Okay, I'm

1 persuaded. So, are we okay --

2 MR. STONE: It's only whether you
3 wanted a phrase at the end that said after
4 reviewing all the other material related to it,
5 just to make sure it gets --

6 MR. TAYLOR: Well, I think you have to
7 trust these senior officers to decide what they
8 need, what is relevant. My experience is that
9 most of them want more information instead of
10 less anyway.

11 CHAIR HOLTZMAN: Well, let's just see
12 what happens.

13 So, we are accepting 9 as is.

14 HON. JONES: Yes.

15 CHAIR HOLTZMAN: Okay, no objection to
16 that.

17 Okay, number 10.

18 LTC MCGOVERN: This addresses your
19 concerns about the maltreatment definition which
20 State developed be parallel to the auspices zone
21 like the specific intent requirement. And Nalini
22 worked very hard on this to coordinate with the

1 Services and get their input, as well, and
2 compared it to the hazing regulation to develop
3 some specific language for your review.

4 But the recommendation is that the
5 Service Secretaries revise Service regulations on
6 maltreatment, which are unduly narrow.

7 CHAIR HOLTZMAN: Unduly narrow in what
8 way?

9 LTC MCGOVERN: With the specific
10 intent requirement.

11 CHAIR HOLTZMAN: Maybe we should have
12 that a little more descriptive because I don't
13 really understand it. Maybe you have it here but
14 I can't read it.

15 LTC MCGOVERN: We can add language at
16 the end of that -- specific intent requirement to
17 discourage reporting or otherwise discourage the
18 administration of justice.

19 If you look at the third bullet, if
20 you all would be comfortable reviewing the
21 proposed language as an alternate definition to
22 offer the Services.

1 COL GREEN: Why don't you say how you
2 came up with that.

3 MS. GUPTA: Sure, so I spoke with a
4 couple Services and one of the things that we had
5 discussed at our last meeting was just
6 eliminating the specific intent element. And the
7 Services expressed concern over that because it
8 would make maltreatment very broad and to the
9 point that it could reach behaviors that are just
10 mean and it wouldn't necessarily any more be
11 connected to retaliation. So, it wouldn't
12 necessarily just punish behaviors that are done
13 because a report was made or because someone
14 wanted to make a report.

15 So, we looked to the NDAA language
16 from the FY14 NDAA and we thought it might be
17 better, instead of that specific intent, to
18 include this language that -- sorry, now I can't
19 find it here.

20 I was, "...trying to discourage the
21 individual from reporting a criminal offense or
22 because the individual reported a criminal

1 offense." So, that would be slightly broader
2 than what is currently in the maltreatment
3 regulations but would still tie it back to a
4 criminal offense being reported.

5 MR. TAYLOR: So, is that latter part
6 of the language from the NDAA?

7 MS. GUPTA: It was, yes.

8 MR. TAYLOR: And I had raised a
9 concern about this simply because I was afraid
10 that we were confusing the First Amendment issue
11 and the maltreatment under 93 and it was
12 inconsistent with the NDAA. So, thank you for
13 taking a crack at this.

14 MS. GUPTA: Another thing that we also
15 did was -- currently under the Service
16 regulations, the act that is defined is -- I will
17 just read out the first part. "Maltreatment,
18 which is treatment by peers or by other persons
19 that, when viewed objectively under all the
20 circumstances, is abusive or otherwise
21 unwarranted, unjustified, and unnecessary for any
22 lawful purpose."

1 So, we looked at the hazing statute to
2 sort of bolster up that language. And what we
3 recommended or what we included in the
4 recommendation is maltreatment is a form of
5 retaliation -- as a form of retaliation is
6 treatment by peers or by other persons that, when
7 viewed objectively under all the circumstances,
8 is abusive, cruel, humiliating, oppressive,
9 demeaning or harmful. So, it is just slightly
10 more descriptive what the actual act might be.

11 CHAIR HOLTZMAN: So who has a problem
12 with this?

13 LTC MCGOVERN: Hopefully no one. The
14 Services, in one of our discussions, we thought
15 the description might actually, paralleling it to
16 the hazing, which is similar misconduct, just a
17 different motive, would be helpful for the
18 Services to have what -- because Article 93
19 doesn't say what maltreatment is. It doesn't
20 define it. So, the Services have done that for
21 hazing. So, they can do it here for maltreatment
22 in the form of retaliation. So, it is not just

1 being mean. It is abusive, cruel, humiliating,
2 oppressive, demeaning, or harmful.

3 CHAIR HOLTZMAN: Why are we talking
4 about an alternate definition? Alternate to
5 what?

6 COL GREEN: The current -- the
7 definition that the Services have adopted in
8 their regulations is one that requires specific
9 intent. And so, it goes back to --

10 MR. STONE: It's hard to prove.

11 CHAIR HOLTZMAN: Right, I understand
12 that. So, maybe it is just make it clearer that
13 a definition of maltreatment that does not
14 require specific intent could stay or would stay.

15 MR. STONE: Yes, and which would
16 address the concerns.

17 CHAIR HOLTZMAN: Right.

18 Well, it seems pretty good to me but
19 I don't know how the other Members of the Panel
20 feel. Mr. Taylor, are you okay?

21 MR. TAYLOR: Absolutely.

22 HON. JONES: I am, too, yes.

1 CHAIR HOLTZMAN: Mr. Stone, I think
2 you are okay.

3 MR. STONE: Yes, I'm fine.

4 CHAIR HOLTZMAN: Okay, so without
5 objection, we accept --

6 MR. STONE: I have one sort of odd
7 thing. I think it is sort of peculiar, I guess,
8 they said they call it maltreatment. It is not
9 very descriptive. I feel like there are 50
10 things that could be maltreatment. But if that
11 is the term that is used in Article 93, then I
12 guess that is what we use. You know, when you
13 say hazing, that is descriptive of something.
14 When you say maltreatment, I don't immediately
15 think of anything. I don't know what it is I'm
16 supposed to be thinking of, until I read the
17 definition.

18 COL GREEN: It is also the term that
19 is used in the statute.

20 MR. STONE: Okay, that is what I mean,
21 then. I guess I am sort of stuck with it. They
22 couldn't come up with a better term.

1 CHAIR HOLTZMAN: All right, we are up
2 to 11.

3 LTC MCGOVERN: Yes, ma'am. This is
4 your recommendation that there should not be an
5 enumerated Article for specifically prohibiting
6 retaliation.

7 It reads: Congress not add
8 retaliation to the Uniform Code of Military
9 Justice as a separate enumerated offense.

10 And the rationale you all expressed
11 earlier is that commanders seem to have adequate
12 means to dispose of it under Article 92 or for
13 the other misconduct, whether it is Article 93
14 maltreatment or assault, or whatever it may be.

15 The Military Justice Review Group then
16 published their report, after our last meeting,
17 and they did recommend establishing an enumerated
18 article for professional retaliation.

19 CHAIR HOLTZMAN: Why are we including
20 that?

21 LTC MCGOVERN: We just wanted to add
22 it in there today for your consideration whether

1 you want to adjust your recommendation, in light
2 of their proposal and entertain whether a
3 separate one should be for professional
4 retaliation or if you disagree that it still is
5 not necessary.

6 MR. TAYLOR: Can I ask a clarifying
7 question, please?

8 So, is this part of the DoD
9 legislative program that is now being circulated
10 as the Department's position?

11 LTC MCGOVERN: Yes, sir.

12 COL GREEN: Yes, sir. The proposed
13 Article 132 on retaliation would target acts of
14 professional retaliation. So, this is part of
15 the --

16 LTC MCGOVERN: And you all have a copy
17 of that in your papers.

18 CHAIR HOLTZMAN: And why do we need
19 it? I mean just curiosity. Isn't there
20 something that covers professional retaliation
21 right now? I mean how would it be covered? How
22 would it be prosecuted?

1 LTC MCGOVERN: Under Article 92 as
2 retaliation.

3 CHAIR HOLTZMAN: As retaliation.

4 LTC MCGOVERN: As disobeying
5 regulation --

6 CHAIR HOLTZMAN: Oh, it's disobeying
7 a regulation.

8 LTC MCGOVERN: -- which prohibits
9 retaliation.

10 CHAIR HOLTZMAN: It wouldn't be the
11 maltreatment.

12 LTC MCGOVERN: It could be, if that is
13 the underlying misconduct but it would be charged
14 as maltreatment, not as professional retaliation.

15 CHAIR HOLTZMAN: Right, but an
16 alternative to maltreatment would be Article --

17 LTC MCGOVERN: Disobeying a
18 regulation, which prohibits retaliation.

19 CHAIR HOLTZMAN: Okay. And well, I
20 feel very uncomfortable about making any mention
21 of this Military Justice Review Group because we
22 haven't really analyzed why they did this, what

1 they thought was inadequate. I mean, so how can
2 we opine on that?

3 LTC MCGOVERN: We wanted to discuss
4 that with you today.

5 The excerpt from their report is
6 provided. There is not a justification as to why
7 that was included.

8 CHAIR HOLTZMAN: Well, my
9 recommendation would be just to ignore it.

10 COL GREEN: I think the Staff wanted
11 to bring it to the Panel's attention that it is a
12 recommendation that directly contrasts one that
13 is also there. So, I mean if the Panel wishes to
14 address that, certainly, we just wanted to bring
15 it to your attention.

16 MR. STONE: All right. I'm not
17 inclined to ignore it. I don't think we can
18 ignore it. Actually, this highlights the problem
19 that I complained about twice with Judge Effron,
20 that they were not either waiting to hear what we
21 had to say or coming and testifying before us on
22 substantive matters and that we were going down a

1 road that was parallel to theirs without knowing
2 where we were going.

3 My inclination is that they have more
4 military expertise and a broader pallet of
5 responsibility to work with and I'm loathe to
6 ignore their view that it needs a new audible.

7 So, I mean it seems to me that, at a minimum, I
8 would want to say that we hadn't reviewed their
9 recommendation and have no comment on it. And
10 maybe at a maximum, I would want to see if there
11 was a way that our recommendation could say to
12 the extent that their retaliation statute would
13 take this into account, we have no problem with
14 it. To the extent that we are looking at conduct
15 they don't cover, we wouldn't broaden their
16 statute.

17 But I don't think it is going to be
18 helpful to people on the Hill to have something
19 DoD sent over on retaliation that is different
20 from them and from us. I think that is a
21 mistake. That is a recipe for having some of the
22 stuff we are doing be ignored.

1 MR. TAYLOR: You're review --

2 CHAIR HOLTZMAN: I don't agree with
3 that. They won't ignore it. The only question
4 is I don't think that we are in a position --
5 right now, we have to produce a report by
6 February first to the Department of Defense. We
7 have just seen this report by the Military Review
8 Commission.

9 Colonel McGovern says that there is no
10 justification for and no background for the
11 decision that they may establish a professional
12 retaliation offense. Now, how do we have time
13 between now and February first to make any
14 intelligent comment about their recommendation?
15 I just don't see that we can.

16 I mean I have no objection saying that
17 we just became aware of this and have not had a
18 chance to evaluate their proposal, but I don't
19 think that we can take a position. I mean, if
20 the Panel wants to, obviously, in their votes for
21 that, that's fine. But I just don't think that
22 intellectually, we are in a position to make a

1 substantive comment. That is what I meant. I
2 didn't mean to necessarily -- but I don't feel
3 comfortable making a comment about it.

4 MR. TAYLOR: I would just like to add
5 that I agree with the Chair on this. I don't
6 think we should take a position one way or the
7 other on it.

8 I can think of reasons why they might
9 want to do this. For example, they might want to
10 do this as a public policy matter, to highlight
11 the importance. Or they might want to do it
12 because it will make it easier to track
13 retaliation complaints.

14 I can think of reasons why it might be
15 a good idea. But on the other hand, this
16 represents a reversal of the report that the
17 Department made to the Congress a couple of years
18 ago where they said we didn't need anything. So,
19 I just don't think we can wade into it
20 intelligently. I think we should acknowledge
21 that we know it is there but take no position on
22 it.

1 MR. STONE: Is there some reason that
2 we have to comment on it in this report for
3 February and we can't just, on any of these
4 issues that they have come to and say these
5 issues were only made public shortly before this
6 report was prepared and, therefore, we don't make
7 any comment on this issue but we may do so in a
8 future report?

9 CHAIR HOLTZMAN: I don't think that we
10 want to bind ourselves to that, a future report.
11 This report, our report is on retaliation and we
12 have this already as part of our report, that
13 Congress not add retaliation. And we don't
14 think, by the way, that there should be
15 retaliation with regard to non-professional. I
16 mean Military Justice Review Group didn't address
17 the non-professional retaliation.

18 So, I don't see that we should -- I
19 mean I agree -- well, I have said it already. I
20 agree with what Mr. Taylor has said, that we
21 should just simply acknowledge that this has been
22 done and say that we are not in a position to,

1 because it was done in such a late stage, to make
2 a comment on it but note that it is different
3 from the position that we have taken. That's
4 all.

5 LTC MCGOVERN: We can address that in
6 the report. Then, would you like us to delete
7 that highlighted bullet about the MJRG?

8 CHAIR HOLTZMAN: If we address it in
9 the report, sure.

10 How do you feel, Judge Jones? You
11 have been silent.

12 HON. JONES: Well, you know what? I
13 have been silent only because when I read the
14 phrase professional retaliation, it is much
15 narrower, much less prosecuted, if you will, and
16 very different from what we are discussing when
17 we say that commanders have adequate means with
18 respect to disciplinary action against members of
19 their command who engage in retaliation. To me,
20 that was broader and took in probably the bulk of
21 what is done to deter retaliation or punish it.
22 And it involves ostracism and bullying or

1 whatever.

2 So, it just struck me that they have
3 singled out a type of retaliation that is quite
4 specific, our friends in the Military Justice
5 Review Group. And as I think you said, Mr.
6 Taylor, I'm sure they have their reasons for it
7 and we could imagine what they were.

8 All of that is to say, look, I don't
9 think we should promise to do anything in the
10 future. And I don't know, I suppose we could
11 just -- what are we going to say? Nothing. We
12 have done this. We are aware of what the
13 Military Justice Review Group has mentioned with
14 respect to professional retaliation. We haven't
15 examine that.

16 CHAIR HOLTZMAN: Right.

17 HON. JONES: Period.

18 MR. STONE: That would be okay with
19 me.

20 HON. JONES: Okay.

21 CHAIR HOLTZMAN: Well, we haven't had
22 time to examine.

1 HON. JONES: Well, we haven't had time
2 either, right.

3 LTC MCGOVERN: Just to clarify for the
4 explanation in the report, your opinion is that
5 commanders have this adequate means at their
6 disposal to take disciplinary actions against
7 social retaliation.

8 HON. JONES: Honestly, I'm not -- I
9 would not have been including professional
10 retaliation in what we were talking about. Maybe
11 you have keyed in on what I am thinking but
12 haven't expressed very well. Because I don't
13 think of professional retaliation where you
14 actually have somebody who does not get an
15 advancement because they reported something.

16 When I looked at what we have said
17 here, I think more of the more general types of
18 retaliation that in fact commanders do deal with,
19 probably on a daily basis, for all we know.

20 I don't know whether commanders deal
21 with professional retaliation to any degree.
22 Normally it is --

1 LTC MCGOVERN: Well, the IG so rarely
2 has substantiated it.

3 HON. JONES: I know. That is just it.
4 It is such a narrow, small, both in number and
5 frankly, in terms of anybody looking at it or
6 tracking.

7 So, I mean the more I sit here, the
8 more I think it is probably a good idea what the
9 Military Justice Review Group has come up with
10 but we can't say that. We don't know.

11 But I don't know that we meant
12 professional retaliation when we made this
13 comment. That's all I'm saying.

14 CHAIR HOLTZMAN: So, maybe one of the
15 ways to deal with this is to say we have focused
16 on social retaliation and ostracism. The
17 Military Review Group has made a recommendation
18 on professional retaliation. They just made that
19 recommendation and we have not had an opportunity
20 to review and to express an opinion on it.
21 Something like that.

22 MR. TAYLOR: I'm fine with that.

1 HON. JONES: Yes.

2 MR. TAYLOR: Sure.

3 CHAIR HOLTZMAN: Mr. Stone?

4 HON. JONES: I mean I was never just
5 thinking of professional retaliation.

6 MR. STONE: Yes, right. And the other
7 way to express that with the words here is when
8 we say after each time we say retaliation just
9 say other than professional retaliation. In
10 other words, just point out we are not commenting
11 on the professional retaliation part, which is
12 what they commented on.

13 LTC MCGOVERN: Maybe it would be more
14 clear just to say that they not add an enumerated
15 offense prohibiting social retaliation. We can
16 come up with language for you.

17 CHAIR HOLTZMAN: Does that suggest
18 that we want an enumerated offense dealing with
19 professional retaliation?

20 LTC MCGOVERN: No, ma'am, it is
21 staying silent on it.

22 CHAIR HOLTZMAN: Okay.

1 MR. STONE: Yes, right.

2 LTC MCGOVERN: Are you comfortable
3 with that?

4 CHAIR HOLTZMAN: I would like to see
5 what it looks like.

6 HON. JONES: Yes, I mean I just don't
7 think we meant it as part of our bullet.

8 MR. STONE: Right.

9 LTC MCGOVERN: And just to --

10 CHAIR HOLTZMAN: What concerns me, for
11 example, is I don't want to exclude professional
12 retaliation from all of the tracking and all of
13 the rest that we have asked for. So, that is my
14 concern here is that if we exclude professional
15 retaliation in some explicit way from everything
16 that we are doing, who is tracking it?

17 LTC MCGOVERN: No, ma'am, I don't
18 think --

19 HON. JONES: It's not going to change
20 tracking, I wouldn't think.

21 LTC MCGOVERN: This is a very narrow
22 issue just dealing with whether or not it should

1 be in here.

2 CHAIR HOLTZMAN: Okay, I just --
3 that's why I want to look at it and make sure I'm
4 okay.

5 LTC MCGOVERN: Yes, ma'am.

6 MR. STONE: Well, it might mean that
7 in the one we previously covered where we talked
8 about tracking that we say retaliation of all
9 kinds, of all varieties, including professional
10 retaliation, so it is clear that that one we
11 didn't mean to exclude.

12 LTC MCGOVERN: And I believe that is
13 addressed through the report. The first case
14 that they had of professional retaliation from
15 FY12 to FY15 they had one case in FY15. So, it
16 is rare and we don't know the disposition. We
17 know that they recommended action be taken
18 against the colonel and lieutenant colonel but we
19 don't know --

20 CHAIR HOLTZMAN: Now, did it involve
21 sexual assault?

22 LTC MCGOVERN: Actually the report was

1 made by an employee who reported on behalf of a
2 victim who was sexually assaulted by the
3 lieutenant colonel. And then that master
4 sergeant who made the report was retaliated
5 against and not promoted by the lieutenant
6 colonel.

7 And so, it was very interesting. It
8 wasn't even the victim who made the complaint and
9 was retaliated against. That is why we have gone
10 back and revised to make sure that your
11 recommendations do include both victim and those
12 making reports.

13 HON. JONES: Right, not only victims.

14 MR. STONE: I don't think that is
15 surprising. The victim is the one who is worried
16 about retaliation and so they are the most
17 chilled. And very often, it is somebody else who
18 hears it and doesn't think that retaliation is
19 going to affect them. They are not in that chain
20 of command, normally, or they are not dealing
21 with that person in an ongoing basis. So, they
22 are less constrained by the thought oh, gosh, I'm

1 going to ruin my career.

2 CHAIR HOLTZMAN: I've been there.

3 Okay, let's go to number -- so, we are
4 finished with number -- we accept number 11 with
5 all of the qualifications and recommendations and
6 changes we have discussed. Without objection,
7 that will be adopted.

8 And we are up to Recommendation 12.

9 LTC MCGOVERN: Yes, ma'am. This
10 recommendation is for innovative training.

11 The Secretary of Defense and Service
12 Secretaries develop innovative and effective
13 training on retaliation for Servicemembers and
14 commanders, including targeted training that may
15 be used in response to problems of retaliation
16 within an organization.

17 CHAIR HOLTZMAN: I guess I am a little
18 bit at sea about this. Maybe that is not the
19 right phrase to use. But what kind of training
20 --

21 LTC MCGOVERN: We received testimony
22 that there is so much training going on on sexual

1 assault and everything else that there is just
2 training saturation. And so, the discussion was
3 that they need to make sure that they come up
4 with new and innovative ways to ensure that
5 people are being trained on retaliation.

6 CHAIR HOLTZMAN: I got it. I'm okay
7 with it. Anybody have any comments, questions,
8 objections? Without objection, then, we adopt
9 Recommendation --

10 MR. STONE: Well, the third bullet
11 does seem to make the point that we were
12 concerned with before that the commanders are
13 going to get trained.

14 CHAIR HOLTZMAN: You're right.

15 MR. STONE: So, that seems to take
16 care of the vagueness that I thought there was
17 before. So, they are going to be trained, too.

18 CHAIR HOLTZMAN: All right. So,
19 without objection, Recommendation 12 is adopted.
20 Now, we are up to Recommendation 13.

21 LTC MCGOVERN: This is recommending
22 that the Military Whistleblower Protection Act

1 elements and burden of proof mirror the language
2 of the Whistleblower Protection Act for DoD
3 civilians. That the Secretary of Defense revise
4 the elements of -- elements and burden of proof
5 for reprisal claims made under the Military
6 Whistleblower Act so that they parallel the
7 elements and burden of proof outlined in the
8 Whistleblower Protection Act for DoD civilians.

9 CHAIR HOLTZMAN: Any discussion,
10 comment, disagreement? Without objection,
11 Recommendation 13 is agreed to. Now, we have
12 potential additional recommendations on
13 retaliation.

14 LTC MCGOVERN: I believe we have
15 already discussed this, ma'am --

16 CHAIR HOLTZMAN: Okay.

17 LTC MCGOVERN: -- when we talked about
18 professional retaliation.

19 CHAIR HOLTZMAN: So, are we all done?

20 COL GREEN: Just one point. The x'd
21 out portion, Protect Our Defenders did, in their
22 submission to you, comment on expanding

1 protections for those who are improperly and
2 involuntarily separated and the prioritization of
3 the medical, a potential medical discharge
4 compared to a separations process. And they made
5 some recommendations to you to consider that.

6 Again, that is not material or
7 anything that you have heard from witnesses on or
8 even considered in the course of your assessment
9 on retaliation. I think the separations process
10 and the medical separations process are different
11 processes. So, you know the Staff's
12 recommendation or view is that you don't have
13 information on this but we wanted to at least
14 bring that to your attention in terms of a public
15 comment, as to whether or not you would consider
16 it.

17 CHAIR HOLTZMAN: And are these things
18 within our jurisdiction anyway?

19 COL GREEN: I think the medical
20 separations process -- I mean, obviously, if it
21 is a collateral consequence of a sexual assault
22 victim, tangentially, but it is pretty far afield

1 from the study that you have been doing specific
2 to this.

3 MR. STONE: I thought we did get
4 testimony at one of the hearings in the District
5 Court building in D.C. by a victim who said they
6 viewed what the person was doing -- as suggesting
7 that the person was mentally unbalanced and they
8 terminated the person and he was discharged for
9 that reason. Then he was very unhappy because he
10 and the other people like him were then chilled
11 and feared they were going to walk into a medical
12 discharge and be sent down that road. I thought
13 we did hear testimony. I'm not sure that it
14 wasn't anecdotal but I did think we heard
15 something.

16 LTC MCGOVERN: I think what we had
17 discussed is that the administrative separation
18 process and medical separations are very
19 complicated. And to bring in testimony for them
20 to explain the two tracks and the commanders'
21 decision-making process at the end in order to
22 fully consider POD's recommendation would take a

1 bit of testimony and quite a bit of
2 understanding. So, what we proposed, instead, is
3 to note in the report and in a footnote that you
4 did receive this but your recommendation is that
5 flag officers continue to review as required by
6 the NDAA; that that is a safeguard but it needs
7 to be tracked.

8 MR. STONE: So, that if I understand
9 you correctly, if a person who reported
10 retaliation was medically discharged, and I don't
11 know if it is within some period of time --

12 LTC MCGOVERN: One year.

13 MR. SCROGGS: -- within a year, that
14 would be reviewed by that review process, even
15 though it was a medical discharge. Is that
16 right?

17 LTC MCGOVERN: Absolutely.

18 MR. STONE: Okay, then I think we are
19 addressing it. Then, we are saying we don't care
20 which kind of discharge it was. It was an
21 involuntary discharge within a year after
22 reporting the retaliation and, therefore, there

1 will be some kind of review.

2 LTC MCGOVERN: Well, they had asked
3 that you all recommend that the medical be given
4 priority over the administrative involuntary
5 separation. And that is just a lot of factors go
6 into that.

7 MR. STONE: No, but I guess what I am
8 asking is I would like a footnote somewhere --

9 LTC MCGOVERN: Yes, sir, we have got
10 that.

11 MR. STONE: -- that says that that
12 process will include not only administrative but
13 also medical blah, blah, blah.

14 LTC MCGOVERN: Okay.

15 MR. STONE: Okay? So, that they at
16 least know we took account of it and we do expect
17 to count those.

18 LTC MCGOVERN: Yes, sir.

19 MR. STONE: Great.

20 LTC MCGOVERN: Those are being
21 tracked.

22 CHAIR HOLTZMAN: Okay. Colonel Green,

1 anything further?

2 COL GREEN: Okay, in addition --

3 CHAIR HOLTZMAN: Colonel McGovern, do
4 you have anything further? No, great.

5 COL GREEN: Just the report on the
6 retaliation, the draft, again, we have got your
7 changes. And what the Staff will do now is
8 summarize the three major sections of the report,
9 being the Article 120 and your recommendations
10 there; the draft report on that; the retaliation
11 report that you received, we will make the edits
12 that you have recommended and to the summary
13 recommendations there and combine it with the
14 restitution and compensation recommendations an
15 reports previously. We will combine the
16 recommendations and give those to you next week
17 as the combined list of your full recommendations
18 for this report, along with the report.

19 CHAIR HOLTZMAN: And I hope that there
20 is going to be some careful consideration to the
21 press on this because I do think that these are
22 very important recommendations and they shouldn't

1 just be buried. We should prepare a proper press
2 release on this and maybe sit down with some of
3 the press that has been covering this issue in
4 the past, whether it is CNN or whatever, so that
5 we can get appropriate coverage.

6 And these are two really important
7 issues, one on restitution and the issues on
8 retaliation, which have been widely reported and
9 these are important recommendations, not to
10 mention that everybody has worked so hard on it.
11 So, maybe we can discuss that or you can give us
12 that information before next week. But next
13 Friday we are going to reviewing the final
14 version of this.

15 COL GREEN: Right, the Staff will get
16 the revisions back to you by mid next week and
17 then we --

18 CHAIR HOLTZMAN: Well, will we need a
19 meeting if we read the report and there are no
20 changes?

21 COL GREEN: Well, we have other
22 topics. The data analysis, we have Dr. Spohn and

1 the Staff have been working hard to prepare that
2 and get that for, obviously, a standalone report
3 that you are preparing.

4 CHAIR HOLTZMAN: Got it.

5 COL GREEN: But depending on as long
6 as you are comfortable with it, hopefully that
7 first part in terms of going through the approval
8 of the report, as we have it, should be fairly
9 brief.

10 CHAIR HOLTZMAN: Excellent. So, are
11 we up to public comment now?

12 COL GREEN: We are and we have none.
13 So, unless there are other issues.

14 CHAIR HOLTZMAN: Well, so then we
15 adjourned.

16 MS. FRIED: Yes, the meeting is
17 closed.

18 CHAIR HOLTZMAN: Thank you very much,
19 Panel Members and Staff. Thank you very, very
20 much.

21 (Whereupon, the above-entitled matter
22 went off the record at 2:33 p.m.)

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In the matter of: Public Meeting

Before: U.S. DoD Judicial Proceedings Panel

Date: 01-15-16

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