UNITED STATES DEPARTMENT OF DEFENSE

JUDICIAL PROCEEDINGS PANEL

PUBLIC MEETING

FRIDAY,
JANUARY 15, 2016

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
## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Deliberations: Article 120, UCMJ</td>
<td>7</td>
</tr>
<tr>
<td>Deliberations and Review of Draft Report:</td>
<td></td>
</tr>
<tr>
<td>Retaliation Against Victims of Sexual Assault</td>
<td>175</td>
</tr>
<tr>
<td>Public Comment</td>
<td>268</td>
</tr>
<tr>
<td>Adjourn</td>
<td>268</td>
</tr>
</tbody>
</table>
Good morning, Panel Members, this meeting is open. Happy New Year.

CHAIR HOLTZMAN: Thank you, thank you.

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

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

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

Madam Chair?

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

And, good morning to everyone. Happy New Year.
I'd like to welcome everyone to this meeting of the Judicial Proceedings Panel. All five Members are here today.

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


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

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

To begin with, the Panel will
deliberate on Article 120 of the UCMJ. We will
discuss the assessment and recommendations we
received last month from the JPP Subcommittee to
determine whether and to the extent to which we
will accept the Subcommittee's findings and
recommendations and determine how to formulate
our report on Article 120.

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

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

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

This afternoon, the Panel will
continue its deliberations on the prevention and response to retaliation and ostracism against victims of sexual assault crimes.

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

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

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

Thanks very much for joining us today.
We are ready to begin our deliberations on Article 120.

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

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

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

And of the ten remaining issues that the Panel had asked the Subcommittee to consider, made recommendations for no change specific to those recommendations, although a number of those issues tie into the recommendations made by the Subcommittee.
The Staff reviewed the Subcommittee's report and summarized the recommendations that the Subcommittee has made and if the Panel were to accept it, what would that appear? And so, the documents that you have from 8 January 16, on the left side of your folder, is a summary of those recommendations. And, I mean, obviously, you know, the Panel could review the Subcommittee's report and its review of issues or the -- in the alternative, the summary of recommendations that we built, I think, covers all of the issues covered by the Subcommittee as well.

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

HON. JONES: No.

MR. TAYLOR: Sounds good.

CHAIR HOLTZMAN: And, we could start with Recommendation Number A-1. Should we do
this by -- Colonel Hines, do you want to summarize for us? Is that how we proceed or Judge Jones -- we look to you for guidance as the Chair of the Subcommittee in the event you have something to supplement in terms of what he's going to say.

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

LTCOL HINES: So, yes, ma'am.

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

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

So, essentially, some of the witnesses before you last fall and witnesses before the
Subcommittee stated that the definition of consent can be confusing in some areas and it still retains -- and this is the subject that came up with the Subcommittee's deliberations that the present definition, in some places, contains vestiges about dated rape laws that could be interpreted to require evidence that a victim physically resist an attacker before a fact finder could conclude that there was a lack of consent.

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

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

And, this recommended definition doesn't substantially, in my view, doesn't -- and I think the Subcommittee's view, doesn't
substantially alter the present definition.

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

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

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

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

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

Colonel, did we get any public comment
on this provision?

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

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

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

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

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

    HON. JONES: I certainly do, yes.

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

Okay, that takes care of Recommendation A-1.

Recommendation A-2? Colonel Hines?
LTCOL HINES: Yes, ma'am.

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

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

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

CHAIR HOLTZMAN: Where would that be?

LTCOL HINES: It's on the --

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

LTCOL HINES: But, essentially, it's
very generally worded and says an accused may raise any defense available. So, it doesn't specify, you know, a litany or a laundry list of defenses.

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

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

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

If an accused raises or if the evidence raises actual consent, the military judge instructs the members that it's not
important whether it's called a defense or an
attack on the proof, but essentially in practice
it's what we call an attack on the Government's
proof.

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

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

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

There seemed to us to be nothing but
a problem that we might create if we tinkered
with the statute because the defense had been specifically noted in the previous statute, as I recall, and taken out in the current version.

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

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

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

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

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

MR. TAYLOR: I agree.

VADM TRACEY: I agree.

MR. STONE: I'm fine with it.

COL GREEN: Can I note for the Panel,
the one issue, and as I started to look at the
Staff's drafting in this as we're going along,
but the recommendation says the President should
amend because the report is the Secretary of
Defense, I believe the recommendation should be
worded that the Secretary of Defense should
propose that the President amend. So, we would
just change the --

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

COL GREEN: Well, I mean --

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

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

I mean if --

VADM TRACEY: I thought that the
recommendation is that the Manual for Courts-
Martial be amended.
COL GREEN: And that -- right. It's just a matter of -- well, we can do that, too.

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

COL GREEN: Correct.

HON. JONES: All of them?

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

HON. JONES: I see.

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

COL GREEN: Okay.

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

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

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

COL GREEN: Okay.

VADM TRACEY: -- finds that

problematic for their chain of command then just

take the --

CHAIR HOLTZMAN: Okay, so --

HON. JONES: Agreed.

CHAIR HOLTZMAN: -- we're -- so,

Recommendation A-2 is unanimously adopted.

Recommendation A-3?

LTCOL HINES: Yes, ma'am.

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

The witnesses before you last fall and the witnesses before the Subcommittee indicated there is no definition at this time of this term that is relevant in cases under Article 120(b)(2)
-- I'm sorry, under 120(b)(3) which says when an accused commits a sexual act upon another person when the other person's incapable of consenting.

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

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

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

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

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

CHAIR HOLTZMAN: Did we get any
comments on this provision?

COL GREEN: Yes, ma'am.

CHAIR HOLTZMAN: Or on the Subcommittee recommendation?

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

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

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

CHAIR HOLTZMAN: Excuse me, may I ask
a question about that? But, that's not relevant to this point right there, is it?

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

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

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

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

Judge Jones, do you want to --

HON. JONES: I would only say that
everybody seemed to want a definition with respect to this -- with respect to consent. And so, we thought this was an important addition or change to the statute.

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

LTCOL HINES: Peace.

HON. JONES: Yes.

LTCOL HINES: Yes, ma'am.

The actual Navy and Marine Corps appellate case.

HON. JONES: Okay.

LTCOL HINES: It was Peace.

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

So, we also felt safe in making this recommendation. We thought it was well within the jurisprudence. You know, the current
appellate law in the military.

So, anyway, I certainly agree with this proposal.

CHAIR HOLTZMAN: Any comments, disagreements, questions?

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

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

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

And, that's in her supplemental commentary.

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

CHAIR HOLTZMAN: I was wrong, Colonel
Hines. I thought that Ms. Kepros' concern that the "should have known" applied only to a different portion, but I see she's also looking at this other matter.

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

CHAIR HOLTZMAN: Right, right.

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

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

She, in her descending comments, she sort of ties those together and she doesn't like the proposed definition because the greater issue, she thinks, you know, that particular element, that the "reasonably should have known,"
it's too broad and would capture a negligent accused.

And so --

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

LTCOL HINES: Yes, ma'am, correct.

VADM TRACEY: Okay.

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

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

LTCOL HINES: Yes, ma'am.

So, 2242, I think the discussion with the Subcommittee was, and Professor Schulhofer noted this as well, that the requirements for a conviction under 2242, the Government has to prove not only the act, but that the accused knew
of the victim's incapacity.

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

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

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

CHAIR HOLTZMAN: Which language?

LTCOL HINES: -- reasonably should have known.

CHAIR HOLTZMAN: Where is that?

LTCOL HINES: So, that would appear --

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

LTCOL HINES: That would appear on --

VADM TRACEY: Fifty-three?

LTCOL HINES: Right.
VADM TRACEY: On page 53?

LTCOL HINES: Admiral Tracey's right.

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

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

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

CHAIR HOLTZMAN: I see.

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

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

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

LTCOL HINES: Well --
CHAIR HOLTZMAN: Okay.

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

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

LTCOL HINES: Yes, ma'am.

So --

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

COL GREEN: No, ma'am.

And, as a matter of fact, that's how the Subcommittee did it. They made a recommendation for a definition and then the issues in terms of the accused knowledge of that condition --
HON. JONES: Right.

COL GREEN: -- is a separate issue.

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

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

HON. JONES: I don't think so. I think Ms. Kepros' real concern was the negligence standard that exists in the Military Statute.

And, had the Subcommittee gone differently and agreed with her recommendation that it be taken out, I don't think she would have -- I could be wrong and I can't speak for her, but I'm still not sure that -- I don't think she would have objected to this definition.

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

LTCOL HINES: I think you're right, ma'am. I mean if you look through the transcripts that are in the record, I think it's clear that in the deliberations her main concern
was more with what was original Issue 10. But I'll note, we're going to come back, Admiral Tracey, to the question of Issue 10 on -- it's on page 3 under the Additional Issues. It'll be the first Addition Issues that we get to where the Subcommittee did not recommend a change.

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

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

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

And, any other --

MR. TAYLOR: I just have a question. I agree with A-3 as well, but this is a question. Just as we recommended that the President amend the Manual to clarify the defenses that qualify, can you tell me a little bit about why the President couldn't define consent?
CHAIR HOLTZMAN: You mean capable of consenting?

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

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

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

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

HON. JONES: Exactly.

Well, I can only say that, as I recall, this is one of the very first issues that we were -- we heard a lot of testimony on it. Everybody wanted some clarification.
And, I think we were of the impression that it was important to actually be in the statute because it's such an important concept. I honestly don't have a clearer recollection of -- or of the discussion as to whether to put it into the Manual. And, I'd have to give that some thought and review, which I probably should have done before today, what my thinking was.

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

CHAIR HOLTZMAN: My recollection, and that could be wrong, maybe Colonel Hines, you have a better or any of the Staff have a clear recollection, but my recollection is the same as Judge Jones in that there was enormous, I would almost say consensus, and maybe not quite consensus, but one of the few areas where almost
all the people who testified really felt there
needed to be a definition.

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

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

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

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

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

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

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

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

MR. TAYLOR: That makes sense, thank you.

MR. STONE: If I may, I kind of wonder whether these recommendations either shouldn't
just say what the recommendation is or be
introduced by saying the President or Congress
should.

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

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

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

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

I think it's -- for the most part, I
don't think we thought leaving that language in
but trying to explain it in the Manual was
workable. We're trying to get rid of in the very
first example, for instance, the vestiges, if you
want to keep calling it that, of resistance.

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

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

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

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

And then, number three, go to Mr.
Stone's point about the last part of this
recommendation about the President and the clarification in the -- where ever he's going to clarify it.

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

MR. TAYLOR: Yes.

CHAIR HOLTZMAN: Any objection? Okay, I --

MR. STONE: I have one comment, though --

CHAIR HOLTZMAN: Okay.

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

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

And, I think the comment about the
other part of the statute and the dissent was
whether the perpetrator had some impairment and
this one has to do with whether or not the victim
has some impairment.

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

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

It's not -- it doesn't rise to the
same level of problem that it does in the
military both because of its frequency and because the military imposes a higher standard on its participants, the defendants and victims, that they're there for a special purpose and the standards of conduct and their obligations and duties require a somewhat stricter standard than generally that people have to recognize that, you know, we can't have people in the general public who want to be drunk a 100 percent of the time and it's not a crime but in the military, there's all kinds of consequences if you're not capable of knowing what's going on.

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

And so, since it has appeared to be a big problem, which is why this Committee was constituted in the first place, for those reasons, I go along.
Now, if I'm missing something, by all means correct me.

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

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

Then the question was, what's --

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

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

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

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

Her attack is on the substance of (b)(2) and (3) which we didn't touch. Even if we did nothing about incapable of consent, she would
have a problem with 2 and 3 because 2 and 3 already have a negligence factor in it.

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

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

HON. JONES: I think that's right.

MR. TAYLOR: No, that's --

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

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

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

Now, the Panel could say, hey, wait a
minute, we should have touched it. We agree with
Kepros but agreeing or not agreeing with Kepros
doesn't have anything to do with whether we
accept or don't accept this language. This
language doesn't incorporate or doesn't really
address the whole issue of negligence.

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

CHAIR HOLTZMAN: Right.

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

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

So, can we postpone? Is that okay?

MR. STONE: Sure, sure.

CHAIR HOLTZMAN: The negligence issue

until we get to 10? Is that okay with everyone?

HON. JONES: Yes.

CHAIR HOLTZMAN: Okay, so, is there

anything else we have to -- oh, yes, we want to

look at the issue about whether the President

should provide further executive guidance.

Anybody have any objection to that language?

The President should provide further

executive guidance about the circumstances to

consider when considering whether a victim was

incapable of consenting?

MR. TAYLOR: No objection.

HON. JONES: None.

CHAIR HOLTZMAN: Victor?

MR. STONE: No, that's fine.

CHAIR HOLTZMAN: Okay.

All right, so we're up to

Recommendation Number 4, Congress should amend
the definition of bodily harm in Article 120(b)(1)B.

Colonel Hines?

LTCOL HINES: Yes, ma'am.

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

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

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

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

There was concern with some of the
witnesses before the Panel and Subcommittee whether panel members really understand this concept.

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

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

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

VADM TRACEY: So, are we actually amending the definition of bodily harm or are we removing the concept of bodily harm as a requirement?
LTCOL HINES: Ma'am, what we're doing or what the Subcommittee's recommending is that you just remove the language causing bodily harm to the other person and replace it with without the consent of the other person.

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

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

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

LTCOL HINES: Yes, sir.

MR. STONE: Deleting and replacing.
CHAIR HOLTZMAN: Am I correct that we're taking the existing definition of bodily harm, what we have now is --

HON. JONES: Right.

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

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

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

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

HON. JONES: Yes.

CHAIR HOLTZMAN: It's --

HON. JONES: Basically, we've removed --

VADM TRACEY: But, the writing in the recommendation is --
HON. JONES: Doesn't fit with that.

MR. STONE: The blue --

VADM TRACEY: The blue language is confusing.

MR. STONE: At the top.

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

CHAIR HOLTZMAN: : Right.

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

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

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

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

And it also seemed to be a change that
removed the confusion and, to the extent there
may be any, it doesn't exist anymore.

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

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

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

And so, the Subcommittee Members, well
then, why don't we just say that? Not so much
bodily harm --
HON. JONES: That's a very good point.

Thank you.

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

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

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

And so, that was part of the rationale for the suggestion as well.
CHAIR HOLTZMAN: Do we have any objection to this? I believe the Marine Corps objected to this?

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

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

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

CHAIR HOLTZMAN: On this point.

HON. JONES: On this point.

CHAIR HOLTZMAN: Are we ready to --

Mr. Taylor, do you have any comments?

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

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

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

HON. JONES: A-4.


HON. JONES: No.
CHAIR HOLTZMAN: We're up to A-5.

VADM TRACEY: Subject to being rewritten, right?

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

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

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

VADM TRACEY: No, actually we don't.

CHAIR HOLTZMAN: We don't have to?

COL GREEN: We can just replace or --

VADM TRACEY: And then you will have to remove.

COL GREEN: Correct.
VADM TRACEY: So, we're recommending two actions?

COL GREEN: Correct.

MR. TAYLOR: Yes, that's right.

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

CHAIR HOLTZMAN: Right.

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

CHAIR HOLTZMAN: Right.

Okay, we're up to A-5.

LTCOL HINES: Yes, ma'am.

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

The Subcommittee felt that there were some confusing things in both definitions that the definition of sex act should be modified in some places and that sexual contact should include the use of an object.
While the Subcommittee was deliberating and holding their meetings, the Court of Appeals for the Armed Forces addressed the object issue in the case of U.S. v. Schloff and determined that the statute as written right now does include the use of an object for sexual contact.

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

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

And, without getting into the actual
changes, the thought process was that the three
subsections would address the following, and that
is, in the suggested new subsection A, the
statute is targeting penetrative acts when the
penis penetrates one of the listed areas, B
targeting the use of the mouth upon one of those
listed areas and C targeting the penetration of
one of the listed areas by any other part of the
body or an object when done with the requisite
mental state.

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

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

And, I don't -- Judge Jones, I don't
think there was a lot of dissension with respect
to this recommendation.

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

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

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

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

HON. JONES: Right.

LTCol HINES: -- the Staff's decision in the statute which --

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

COL GREEN: Well, yes, ma'am.

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

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

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

CHAIR HOLTZMAN: Okay.

Did we get any comments on this?

HON. JONES: I think the Navy.

CHAIR HOLTZMAN: The Navy commented and the Marines?

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

HON. JONES: As I recall, the Navy had a lot of comments on this.
COL GREEN: The Navy's comments spoke specifically to (g)(1)C, the proposal from the Subcommittee for (g)(1)C which is the penetration however slight of the vulva.

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

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

This gets into the Subcommittee's discussion on these issues, but I mean the Subcommittee did consider this and I think Ms. Friel talked with the Subcommittee, although, obviously, the penetration of a penis and the circumstances is not something that's likely, but there are circumstances which may occur and I think she just felt that the gender neutralization of the statute and that the circumstance does exist. I think that was their
reasoning for adding that language specifically.

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

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

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

CHAIR HOLTZMAN: So, do we have any --

HON. JONES: It was valuable input.

CHAIR HOLTZMAN: -- further comment on this?

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

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

However, the MJRG did make one
proposal relative to the definition for a sexual act and they basically aligned the definition of sexual act in accordance with the federal definition in Title 18 and made a recommendation that the definition from Title 18 be carried over to Article 120.

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

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

Glen, do you want to talk about that?

LTCOL HINES: In my view, ladies and gentlemen, was that the MJRG, and this is the only recommendation that the Military Justice Review Group made with respect to 120, but that the recommendation that they put up, to bring this definition in line with what's in Title 18, it's really a distinction without a difference.
It's just the federal definition is more of what I would say generally worded. So, they talk about the genitalia or the genital opening as opposed to Ms. Friel's recommended definition was very specific.

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

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

CHAIR HOLTZMAN: So, Colonel Hines, are you saying that, basically, the definitions would be exactly the same except for some wording? I mean that the federal statute and what the Committee has recommended, Subcommittee
has recommended are, in essence, the same?
There'd be no difference in outcome?

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

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

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

       And then, secondly, do we accept these changes?

       Or, I don't know, maybe that's not an appropriate way to do it. But, let's try that.
Okay, are we in favor of adopting basically the Subcommittee's recommendation deferring from the question of whether we would disagree with the substance as opposed to the MJRG's proposal? Any disagreement with adopting this at this point? No? I don't hear any.

HON. JONES: No.

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

I mean, we haven't really studied --

I mean I --

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

COL GREEN: Well, if you want to look
at the words, there's a copy of the -- on the
right side of your folder, the Article 120,
there's an excerpt from the MJRG report. And,
the last -- the back page of the -- it's a four-
page document -- their legislative proposal, the
exact language that they have there is there.
And, again, I mean if you just would like to make
a comparison.

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

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

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

    MR. TAYLOR: Well, yes, excuse me,
Madam Chair.
CHAIR HOLTZMAN: Oh, please.

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

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

CHAIR HOLTZMAN: Good.

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

VADM TRACEY: I agree.

HON. JONES: I agree.

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

I would have been interested to see if the Subcommittee thought there was no substantive difference whatsoever between their recommendation and the federal language, in which
case, I probably would have gone with the language that was out there.

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

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

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

So, I think that, you know, they would have deferred to us had they had the opportunity. And, maybe they will be asked about that by Congress.
So, I understand your hesitation, Mr. Stone, because I like, you know, using existing statutes if we can, saves a lot of heartache for judges and everybody else.

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

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

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

COL GREEN: Yes, I mean, Mr. Stone, the -- I mean, obviously, the Panel can do that.
I would just in terms of the Subcommittee's
deliberation on that issue, there was a lot of
discussion about whether to leave it general or
to --

MR. STONE:  Okay.

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

MR. STONE:  Okay.

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

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

But, in any event, so, look, I'm very
strongly in support of this and I merely, you
know, say that, you know, if I were going to try
to choose between the two, I would like to take a further look at theirs.

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

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

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

HON. JONES: Or oppose it.
MR. STONE: -- in that narrow aspect
to be essentially the same. That would satisfy
me, if that's all right.

CHAIR HOLTZMAN: Any objection to
that? Okay.

HON. JONES: No.

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

Okay, A-6?

LTCOL HINES: All right, A-6 --

CHAIR HOLTZMAN: Oh, yes, sure, sorry.
Can we take a five minute break?

Excellent.

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

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

LTCOL HINES: Yes, ma'am.

So, Recommendation A-6, the
Subcommittee sort of wrapped several issues into
this recommendation having to do with not only
the current practice of charging inappropriate
sexual relationships in a training environment,
whether that current practice was effective,
whether the definition in the statute of
threatening or placing another person in fear and
threatening wrongful actions, whether those
definitions needed to be amended or not.

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

CHAIR HOLTZMAN: Fifty-three.

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

And it would be a new Article

120(b)(1)E which would target an accused
committing a sexual act upon another person by
using position, rank or authority to secure
compliance by the other person.

I think one of the main points of
discussion with the Subcommittee, ma'am, was
whether the current subsection that the majority
of these types of fact scenarios are charged,
which is 120(b)(1)A, by threatening or placing
the other person in fear.

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

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

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

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

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

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

And, that this wouldn't just be limited to training environment cases, it could be used anywhere else where someone, officer on officer, and enlisted on enlisted, outside the
training environment uses their rank or authority
to coerce, compel or secure compliance in a sex
act by the victim.

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

CHAIR HOLTZMAN: Did we get any
commentary about this?

COL GREEN: Yes, ma'am, we did.
The Navy advised -- indicated that
they don't understand the addition of the
proposed additional theory to offer a workable
prosecution option to offenses.

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

And, they note that, in their belief,
it will lead to confusion or lack of use by
prosecutors because those other avenues offer
greater likelihood of conviction.
And the Marine Corps submitted a similar recommendation or comment noting, again, that these cases are charged and dealt with effectively through other means in the UCMJ by the Services according to Service regulations. And, that they also raised the concern about the use of the words secure compliance and reiterated the same point made by the Navy.

CHAIR HOLTZMAN: Judge Jones?

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

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

We did look at the, I guess it was the 2007 statute, the previous statute, which seemed to have a section like this.
I don't remember that we learned a lot. I think we tried to about why it had been removed before the 2012 statute came in.

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

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

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

We have the straight out, without the consent of the other person, the fraudulent representation is in there, inducing a belief by any artifice pretense. Those seem to be accepted
and people sort of think they understand those or
do understand them.

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

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

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

Everyone understands being threatened
with, you know, death. People understand when
you're lied to. All these others are a little
bit more understandable.

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

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

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

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

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

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

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

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

CHAIR HOLTZMAN: Thank you, Judge Jones.

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

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

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

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

So, it targets on the accused's side,
it targets trainers or recruiters. And, the
victims have to be basically in the training
environment or they have to be recruits in the
pipeline going into training.

So, and it would cover consensual
sexual offenses.

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

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

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

COL GREEN: And, the Services all have
Service regulations that are specific to the
training environment and to the recruiting
environment that somewhat mirror the proposal of
the MJRG Article 93(a).
Those are general orders and are prosecuted currently under Article 92. So, I think what the MJRG proposal does is it creates an enumerated offense specific to those same policies that are now covered under Article 92 but it does not deal with the circumstances of sexual offenses where consent has been overcome by the use of rank, position or authority.

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

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

HON. JONES: Secure --

VADM TRACEY: -- underlying secure compliance --

HON. JONES: Yes.

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

MR. STONE: And, I'd like just to say for the record that when the Panel sent me down
to observe the Special Victims' Counsel's
training in Charlottesville the summer of 2014,
one of the last presentations we had that I
listened to was a panel of victims who spoke to
the whole group.

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

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

It was hard to say fear but she wanted
to get out of the military because she was placed
in this situation where that was the person above
her who would determine all of her future and she
did not know how to say no to his advances other
than the way she tried which was relatively
polite but got her nowhere.

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

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

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

And so, I think this is a very good
solution to that problem. I don't think it is
addressed right now and it's certainly going to make a lot of people in that woman's position feel better about staying in the military. So, I support it.

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

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

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

VADM TRACEY: It's giving in.

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

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

CHAIR HOLTZMAN: Okay, so --

HON. JONES: There's no consent.

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

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

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

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

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

MR. STONE: Exactly.

CHAIR HOLTZMAN: Okay, so --
HON. JONES: Thank you, Mr. Stone.

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

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

HON. JONES: Right.

CHAIR HOLTZMAN: What's the --

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

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

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

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

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

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

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

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

    CHAIR HOLTZMAN:  -- go over that.

    HON. JONES:  Yes. I think the discussion about abusing, as I recall, I mean you could be using your authority in the sense that,
yes, you have the authority to order someone to
do a particular duty and you wouldn't be abusing
it to have that person do that particular duty.

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

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

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

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

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

LTCOL HINES: I think on that point,
ma'am, one of the -- a lot of the discussion, and
I think Professor Schulhofer was one of them, was
the question of, well, how much authority does a
trainer or anyone else have to order a putative
victim into a situation.

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

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

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

LTCol HINES: Right.

HON. JONES: Yes.

LTCol HINES: You could order a
recruit to your office for any number of lawful
purposes, to counsel them, to have them clean up
the office, whatever. So, the question was,
well, where does the line -- where is the line
between lawful orders and where does that stop?

And, I think the Subcommittee decided

-- because abusing was initially there, I think,

in one of the drafts.

HON. JONES: Yes, it was.

LTCOL HINES: And so, they decided,

well, let's remove all those questions and make

it more general. Any use, whether it's for a

lawful or illegal purpose, any use of your

position or abuse is a violation of the statute.

MR. STONE: And, correct me if I'm

wrong, Judge Jones, but I actually think this is

sort of a compromise position between the

proposal that's either in the regulations or in

this 93(a) that new Commission proposal that is

where this strict liability for trainers and

recruiters.

This is not strict liability but it is

a slightly higher standard than faced by someone

who is not in a superior position, rank or

authority. And that, basically tells the

military services, you're going to have to
recognize that this is a sensitive subject.

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

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

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

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

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

COL GREEN: Maximum punishment is 30 years.

HON. JONES: And, we also talked about that. Look, you either think that abusing
someone by using your power and which has them, however you want to put it, acquiesced to a sexual assault, is a sexual assault or is not a sexual assault.

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

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

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

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

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

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

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

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

So, Article 93(a) has some appeal to
me for that reason. But, I think this is a very
useful and helpful way to approach the problem.

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

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

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

HON. JONES: Yes, so --

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

HON. JONES: I'm sorry, I just didn't hear you.
VADM TRACEY: To overcome a lack of consent by the other person.

MR. STONE: That adds another element.

MR. TAYLOR: Yes.

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

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

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

MR. TAYLOR: Well, I like that.

HON. JONES: It's neat.

MR. TAYLOR: I like that.

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

MR. TAYLOR: Right.

HON. JONES: I would accept that as an amendment. I don't know how everybody else feels. I like that, Mr. Stone.
MR. TAYLOR: I would be in favor of it.

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

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

CHAIR HOLTZMAN: And, why is that?

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

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

MR. STONE: Well, you could always have a prosecution.
CHAIR HOLTZMAN: Not always.

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

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

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

The standard situation that you're talking about, the ones that we heard, Congresswoman Frankel's victim, I think that's a very clear case. I have no problem with that.
But, how do you differentiate it?

Maybe when we try to get the language about
securing compliance, maybe that will solve my
problem. That's my concern.

HON. JONES: I'm not sure.

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

LT COL HINES: Ma'am, if I could just make two --

CHAIR HOLTZMAN: Yes?

LT COL HINES: -- two notes?

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

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

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

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

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

And, I think we arrived at -- I think the Subcommittee arrived at this secure compliance because it was better tied it back to
the accused using the position, rank or authority in order to secure the act.

HON. JONES: And I think that --

COL GREEN: So, that's just background

as to what discussions went on in the
Subcommittee.

HON. JONES: As I recall, I think people were worried about using compel because, again, it seemed to connote some sort of force.

And so, we went around and round on this and came up with something very neutral but possibly not understandable in terms of any previous, you know, use and jurisprudence.

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

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

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

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

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

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

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

CHAIR HOLTZMAN: The sexual act.

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

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

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

HON. JONES: You'd rather underline,

bringing it back to the --

CHAIR HOLTZMAN: Right.

HON. JONES: -- sexual act.

CHAIR HOLTZMAN: Right. So, it's

secures, that it's -- there's a relationship

between the authority and it does suggest --

secure doesn't suggest compulsion. I think

compulsion is too strong a term. But, it's a

little bit more than just -- it suggests

something a little more than nothing in terms of

getting compliance.

So, I feel comfortable with the

language as it is, actually. If we have a

different term that suggested a more elegant way

that tracks legal history or other case law,

that's fine with me, too.

MR. STONE: Actually, you just used

other language. I don't know if you like it

better. You said to bring about the sexual act,

that we say the sexual assault. Do you like that
better by using the position, rank or authority -

CHAIR HOLTZMAN: To bring about the compliance?

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

CHAIR HOLTZMAN: The what?

MR. STONE: The sexual assault.

CHAIR HOLTZMAN: The sexual act.

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

HON. JONES: So, to bring about --

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

HON. JONES: -- the sexual act --

MR. STONE: That's a causation word.

HON. JONES: -- upon the other person?

CHAIR HOLTZMAN: No, you just leave that out.

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

HON. JONES: Oh, just bring about the
sexual act?

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

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

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

COL GREEN: Yes, ma'am.

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

And we did look to some of the legislative drafting principles. And, I mean, although I think there's comfort in practitioners to have a definition that's in the statute or in
the regulations that establishes what it is, it also sort of begs the continual analysis of if you look at that definition and say, well, what do those words mean?

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

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

CHAIR HOLTZMAN: Are we ready to --

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

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

HON. JONES: Yes, I was trying --
CHAIR HOLTZMAN: Obtain? You can use obtain.

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

MR. STONE: Then use obtain.

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

(CHORUS OF AYES)

CHAIR HOLTZMAN: Any opposed?

Unanimously accepted.

Okay, now, Recommendation A-6?

Colonel Hines, please? Oh, that was A-6, I'm sorry, right.

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

LTCOL HINES: Yes, ma'am.

So, with respect to this recommendation, or non-recommendation, if you will, now we're moving into some issues where the Subcommittee does not recommend a change.
And so, this first one deals with what was Issue 10 that the JPP referred to the Subcommittee with respect to whether the accused's knowledge of a victim's incapacity to consent should be an element of sexual assault under 120(b)(2) and (3).

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

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

And so, they would actually do the opposite, I think, of what the original question was which was, should we even require any mental state on the part of an accused?
They would remove that language to bring it more in line with Title 18 which would require that an accused knows, not reasonably should have known, but that the act occurred and the accused actually knew of the incapacity by the victim.

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

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

COL GREEN: No, ma'am.

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

HON. JONES: I just remember that this
was not completely, but somewhat prompted by the Supreme Court's case *Alanas*. And, I just -- I've gone back and forth on this once, I'm now back.

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

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

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

And, I'm content to leave this the way Congress wrote it. And, yes, it's a harsher
position for the military is what it amounts to.

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

    But that's just a practical comment.

So, I would leave it.

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

    HON. JONES: Yes, yes.

    CHAIR HOLTZMAN: Any discussion from the Panel?

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

    I absolutely agree with the argument that an officer or a commander or a senior member of the Service, either enlisted or officer, does get held to a very higher standard.
But, this could apply to a Naval Academy midshipmen. It could apply to a recruit at boot camp. And, we would criminalize behavior that might actually be negligence.

And, what's the logic there?

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

And so --

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

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

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

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

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

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

So, that, you know, what a reasonable
person not drinking might be aware of, maybe this person is not.

I just throw that out as an example.

I am not sure how I stand on this subject.

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

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

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

So, the first point, I think, in response is, I think Dean Anderson gave a pretty eloquent response at last month's meeting. And, what she was focusing on was, these two subsections under 120(b)(2) and (3) are aimed at protecting, arguably, the most vulnerable victims in this situation, someone who's asleep or by physical or mental infirmity, incapacitate or so
intoxicated by a drug of alcohol that it's
probably arguably the most vulnerable victim,
other than children, under the law.

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

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

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

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

And so, the reasonably should have
known language allows the government to attack
the accused's claim of mistake of fact under the
law, mistake of fact is not based on
intoxication, involuntary intoxication, it's
viewed through the eyes of a reasonably sober
person.

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

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

And so, that is relevant evidence for
the government to come back and say, okay, well,
he's saying he was so intoxicated, he didn't
realize that she was incapacitated but listen to
what all these other witnesses said.
A reasonably sober person observing all of those circumstances would know that, or reasonably should know, that she was incapacitated.

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

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

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

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

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

LTCOL HINES: Yes, ma'am.

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

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

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

LTCOL HINES: No, ma'am.

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

CHAIR HOLTZMAN: So, we're talking about a substantial prison sentence and sex offender for life is a very substantial -- I mean I think that's the point --
LTCOL HINES: That's the point.

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

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

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

And so, should they bear the risk? Maybe if they're told about it, you know, and
educated about it, I'd feel better.

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

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

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

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

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

And, Professor Schulhofer, I think, before the Panel and then later in the Subcommittee raise the opposite issue of what the statute as drafted is too victim-friendly and
that generated the opposite discussion which was really, I don't think anyone had any issue with considering, well, yes, should we make this more government-friendly as the issue was put to the Subcommittee.

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

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

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

LTCOL HINES: I don't believe there was any anecdotal discussion about any cases either from practitioners in the case law, Mr. Stone.
The one case, Judge Jones, is right, the case Professor Schulhofer raised was this Alanas case from the Supreme Court which came down targeting 18 USC 875, the Interstate Threat Statute that was silent about a mental state all together.

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

HON. JONES: I don't remember.

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

CHAIR HOLTZMAN: Right.

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

So, it was referred to the Subcommittee and there were no presenters before the Subcommittee who suggested amending this section. There was one former Marine prosecutor
and civilian defense counsel who said that the
government should have to prove the accused had
some knowledge that the victim was incapable of
consenting. That was the only discussion.

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

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

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

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

But, I --

COL GREEN: To the contrary, ma'am, I
think a number spoke about exactly what Colonel
Hines summarized in terms of the issue with
mistake of fact and whether this -- without this
provision that an accused can raise something
that can then not be contradicted or would
preclude prosecution in particular cases where --
without that reasonably should have known, it
would be prosecutable with that, but would not be
if that were to be removed.

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

CHAIR HOLTZMAN: Except this one.

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

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

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

HON. JONES: Are we not all that
quickly? Is that the problem?

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

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

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

COL GREEN: And, I think relative to the other issue that, in terms of the analysis of the Alanas case is that Congress spoke specifically on this issue and established the standard.
And so, I guess the question before the Panel is whether the Panel wants to make a recommendation to Congress to amend the statute to relax that standard relative to this issue.

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

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

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

COL GREEN: Well, I mean Article 120
convictions have always been registrable offenses according to the DoD standard.

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

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

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

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

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

I'm actually -- I've always -- my strongest feelings about this were, I didn't realize Congress had just drafted it this way with the reasonably should have known as recently
as 2012.

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

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

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

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

COL GREEN: Yes, ma'am.

CHAIR HOLTZMAN: Well, we might ask --

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

Going back to the example of have you controlled drunken driving? As an analogy, the
answer is, as a practical matter, most of, the
state have come up with standard where they take
a blood alcohol test and they tell you what the
level is. And, if it's above 0.08 or whatever it
is and various things, you're going to get
yourself prosecuted and probably convicted. And,
if it's below, they won't.

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

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

And, it seems to me this standard is
sort of an analog to having a you can only have
so much of a blood alcohol level. You will be on
notice that, if you get yourself to that point,
you may be held responsible for what you should
have known.

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

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

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

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

The accused state of intoxication, if
any, at the time of the offense is not relevant
to mistake of fact, a mistaken belief that the
other person consented must be that which a
reasonably careful, ordinary, prudent, sober
adult would have had under the circumstances at
the time of the offense.

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

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

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

COL GREEN: 2007 is when it was
enacted.

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

MR. MARSH: There was not, no, ma'am.

The pre-2007 --

CHAIR HOLTZMAN: I see. So --

MR. MARSH: -- standard is --

CHAIR HOLTZMAN: -- it started in

2007?

Well, the other possibility, since we
do have a time issue here, is just to ask. Say,
this issue was not raised by any practitioners, defense counsel, but that perhaps Congress would want to review this at a later time.

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

I mean --

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

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

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

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

Mr. Taylor, you're frowning. Are you
okay with that?

MR. TAYLOR: No, I am. I was okay

with the original measure. So, I mean for a lot

of the reasons that have been hashed and

rehashed, except for one, perhaps, and maybe a

slightly different take.

And, that is, that I think in the

military culture from which people are coming and

we're talking about here, there might be a higher

obligation, a more special relationship that they

should assume.

I think it should be part of the

training. I totally agree, but I'm pretty much

okay with the original recommendation.

I'm also okay by saying others have

flagged this and have questions about it and

Congress might want to look at it or we might

want to look it, depending.

CHAIR HOLTZMAN: Or and that possibly

the training should focus on it so that it's very

clear that if you get yourself really drunk,

you're not going to have an excuse, oh, I didn't
I know what I was doing or I didn't see or whatever. I don't know.

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

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

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

I would just say those first two
things and that we may -- and so, we intend to
look at it further, something along those lines.

       CHAIR HOLTZMAN: So, we should not say
--

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

       CHAIR HOLTZMAN: Yes, okay, all right.

       HON. JONES: For a lot of reasons.

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

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

       But, that needs to be part of initial
training, entry level training or training on
sexual assault that this is what the law is and
you're not going to be able to come back in and claim --

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

CHAIR HOLTZMAN: Right.

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

CHAIR HOLTZMAN: Correct.

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

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

CHAIR HOLTZMAN: So, anyway, if you circulate a draft for us, I think we can have a
chance to look at it.

    LTCOL HINES: Yes, ma'am.

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

    HON. JONES: Right.

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

    HON. JONES: Right.

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

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

    CHAIR HOLTZMAN: Okay, does this finish our --

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

    CHAIR HOLTZMAN: I'm sorry. Okay.

    MR. STONE: Next page.
CHAIR HOLTZMAN: Wait a minute. Okay, sorry. We have the last recommendation on page 4. Colonel Hines?

LTCOL HINES: Yes, ma'am.

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

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

So, I'll hand it over to Kirt.

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

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

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

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

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

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

It was only during that 2007 to 2012
iteration of Article 120 that indecent acts was
included as an enumerated offense. But, it was
removed again in 2012.
Currently, it's nowhere in the Manual. It's not an enumerated offense, it's not an Article 134 offense.

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

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

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

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

And, the history of the offense demonstrated that low level indecent acts haven't been a recurring type of misconduct in the Armed Forces.
And, an Article 134 offense has overall been in effect and that it addresses that misconduct.

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

HON. JONES: Have what, Mr. Marsh?

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

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

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

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

So, those are the first two issues.
This then brings up the third issue which is, if there is an Article 134 offense, what should it look like?

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

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

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

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

Furthermore, there are a few cases where, under the old 134 offense, it was applied
pretty broadly.

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

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

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

So, the draft proposal you provided
just recently, the second one, and I don't know
if you have it handy in front of you, it might be handy to look at.

CHAIR HOLTZMAN: Where is it?

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

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

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

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

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

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

CHAIR HOLTZMAN: So, the Subcommittee, just to make sure I understand, the Subcommittee
made no recommendation with regard to version one?

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

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

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

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

COL GREEN: Yes, ma'am.

CHAIR HOLTZMAN: Did the Subcommittee consider version two?

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

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

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

CHAIR HOLTZMAN: Right.

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

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

CHAIR HOLTZMAN: Where is the language that's different? I'm trying to understand.
Where is the language that you're proposing?

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

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

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

CHAIR HOLTZMAN: Well, I'm sorry --

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

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

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

CHAIR HOLTZMAN: And, where are you
reading from?

MR. STONE: I'm reading the

explanation C, paragraph C of version two is
different than paragraph C of version one.

Language in the text is the same, but the

explanation is different.

I would have changed it in the --
somehow I would have changed it in the text as

well.

CHAIR HOLTZMAN: Correct.

HON. JONES: Obviously then, version

one gives under 134 would give commanders a broad

power to charge you with an offense under 134.

This is a -- version two is a more

specific, more restrained set of factors that

you'd have to look at. Is that fair?

MR. MARSH: That's a fair assessment.

COL GREEN: Also correct some drafting

issues with the proposal in version one. I mean,

Kirt's gone through this and I think they've used

some words incorrectly. Just formatting issues,

so I mean, it does that but then, in addition,
creates some substantive changes in accordance with Subcommittee concerns.

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

CHAIR HOLTZMAN: You mean that you've made?

MR. MARSH: Yes, ma'am.

CHAIR HOLTZMAN: Okay.

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

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

I guess what I want to know is, if this occurs in a set of facts where it is a hostile work environment because a group of military members of one sex want to basically
drive the other person of the other sex out of
that unit, they want to create a hostile work
environment for that person which is the
atmosphere that sometimes leads to the worst
behavior, too.

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

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

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

MR. TAYLOR: Maltreatment --

MR. MARSH: Potentially maltreatment
as well.

MR. TAYLOR: I think maltreatment
might also work.

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

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

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

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

    CHAIR HOLTZMAN: Is this strictly
within our jurisdiction?

    COL GREEN: You mean to look at this
issue, ma'am?

CHAIR HOLTZMAN: Yes.

COL GREEN: Well, the -- okay, the --

and I think Mr. Stone raised it. I mean,

obviously, the issue is to deal with sexual

assault crimes.

The issue raised to the Panel was that
certain types of sex crimes that were prosecuted
formerly under indecent acts, under Article 134,
under the revision to Article 120 made in 2012
are no longer prosecutable.

So, the question is, I mean I think
tied back to analyzing the changes made to the
2012 version of the statute, can the Panel
comment?

I mean I think the Panel could fairly
comment on that and could comment on the type of
offense that might be warranted or the Panel
could chose to simply not make comment regarding
any specific proposals as well.

MR. STONE: Could you foresee this
being used as a lesser included offense to avoid
sexual registry of a Soldier who was completely
drunk and had sex with another Soldier who was
completely drunk at a party? Could this be a
lesser included offense? Do you think it could
be construed that way and that one prosecutor
decides, yes, he doesn't want to put the guy on
the sexual registry for life?

MR. MARSH: Yes, sir, I think probably
not a lesser included offense pursuant to some
military case law that talks about the terminal
element.

But also, in these -- in terms of
registration, that is a state by state issue.
And, Ms. Kepros actually raised it at the last
meeting, there's a comparable provision in
Colorado and it's case by case. And, that's true
around the country.

MR. TAYLOR: So, what would --

MR. MARSH: It really depends on what
kind of indecent act occurred.

MR. TAYLOR: Yes, so what would DoD do
with something like this? Is it conceivable that
under the DoD directive that you mentioned earlier that, if, in fact, the indecent act arose to a certain level that that person could then end up on the registered sex offense?

COL GREEN: The DoD registration instruction currently does not include any 134 offenses. It only includes Article 120 offenses.

The Subcommittee didn't hear, and I'm not aware of anything in terms of what DoD plans to do if the President signs this, whether they will advise that a 134 offense for indecent acts is now registrable.

MR. TAYLOR: I see.

LTCOL HINES: Mr. Stone, was your question aimed more at not necessarily a lesser include offense, but could a prosecutor use 134 to deal something out the back door?

MR. STONE: Yes.

LTCOL HINES: Okay. And, I would answer that and say yes. I mean, I've got to be honest with you, I think in practice, if that was available, you could certainly fashion a pre-
trial agreement where the accused wasn't going to pled to the 120 charge, but was going to plead to the 134 because the facts of a sexual offense, short of whatever those 120 elements are could be crafted in a 134 indecent acts charge.

MR. STONE: But, could it also be dealt with by charging with sexual harassment?

LTCOL HINES: Yes.

MR. STONE: And then, also would not require, at least under the military's view, it's not one of the offenses that requires a sexual registration?

LTCOL HINES: Right. An Article 92 for sexual harassment would not be reported out as a sex offense.

MR. STONE: Okay.

CHAIR HOLTZMAN: But, without this statute, or the proposal that's being made here, there would still be alternatives to prosecution under Article 120 in the existing Code of Military Justice, isn't that correct?

LTCOL HINES: Yes, ma'am. I mean if
you --

CHAIR HOLTZMAN: So, if you wanted to fashion a plea agreement that was less than 120, are there options now?

LTCOL HINES: Yes, ma'am.

CHAIR HOLTZMAN: I mean, we're not saying that this would create --

LTCOL HINES: Right.

CHAIR HOLTZMAN: -- options that don't exist?

LTCOL HINES: Right, and you would --

CHAIR HOLTZMAN: In the sense that we couldn't prosecute these cases?

LTCOL HINES: You wouldn't need 134 to plead this to an Article 92 if it arose in a training environment.

CHAIR HOLTZMAN: Right.

LTCOL HINES: An Article 93 if it arose anywhere else.

CHAIR HOLTZMAN: Right.

I mean, I feel uncomfortable. I haven't really read the -- or studied the
explanation of the proposal for a statute. I don't feel comfortable myself in making a recommendation. I don't know how the other Members of the Panel feel.

HON. JONES: I don't either.

MR. STONE: I agree with you.

MR. TAYLOR: I'm fine.

CHAIR HOLTZMAN: So, I think maybe we just skip over and make no recommendation with regard to -- I mean or accept the recommendation that the Subcommittee made which is that Congress should not adopt an enumerated offense for indecent acts under 120.

MR. MARSH: Yes, ma'am.

HON. JONES: And, at the same time, we said we definitely didn't want it incorporated --

CHAIR HOLTZMAN: Right.

HON. JONES: Yes, right. Okay, got it. He just said that, sorry.

CHAIR HOLTZMAN: Okay, so --

COL HINES: And so, I guess that's the first question.
The second question that Kirt noted, does the Panel wish to make a recommendation regarding establishing an offense under Article 134 --

CHAIR HOLTZMAN: I thought that was just my question right then.

COL GREEN: I'm sorry.

Well, the three question being the 120 offense and I understand the Panel to say no, we don't want to make -- we don't want to recommend that.

Two being, do we want to make a recommendation that the President establish something under 134?

HON. JONES: Put it back in?

COL GREEN: Right.

HON. JONES: Yes.

COL GREEN: And then, third being, do you want to comment specifically on the language.

I just want to make sure that we are clear on the Panel's position on all three of those issues.
HON. JONES: Do we know why it came out? You probably told us, Kirt, a million times.

MR. MARSH: No, actually.

HON. JONES: We don't?

MR. MARSH: I'm not sure why it came out.

MR. STONE: But, the old original one was not limited to either any kind of public exhibition, is that right? So, it could have reached private consenting conduct?

MR. MARSH: In the old one, it was limited to that if there was a third-party present. But, the new one, the new 134 offense version one says, the requirement of the third-party is no longer there.

Which the intent with that, as it was explained to the meeting was to better encompass technology.

HON. JONES: Right.

MR. MARSH: What if, you know, this is committed with a knife or whatever?
But, the way it's written there were some concerns expressed at the meeting that it was a little too broad.

CHAIR HOLTZMAN: So, perhaps a better solution is that we basically adopt a recommendation -- the two recommendations set forth by the Subcommittee we agree with, point one and point two.

And we might note that some Members of the Subcommittee expressed some concern about the vagueness of the proposed Article 134 if we want to go that far. Or we don't have to even say that.

HON. JONES: I think, well, ultimately, we just decided not to comment on its content at all.

CHAIR HOLTZMAN: Right. Okay, I think that's better.

MR. STONE: And say that at this time because we're going to have more meetings. Maybe they'll do something that we'll want to comment on in the next eight, nine months. Why can't we
just say at this time no comment at this time.

CHAIR HOLTZMAN: Okay. Is there
agreement on that? Any disagreement?

HON. JONES: No.

CHAIR HOLTZMAN: So, the question is,
should we take a break now for lunch?

COL GREEN: Let me just ask before we
leave Article 120, the additional -- and we can
do it after if the Panel wants a break -- but the
remaining recommendations to take no action that
the Subcommittee made, I mean, we're not
reflecting -- I mean, if the Panel has issues
with those and disagree with the Subcommittee's
conclusion, but otherwise, is the Panel in
agreement with the Subcommittee as to not making
--

CHAIR HOLTZMAN: On what?

COL GREEN: On the remaining issues?

CHAIR HOLTZMAN: Oh, where are they?

Do we have them in front of us?

COL GREEN: Well, we haven't
summarized -- I mean, we talked about just two of
them.

HON. JONES: Oh, I see, you're talking about all the ones where we said we are not going to make any -- we've only got two places where we suggested amendments, et cetera. I got it.

CHAIR HOLTZMAN: Okay. So, I think we should take a break now for lunch. I'm sorry. Or we could just take a break for ten minutes and then come back and consider the --

COL GREEN: We can break for lunch, ma'am.

CHAIR HOLTZMAN: We can break for lunch. Okay, let's break for lunch and when we come back, we'll consider -- the Staff will get a list of the other recommendations that we can agree or not agree with and then we'll go through retaliation.

Great, thank you.

(Whereupon, the above-entitled matter went off the record at 11:57 a.m. and resumed at 1:00 p.m.)

CHAIR HOLTZMAN: So, we still have the
areas where the Subcommittee recommended no action. Can we review those quickly?

LTCOL HINES: Yes, ma'am. And we touched on some of them but I will try to go through this as quickly as I can.

So, the first one was issue --

CHAIR HOLTZMAN: Where would we find this?

LTCOL HINES: Okay, ma'am, the list would be page four of the Subcommittee Report.

That's what I'm going off of.


LTCOL HINES: Starting on page four.

CHAIR HOLTZMAN: Okay.

LTCOL HINES: So, with Issue 4, the question was, is the definition concerning the accused administration of a drug or intoxicant over broad? The Subcommittee looked at that and believed that it wasn't over broad. The practitioners said this is a rarely used theory and the Subcommittee recommended no changes for
Issue 4.

CHAIR HOLTZMAN: Any disagreement with the Subcommittee decision? Hearing none, we accept it.

Number 6.

LTCOL HINES: Yes, ma'am, we touched briefly on this Issue 6, which is the definition of threatening willful action, ambiguous or too narrow. The Subcommittee looked at this in the context of not just the definition but along with Issues 13 and 15 with respect to the new subsection that we have already discussed that you are recommending.

And the Subcommittee's recommendation was or answer was no, that definition doesn't need to be amended, with the caveat that if its recommendation for the new subsection is adopted, then this definition would not need to be amended in any way.

CHAIR HOLTZMAN: Any disagreement with this Subcommittee recommendation? Hearing none, it is accepted. Issue 7.
LTCOL HINES: Issue 7, ma'am, was how should fear be defined to acknowledge subjective and objective factors. The question here was the present definition requires that -- well, the framework requires that the fear have to be not only the victim's subjective actual fear but that has to be objectively reasonable. The Subcommittee recommended that there be no changes with respect to Issue 7.

CHAIR HOLTZMAN: All right, is there any objection to recommending -- accepting the Subcommittee's recommendation? Hearing none, it is accepted. Number 8.

LTCOL HINES: Yes, ma'am. The question on 8 is, is the definition of force too narrow? The Subcommittee decided, in light of its recommended changes with respect to the definition of consent, that they recommended no change to the definition of force.

CHAIR HOLTZMAN: Any objection to recommending this Subcommittee recommendation -- to accepting the Subcommittee recommendation?
Hearing none, it is accepted.

Number 10.

LTCOL HINES: Well, ma'am, we have covered 10 and 11, I think. So, I am going to move down to 12.

CHAIR HOLTZMAN: Okay.

LTCOL HINES: Is the current practice of charging inappropriate relationships or maltreatment under Articles of the UCMJ, other than 120, appropriate and effective when sexual conduct is involved?

And I think we have addressed this to some extent with our discussion of Articles 92 and 93 and the new subsection. The Subcommittee determined that yes, when consensual sexual conduct is involved, charging that under 92 and 93 can be appropriate. And so the Subcommittee recommended no change on Issue 12.

CHAIR HOLTZMAN: Any objection to adopting the Subcommittee recommendation on Issue 12? Hearing none, it is accepted.

Issue 14.
LTCOL HINES: Issue 14, ma'am was, should the definition of threatening or placing that other person in fear be amended to ensure the course of sexual relationships or those involving abuse of authority are covered under an existing Article 120 provision, with the caveat that the new subsection under 120(b)(1)(E) be adopted? The Subcommittee recommended no changes to this definition.

CHAIR HOLTZMAN: Is there any objection to accepting Subcommittee recommendation on Issue 14? Hearing none, it is accepted.

Issue 16.

LTCOL HINES: Yes, ma'am, 16 was, should sexual relationships between basic training instructors and trainees be treated as per se illegal or strict liability under 120? And we have already discussed that but, again, the Subcommittee felt that as long as the new subsection was adopted, as Mr. Stone I think has indicated, this was sort of a middle ground that
was adopted. And so, with a caveat that if this subsection was adopted, the Subcommittee did not recommend that these offenses be treated as either per se illegal or strict liability offenses.

MR. STONE: Did that discussion come before we saw what the Military Review Group said about proposing a new subsection?

LTCOL HINES: Yes, sir. We didn't get the MJRG's proposed new subsection officially until after the final Subcommittee meeting. We knew that they were potentially working on that but it wasn't officially released until after the Subcommittee had deliberated.

MR. STONE: Well, I guess this is a question for the Chair, rather than you, is do we need to comment on what the Review Group did or you think we don't need to?

CHAIR HOLTZMAN: We could mention that this was prepared before the Review Group's determination but I don't remember what the Review Group determined.
HON. JONES: I was going to ask.

CHAIR HOLTZMAN: Did they determine

strict liability or not?

MR. TAYLOR: They did.

COL GREEN: Well, under a 93(a) violation.

CHAIR HOLTZMAN: Okay, well, then the Subcommittee disagreed. I mean you know, the Subcommittee, in my view, the Chair can disagree with me, very seriously and thoroughly reviewed the question of strict liability and decided no. So, this is just another voice for strict liability but that decision was very carefully reviewed.

VADM TRACEY: But that is strict liability under a different article, right?

LTCOL HINES: Yes, ma'am, exactly.

MR. STONE: Well, the new one.

COL GREEN: And not under Article 120 and not with all of the sexual registration parameters that I think the Subcommittee noted as problems or concerns.
MR. STONE: No, I'm just saying that because I think I would like to see the report have a little footnote that says we did not consider the Review Group's recommendation because that came out after our deliberations were conducted. I don't know, something like that, just so it is clear that we are not endorsing it but we are also not rejecting it because it was not in front of us.

HON. JONES: Well, did we reject it, then, I mean without knowing they were going to make that?

CHAIR HOLTZMAN: The difference is that that would have been -- the Military Review Group would not be under Article 120.

HON. JONES: Right.

CHAIR HOLTZMAN: So, there wouldn't be any sexual offender registration for that.

HON. JONES: Right.

VADM TRACEY: Isn't that consistently what the Subcommittee recommended?

(Simultaneous speaking.)
MR. STONE: I just didn't want to
totally ignore what they did. I don't want to be
ships passing in the night. We should have some
--

LTCOL HINES: I think what I hear you
saying, Mr. Stone, is just as long as we can
reflect in the report that the subcommittee
didn't have this available but the Panel has
because we provided the 93(a) today and the Panel
has considered it. So, the readers of the report
know that the Panel knows that the MJRG's
proposal is out there.

VADM TRACEY: I didn't think the Panel
was making any comment on 93(a), and 93(a) isn't
affecting the Panel's recommendation with regard
to 120. So, whatever note we make ought to be
clear that existence of that change doesn't
change the Panel's recommendation.

MR. STONE: Right.

CHAIR HOLTZMAN: Exactly. So with
that suggested footnote, is there any objection
to accepting the recommendation for number 16,
Issue 16? Hearing none, it is accepted.

Issue 17.

LTCOL HINES: Yes, ma'am, finally, the question on 17 was as an alternative to further amending Article 120. Should coercive sexual relationships currently charged under Articles be added to DoD's list of offenses that trigger sex offender registration? And that was under Articles 92 or 93. And the Subcommittee recommended not adding those to DoD's list of offenses that would be reported out as a sex offense.

CHAIR HOLTZMAN: Is there any objection to accepting this recommendation of the Subcommittee? Hearing no objection, it is accepted.

And that concludes our consideration of the Subcommittee's Report. Thank you Members of the Panel.

Now, I guess we are up to retaliation.

COL GREEN: Yes, ma'am. We will transition the Staff members and do it for
As we are transitioning the Staff,
just to orient you on some materials that we
have, the Staff distributed last week, mid-last
week a draft copy of a summary of recommendations
and a full copy of the draft report on
retaliation. This was taken from the Panel's
meetings on this issue, going back to the spring
of 2015 and then on the multiple sessions of
deliberations that you have held on this topic.

We received some comments back on
those from Panel Members. And so the copies that
are in your folder of these, both the draft
summary recommendations and the draft report
incorporate the comments that we received from
the Panel as well as just some Staff
non-substantive edits, which were just edits, you
know modifications to the report itself, based on
our continuing review of that. So, those are the
documents that we have.

In addition, we have received public
comments from Protect our Defenders on
retaliation issues. That is in your folder. So, we have incorporated that into a couple of places within the document as well.

CHAIR HOLTZMAN: So, Kyle, how do you suggest we approach this? Do we have a series of recommendations that we should review, as well as the report? I'm not seeing the recommendations.

COL GREEN: Yes, ma'am.

CHAIR HOLTZMAN: It's the right hand side.

LTC MCGOVERN: It should say draft 14 January 2016 up top.

COL GREEN: No, those are MJRG proposals.

HON. JONES: So, this is one, right, new provisions?

LTC MCGOVERN: That's the MJRG.

HON. JONES: And this is?

LTC MCGOVERN: That's the draft report.

HON. JONES: And what else am I missing?
LTC MCGOVERN: That's it.

HON. JONES: That's it? Okay.

LTC MCGOVERN: Yes, ma'am.

HON. JONES: Right there?

LTC MCGOVERN: If that is what is on top.

HON. JONES: Oh, the back of that.

LTC MCGOVERN: Right, under Protect our Defenders.

HON. JONES: All right, thank you.

LTC MCGOVERN: So really, I think the only two things you all need in front of you for this discussion right now is just the recommendations and the draft report.

CHAIR HOLTZMAN: Okay, so we will start with Recommendation 1?

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: Do you have any objection to that?

LTC MCGOVERN: No, ma'am.

CHAIR HOLTZMAN: Okay.

LTC MCGOVERN: The only change we have
made since last week is that we added a third bullet, based on Ms. Holtzman's recommendation.

CHAIR HOLTZMAN: Okay. So, do you want to read the recommendation?

LTC MCGOVERN: Sure. And I can just explain generally the thought process through these.

CHAIR HOLTZMAN: Yes.

LTC MCGOVERN: These are the main points that we were able to pull from the reports and then the supporting bullets were the -- the bullets were the supporting observations and findings for that recommendation.

So, Recommendation 1 is about the overall retaliation strategy. It says: In the Department of Defense strategy addressing retaliation against sexual assault victims, the Secretary of Defense specify 1) channels where victims can report retaliation; 2) the responsibility for collection and monitoring of reports; and 3) mechanisms for tracking retaliation complaints and outcomes.
The first two sub-bullets give some background information and the third sub-bullet was added to prepare the reader that the details of those three points are in the recommendations below.

CHAIR HOLTZMAN: Is there any objection or discussion of this recommendation?

MR. STONE: I have a couple -- two comments and you can tell me if we maybe covered them elsewhere. The first is in talking about item number 1, channels. Do we need to say somewhere including an optional independent alternate channel? In other words, for people who are afraid to report it because the harassment or whatever the retaliation is coming directly from the channel that is the normal channel.

I mean we say channels but I presume it means it will be the regular channel and there will be some kind of alternate.

LTC MCGOVERN: Yes, sir, I think we addressed that in the report and for the
recommendations that just like sexual assault,
there are multiple channels and one of the other
recommendations is that they maintain all of
those channels but then directly report to the
SARC. So here, when we say channels, they are
talking about multiple, not just the command
channel.

MR. STONE: All right, so you think it
is okay because we are going to cover it in
detail.

LTC MCGOVERN: Yes, sir, I really do.

MR. STONE: And the second question
was, and I guess this relates a little bit to the
new bullet down at the bottom, too. I am
wondering if it should say on the first and
second line, to effectively address and respond
to retaliation the Services must develop better
processes for -- I wanted to say uniformly
reporting across all Services, then, comma,
monitoring and tracking, blah, blah, blah.

Because I think we have had that
problem all along that the Services feel, absent
a specific direction, that they can tailor the reporting to what works best for them. And I understand that it works best for them. It's just that trying to monitor it later is a nightmare when what works best for them doesn't line up with the other Services.

So, I just would like to see maybe uniformly reporting across all the Services so that there is no question that is what we mean.

I don't know if the Panel Members agree with me.

CHAIR HOLTZMAN: I have no objection

HON. JONES: No, me neither.

CHAIR HOLTZMAN: May I just make two suggestions, Lieutenant McGovern? One is, instead of just specify, I would like to say specifically name or specifically designate. And I think we should have multiple channels, not just leave it channels. So, it is clear what we are saying, even though this is an umbrella recommendation.

LTC MCGOVERN: You want that in the overall recommendation at one?
CHAIR HOLTZMAN: Right.

LTC MCGOVERN: Okay.

CHAIR HOLTZMAN: Unless anyone objects.

MR. TAYLOR: No objection.

CHAIR HOLTZMAN: Okay. So, do we accept Recommendation 1?

HON. JONES: Yes.

CHAIR HOLTZMAN: All right, hearing no objection, we are up to Recommendation 2, Lieutenant McGovern -- I mean Colonel McGovern sorry. Whoops.

LTC MCGOVERN: This is a recommendation to support --

CHAIR HOLTZMAN: Excuse me. I meant to say General.

LTC MCGOVERN: Thanks for the promotion, ma'am.

(Laughter.)

LTC MCGOVERN: The second recommendation is your proposal that they develop a standardized form. It states the Secretary of
Defense and Service Secretaries develop a standardized form for reporting retaliation. This form should be linked to the DD Form 2910 in the Defense Sexual Assault Incident Database and should provide victims with the option to request a formal investigation or informal processing of a retaliation complaint.

CHAIR HOLTZMAN: May I just ask a question?

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: Are we also going to talk about a form that tracks what happens to the complaint, once it is made or is this form going to be not only used for making the complaint but for tracking whatever happens to the complaint?

LTC MCGOVERN: This would be the initial form to --

CHAIR HOLTZMAN: Right.

LTC MCGOVERN: -- input it into DSAID and the further recommendations require that the SARC continue to maintain that information at the monthly --
CHAIR HOLTZMAN: And would it be on this same form?

LTC MCGOVERN: It could be. We can add that into the report.

CHAIR HOLTZMAN: Because it seems to me that if we are asking for a single form, it should be the form that is used until the whole issue of retaliation is resolved one way or another so that we just don't start off with a form that reports the retaliation but then there are other little pieces of paper that are tracking the follow-up. So, somehow to suggest --

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: I don't know if it belongs here or somewhere else.

MR. TAYLOR: Well, could we do something like in the second sentence of the bullets, say a standardized form should include the tracking, so it is clear that you want it all to go back to that same form?

CHAIR HOLTZMAN: I mean, does anyone
object to putting it all on the same form? It
should be on the same form.

You know, Mr. Taylor, let them figure
out the language here because maybe it is a
little more complicated than what you are
suggesting. But I think the point is an
important one and I appreciate your support on
that.

LTC MCGOVERN: Oh, absolutely, ma'am.

I think when you all have talked about it in past
meetings, that is the way it was envisioned is
that this piece of paper that goes from the SARC
to the MCIO or the monthly CMGs, it is going to
be the basis and continue to update it in DSAID,
like you would a sexual assault report.

HON. JONES: So, this would be one --

I'm sorry.

CHAIR HOLTZMAN: Go ahead.

HON. JONES: This is going to be one
-- there is already an underlying sexual assault.

LTC MCGOVERN: Yes, ma'am, on the

2910.
HON. JONES: Right. The retaliation report could come either from the victim of the sexual assault or someone else. Correct?

LTC MCGOVERN: Correct.

HON. JONES: But regardless, it would all get linked to the sexual assault incident that caused the retaliation.

LTC MCGOVERN: As an attachment to the --

HON. JONES: So, we are talking about two forms.

LTC MCGOVERN: Yes, ma'am.

HON. JONES: But we are linking all the retaliation forms together under the umbrella of the sexual assault that relates to them.

LTC MCGOVERN: And that was based on the concern within the Services --

HON. JONES: I think that is fine.

LTC MCGOVERN: -- in their RFIs that 2910 is really an intake form and then the SARC is done with it. And then that sexual assault investigation takes on a life of its own.
But what you all are proposing is that this separate form be linked to that and you would like to see it be continued to be updated with progress notes or something.

CHAIR HOLTZMAN: Whatever happens on that case.

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: You should be using that form so that the military has a complete record in one place on one form of what has happened.

LTC MCGOVERN: Okay.

HON. JONES: Thank you.

CHAIR HOLTZMAN: I think we are on the right track.

MR. TAYLOR: I agree.

CHAIR HOLTZMAN: So, we are accepting Recommendation 2. Any other comment?

VADM TRACEY: We were taking out the last bullet?

LTC MCGOVERN: It's actually moved to talk later under another recommendation.
COL GREEN: The next recommendation.

VADM TRACEY: Okay. And that's the MCIOs.

COL GREEN: Yes, ma'am.

VADM TRACEY: Just I am concerned that we are automatically turning a retaliation report over to the criminal investigators. I understood the argument for how that would help in the midst of the sexual assault investigation to know the tenor of the climate. I understood that.

We heard a lot about the kind of retaliation that takes place after the trial is over, whether a guilty or not guilty verdict was the outcome. And I don't understand why those things should be handed over to a criminal investigator right away. If it is being referred for investigation other than an informal process, okay, but I didn't understand why we thought it was right that troops who wind up with their buddy and ostracized the victim should get reported to the criminal investigators as the first thing that we did.
So, when you get to that section, that is my -- I object to that.

LTC MCGOVERN: That is a very a good consideration. Yes, ma'am.

I developed a checklist as you go through these recommendations to address a few corresponding changes within the report, so that we can address each topic all at once.

There was one issue I just wanted to close the loop that Admiral Tracey had raised when we discussed the standardized form informal report, which appears in the blue recommendation.

Currently, it states that I think Admiral Tracey, my understanding was it was very important for you that the victim understand if they are going to take this informal filing option, that they are aware that that could become a formal report, if the commander thought that the underlying conduct was so egregious that it needed to be a formal investigation. And that is how it is written in the current recommendation.
VADM TRACEY: To be clear, I thought that it was important that the commander had the right to --

LTC MCGOVERN: Had the authority, yes.

VADM TRACEY: -- and others thought that was the process was that you had to be sure the victim knew that.

LTC MCGOVERN: Right. And so I went back and looked at the EO process, which is different because you are reporting to an equal opportunity advisor. You are not first going to the command.

And when a victim decides to file an informal report, it can only turn into a formal report if she is appealing the findings of that informal report. That is the channel they chose. So, another way to propose it that they file an informal report of retaliation to have their allegations but if a commander identifies significant misconduct, they could open a separate investigation, which they do for EO, rather than saying they are changing the
informal to a formal.

VADM TRACEY: So, rather than applying it to that victim, they would open an investigation of underlying issues.

LTC MCGOVERN: I just wanted to get your opinion which process you felt more comfortable using for this.

CHAIR HOLTZMAN: Well, suppose the commander finds out the information from the informal process?

LTC MCGOVERN: Right.

CHAIR HOLTZMAN: Would he or she do -- would that happen?

LTC MCGOVERN: Right. So, rather than saying I'm now turning your informal complaint into a formal investigation of your allegations, it would be okay, I learned that there was this big party, there was all this going on. I am going to initiate, in the Army it is an AR 15-6 investigation into this entire thing.

MR. STONE: My own investigation.

LTC MCGOVERN: Yes.
VADM TRACEY: And I'm good. That is where I was headed.

LTC MCGOVERN: Okay.

VADM TRACEY: That is what I was actually looking for was that kind of a solution.

CHAIR HOLTZMAN: I mean and how will victims respond to that? Suppose they don't want a formal investigation? Then what happens? They have no option at this point is what you are saying?

LTC MCGOVERN: Well, for the informal, their specific allegation that they did this to me would be resolved. But the commander, they need to know the commander reserves the right to conduct a separate investigation if they find more egregious conduct.

HON. JONES: So, that is different from filing a restricted report in a sexual assault case.

LTC MCGOVERN: Right, because the commander would never learn about that.

HON. JONES: Right. Right and we are
not giving him that protection in a retaliation context.

LTC MCGOVERN: No but a little more protection by saying it is going to be a separate investigation instead of we are going to turn your informal to a formal.

CHAIR HOLTZMAN: And I think maybe I'm wrong here but the answer really to the point you have raised, Judge Jones, is that we don't really know what impact this is having. And so if we have more information about whether victims are concerned about this, then maybe the military would take some action to give the victim the right to close everything down. Maybe. But we don't even know that that would have any impact. Right now we know very little about the retaliation. So, it seems to me that --

HON. JONES: No, I'm content with that.

CHAIR HOLTZMAN: I'm okay with going forward at this point because we just simply have no way of knowing whether this is something that
is going to adversely affect victims or not.

LTC MCGOVERN: And based on the Services' responses, as Mr. Taylor pointed out before, this pretty much happens, since they don't have a standardized form. If it is informal, they kind of do an informal investigation. If it is more egregious, they do a formal.

It is just now that you have a form, there will be a box. Do you want this to be an informal or formal report?

CHAIR HOLTZMAN: And so it seems to that the language on Recommendation R-2 should be a standardized form not only for reporting retaliation but reporting retaliation and tracking the handling of retaliation complaints.

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: Colonel McGovern, before you say yes, you should make sure you agree with me.

(Laughter.)

LTC MCGOVERN: I do! That is exactly
what you were saying before. I absolutely do.

CHAIR HOLTZMAN: All right, thank you.

So, are we finished with Recommendation 2? We accept Recommendation 2 now with the various changes?

HON. JONES: Yes.

CHAIR HOLTZMAN: Hearing no objection, that is done. We are up to Recommendation 3, Colonel.

LTC MCGOVERN: This is addressing the SARC's responsibility formalizing that responsibility to make them the central point of data collection.

The Secretary of Defense and Service Secretaries provide multiple channels for victims to report retaliation and task installation Sexual Assault Response Coordinators, SARC's, with collecting any information from reports on retaliation, recording information on retaliation allegations in DSAIDs and tracking, monitoring information on the investigation and resolution of retaliation claims. So, they are responsible
for the form we just spoke of.

CHAIR HOLTZMAN: Do we want to give
them more responsibility in terms of making sure
that there is follow-up or they were just dealing
with the form?

LTC MCGOVERN: I don't think -- here,
we are saying that they are responsible for
collecting that information from the various --

CHAIR HOLTZMAN: Right, but if we
wanted to give them responsibility for making
sure that there is somebody who is following up
or that someone is supposed to do whatever they
are supposed to do, that comes in a different
place or that is here?

HON. JONES: No, they are --

LTC MCGOVERN: I don't think that is
within their authority, ma'am.

CHAIR HOLTZMAN: Oh, okay.

LTC MCGOVERN: That is what the Chair
of the Case Management Group would be doing.

CHAIR HOLTZMAN: Oh, I see. Okay.

HON. JONES: But they do track and
monitor the investigation, right?

LTC MCGOVERN: They track it, yes.

HON. JONES: Information --

CHAIR HOLTZMAN: Suppose they find that something is not happening that is supposed to happen?

LTC MCGOVERN: They raise that at the CMG.

MS. GUPTA: Right, we added -- sorry. We added that language to the second bullet underneath, that SARC's should be responsible for ensuring retaliation reports are addressed at the monthly CMGs. So, they are ensuring some follow-up through that.

LTC MCGOVERN: Because right now at the CMGs, there is no specific requirement who does the minutes, who presents the agenda. And so by placing that responsibility with the SARC --

CHAIR HOLTZMAN: My only question is should some of that language be in the blue bullet, the blue form, as opposed to being in the
bullet underneath or is it agnostic?

LTC MCGOVERN: Unless you wanted to
add the word ensuring to tracking and monitoring,
ma'am.

CHAIR HOLTZMAN: Sorry?

LTC MCGOVERN: If you wanted for the
last clause, if you wanted to add in ensuring the
tracking and monitoring information.

CHAIR HOLTZMAN: I leave it up to you.

Okay, any objection now to

Recommendation 3 as amended? Hearing no

objection, it is approved.

Recommendation 4.

LTC MCGOVERN: This continues with the
theme for tracking. The Secretary of Defense and
Service Secretaries track retaliation reports and
disposition information and publish the data in
the Department's Annual Report to Congress on
Sexual Assault Prevention and Response.

Currently, what goes in the SAPRO
report is dictated by Congress. Congress doesn't
require this. So, this is saying there should be
that requirement.

CHAIR HOLTZMAN: Good. Wait a minute.

LTC MCGOVERN: Now did you want to

address the --

CHAIR HOLTZMAN: Excuse me. May I ask

one question?

So, Congress requires what goes into
the SAPRO report? Should we make a
recommendation that Congress require that this be
done here? We haven't done that. Should we?

Do you want to give it more thought?

LTC MCGOVERN: No, I don't. I'm just
deferring to Colonel Green.

COL GREEN: That is a good point, ma'am. And one of the things we hear
consistently from SAPRO in discussions is that
what goes into their annual report is that, is
what is required by Congress.

CHAIR HOLTZMAN: Maybe we should say
-- maybe we should demand this.

COL GREEN: Maybe we create a moral
obligation.
HON. JONES: It really belongs in the SAPRO report.

CHAIR HOLTZMAN: Okay. So, somehow, somewhere, suggest that Congress needs to require that this be done.

I mean unless someone disagrees.

Hearing no disagreement --

LTC MCGOVERN: That way you will guarantee it was done.

CHAIR HOLTZMAN: Okay, great. Are there any other comments about Recommendation 4? Hearing none and hearing no objection, it is approved.

Recommendation 5.

LTC MCGOVERN: This bullet gets to the heart of the investigative authority for professional retaliation. So, specifically, making sure there is an independent body to do the investigations and that those folks have specialized training.

The recommendation reads, "The Secretary of Defense clarified which organization
has authority to investigate allegations of
professional retaliation against victims of
sexual assault and ensure that investigations are
prioritized and conducted by personnel with
specialized training on investigating such
retaliation complaints."

The reason clarification is needed is
because there is confusion between DoD, IG, and
the Service IGs as to whether the investigating
authorities withheld to DoD or not.

CHAIR HOLTZMAN: I guess my question
on this is where, does the info on this get
tallied and reported? In other words, we have
Victim A, sexual assault. All of that is
reported. Victim A reports retaliation of a
professional nature. This then goes to IG. Who
has got the responsibility for writing down on
March 12th this report went to IG? And then, who
writes down that IG here we are April, May, June,
or a year later and nothing has happened? Who
has got responsibility for following up on any of
that stuff?
So, I have got two questions for you. One is who tracks when it goes to IG and then who follows up when IG doesn't do anything as they have or want to do?

LTC MCGOVERN: Apparently, the IGs track and report to commanders. What we proposed is that professional retaliation complaints be addressed at the Case Management Groups so the IGs have a requirement to either attend or provide monthly updates to the SARC.

CHAIR HOLTZMAN: And that is going to be recorded on this form that we have?

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: On our master form.

LTC MCGOVERN: It all comes back to the form.

CHAIR HOLTZMAN: Colonel, this is great. You made me smile.

MR. STONE: I guess I'm going to ask that at least in the report each time we say IG, we specify Service IG or DoD IG because that has been where there is a slip between cup and lip
and I think it is so important that we do it.

So, even when you respond to us, if you can, tell us when you mean Service IG and when you mean DoD IG because that really is where we are trying to head off for other problems.

LTC MCGOVERN: Right. So, based on the background information we receive, if you are going to ask that these specialized trained investigators in sexual assault trauma, there are so few cases the IG and Services didn't think that they would really likely establish a subgroup specifically for the sexual assault.

But that doesn't mean that you had to agree with them. And in fact, the report doesn't.

It says we recommend first that you establish a withholding policy at DoD IG and then of those then they would be specially trained, whether or not they call it a subgroup but they at least are specially trained. So, I believe the way the report reads, it does get it up to DoD IG, rather than the Service IGs, just to have better visibility and control over those cases.
that do occur.

CHAIR HOLTZMAN: And Colonel McGovern,
when we write our report, I think it should be
clear when we say tracking, that this is going to
track the retaliation complaint, no matter where
it goes in the military for investigation,
whether it is the IG, the MCIO, the local
whatever it is called, the command group. So, it
is very clear that what we are expecting and what
Congress should demand is that this reporting
actually take place so we really have a much
better handle on what is going on.

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: Okay, great.

LTC MCGOVERN: Do you have concerns,
sir?

MR. TAYLOR: No.

CHAIR HOLTZMAN: Those are perpetual
frowns.

LTC MCGOVERN: The one question we did
have, then, was it was still a little vague --

CHAIR HOLTZMAN: Where are we, on
Recommendation 5 or 6?

LTC MCGOVERN: Recommendation 5, the second bullet, whether or not you all want to specify that you would like a separate unit at the IG to investigate these or do you just want to ensure that it is investigators with the specialized training.

The way it works now is, it is supposed to work, according to the DoD IG testimony, if it is a sexual assault case that comes into Service or DoD IG, they withhold it. Then, it goes to the Whistleblower Reprisal Investigation Section. So, they do have several sections but it goes to the Reprisal Investigation. And among those investigators who investigate reprisals, that section will investigation sexual assault-related reprisal complaints.

Would you like a subgroup established or do you just want to ensure that those folks have specialized sexual assault trauma training?

CHAIR HOLTZMAN: I'm okay for the
moment. I mean I think we should say that they have advised us this is how they handle it. If they don't handle it that way, then yes, it has to have a separate group. But if they are going to send it already to a separate group, then the people in that group who are going to be handling these cases need to be trained, as well as the supervisor.

I don't know. Do you disagree? Does anybody disagree?

MR. STONE: Does the Staff have a recommendation between the two options or do you think that they equally could work well?

MS. FRIED: It's probably not something the Staff should comment on.

COL GREEN: Well, but I will say what the response is from the Services. We asked the Services for our responses in terms of resolving these cases. And I think they all said that they treat reprisal complaints based on sexual assault, which again, amounts to an extremely small number -- so, there was one issue that they
noted, that creating a specialized subgroup to
deal with these when the case numbers are so
small is not efficient. So, there is that issue.

And then there is a separate issue
where, in their view, any reprisal complaint
deals with a sensitive topic and there is no
specialized training or management of that that
is needed.

CHAIR HOLTZMAN: Okay and I completely
disagree.

LTC MCGOVERN: And we noted that in
the report.

COL GREEN: Yes, ma'am, we noted that.

CHAIR HOLTZMAN: Okay. That is
ridiculous. And you wouldn't have any
specialists. Just the same thing with the
prosecution; why would you have a Special Sex
Crimes Unit?

MR. STONE: I agree.

CHAIR HOLTZMAN: That is just absurd.

But --

MR. STONE: And a subgroup could be
one investigator.

CHAIR HOLTZMAN: Yes, but I think that there should be designated people. I mean you don't have to have a unit but you could designate. I don't know how many people are in their Whistleblower Unit. Let's say there are ten. You could designate four or five of them for this specialized training. Not everybody has to be trained. Because they have such a handful of cases because nobody wants to send it to them.

But assuming that they did a better job after being monitored, you know -- but I think at the moment, I am happy with just having -- they can designate some people in that Whistleblower Unit and make sure that they have the specialized training, as well as the supervisor.

LTC MCGOVERN: So, just to confirm your recommendation --

CHAIR HOLTZMAN: I mean that would be my recommendation.

MR. TAYLOR: Well, let me just ask a
clarifying question. This sort of gets to my
look I was giving, I guess, and that is, are we
clear that DoD IG still is on the fence about
whether they will always or sometimes withhold
these professional reprisal investigations from
the Services?

LTC MCGOVERN: DoD IG, Ms. Tolek, told
you all in her live testimony that they handle
them and then after the 2015 GAO report came out
in May, and she is describing April, it revealed
the Services were doing some of these
investigations. So, they came back, revised
their numbers and their language and said well,
we will investigate all of those which we are
made aware.

So, that is why the proposal of the
report says it is clear in FY12 through 14,
Services and DoD IG were both investigating it.
DoD IG has presented to you all, that they are
withholding these cases but there is no written
policy.

MR. TAYLOR: Yes, so I think one of
the comments I made about the report itself was
that we need to, at some point, and maybe it is
teed up in one of these other recommendations,
say they ought to say on the record that that is
the case because, otherwise, they can create
let's say a team of two or three people within
the Whistleblower Investigation but if they
continue to allow Services to do the
investigations, then we won't know whether we
have really improved the process or not, unless
we make this apply to all the Service IGs, not
just the DoD IG, as we are thinking about it.

LTC MCGOVERN: Would you like to
recommend to withhold?

CHAIR HOLTZMAN: Yes, I think it
should be a recommendation to withhold and if
they don't withhold, that any Service IG person
who handles such a case must have been trained
and the supervisor must have been trained.
Otherwise, they should not be permitted to handle
these cases.

MR. STONE: Specially trained.
CHAIR HOLTZMAN: Specially trained.

MR. TAYLOR: That is exactly my concern.

CHAIR HOLTZMAN: Right.

MR. TAYLOR: Because we may not be solving the problem, although we think we are.

CHAIR HOLTZMAN: Correct.

LTC MCGOVERN: Yes, sir.

CHAIR HOLTZMAN: And if they send it to the Service IG, they have to notify whoever is keeping track of this.

LTC MCGOVERN: It is within ten days of receiving a reprisal complaint, they have to tell DoD IG. And if DoD IG, in a general reprisal case, they may say -- say it is credit card fraud, and they reported it so they think they are being professionally retaliated against. They will have the Service IG investigate that but then the Service IG has to continue to provide -- DoD has oversight responsibility. But if DoD IG were investigating it, nobody has oversight over DoD IG's time line. So, that is
why --

CHAIR HOLTZMAN: Well, but they have
to report it. I don't care what it is. But
whoever is keeping track of our universal form,
somebody has to be reporting, whether it is a DoD
IG, or a Service IG, or MCIO, or anybody, anybody
who is handling one of these cases has to report
that they are handling and where it is.

LTC MCGOVERN: And then it would be
tracked in DSAIDs.

CHAIR HOLTZMAN: Yes, so that we can
have statistics on it. I think that that is
vital. And if they sent it to some other agency,
I mean if they sent it to the Service IG, that
has to be noted on the report, too --

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: -- so, it is very
clear what is going on here. And then maybe we
will get a handle so that somebody can figure out
why they are not handling more of these cases and
why nobody wants to give it to them or what else
needs to be done.
MR. STONE: And right there, I would like a sentence that says and any investigator or supervisor handling these cases shall previously have completed whatever you want to call it, sexual assault/retaliatiion training.

CHAIR HOLTZMAN: Correct.

MR. STONE: I won't tell them what the training is or where they have got to take it but at least it will insist that they have some training so that they are focused on some kind of training they will come up with, even if it is a computer course that they sit down and do at their desk.

CHAIR HOLTZMAN: Right because without the training, they could just assume all the stereotypes that we have been talking about this morning that you have to resist, you had to do this, or whatever. I mean, we have got to get past that one.

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: Okay, so are we okay with Recommendation 5? Any objection?
Hearing none, we are accepting that
and we are up to Recommendation 6.

LTC MCGOVERN: In the order of the
report, we had the MCIO investigation, the IG
investigation, command investigation, IG
investigation, and then talk about the CMGs
monitoring those investigations.

On the draft you all received from
January 6th, it had some bullet comments as to
things that we had pulled from your transcript
that we thought you might want to comment on.

So, there isn't a separate
recommendation that stands alone about CMGs.
Instead, it is worked into what the SARC's
responsibilities are or that the IG is going to
add the report to the SARC so that it can be
updated each month at the CMG.

But I just want to draw your attention
that we have developed that proposed language for
you and you will see that in the next draft
report about the CMG. Specifically, it is
talking about defining the responsibilities for
the SARCs, that you are aware of the limitations
based on privilege, that it is up to the victim,
and that you believe the IG should have the
requirement to report to the CMG as well.

So, I just wanted to make everybody
aware of that before we moved on, since we were
going in sequence of the report and its
recommendations.

So, Recommendation 6 is about when
there is a command investigation, that they are
training for those investigators about
retaliation.

The Service Secretaries ensure that
personnel assigned by commanders to investigation
retaliation complaints are sufficiently trained
on issues regarding retaliation against sexual
assault victims.

CHAIR HOLTZMAN: Instead of
sufficiently, what about properly?

Any objection to Recommendation 6?

HON. JONES: No.

CHAIR HOLTZMAN: Hearing none --
MR. STONE: Can I ask a question?

CHAIR HOLTZMAN: Go ahead, sure.

MR. STONE: And maybe I'm just asking for my information. Since the commander assigns the personnel, is there any question about whether commanders who do the assigning need to have looked at the training or does this happen in all kinds of areas, they just have too many things that you can't subject them to training, too?

I mean when we did sexual harassment training at the Department of Justice, they made everybody do that on their computer. It maybe took three hours but there was no exception, even up, I don't believe, to politically appointed people.

So I mean I don't know if this is something that shouldn't come to the commander because they assigned the people or that that would be overkill.

COL GREEN: Well, number one, commanders get a lot of specialized training in
dealing with this anyway. So, I think there is other training that orientation towards these issues is inherent in commanders' training through all the Services. But probably, more importantly, the commander is really, it is a ministerial act to appoint someone. They know there is a problem and so they want to appoint a properly trained person to deal with it. And at that point, the issue really becomes more the investigator than the commander.

MR. STONE: Okay.

CHAIR HOLTZMAN: But you know, my view is that when we start getting information about this, maybe you will be right. And that occurred to me, too. Your very question occurred to me. But maybe we will just see how this plays out. And maybe you are right, Colonel Green, that everyone, all the commanders are properly trained. And maybe it will turn out that that is fine. Who knows?

Okay, so we have no objection to number 6, Recommendation 6. So, that is
accepted.

Recommendation 7.

LTC MCGOVERN: Suggests expedited transfers. The Secretary of Defense and Service Secretaries expand the expedited transfer program to include job retraining for Servicemembers who belong to small specialty branches and to be made available on a case-by-case basis to bystanders and witnesses of sexual assault who experience retaliation.

CHAIR HOLTZMAN: Any objections or any comments? Hearing none, it is accepted.

Recommendation 8.

LTC MCGOVERN: This recommendation addresses the information that should be provided to the complainant at the end of an investigation or the disposition of a case.

The Secretary of Defense established guidelines clarifying what information about discipline imposed on an offender can be released to a sexual assault victim who experiences retaliation.
CHAIR HOLTZMAN: Well, this was an issue that was raised with us, wasn't it, by Protect Our Defenders? So, I'm glad we are addressing it here.

Any objection? Any questions? Any comments?

MR. STONE: Yes, I would like the recommendation at the end of the first line, Secretary of Defense established guidelines clarifying what information and in there I would insert in addition to the final disposition about discipline imposed. I think the final disposition is not protected, should be protected, can't be protected. A person is entitled to no final disposition.

LTC MCGOVERN: Whether their allegation was substantiated or unsubstantiated, sir?

MR. STONE: Whether action was taken or no action was taken.

HON. JONES: So you are saying whether or not action was taken but not necessarily what
the action was.

MR. STONE: What the action was. They may not have a right to know if it was a reprimand --

HON. JONES: Right.

MR. STONE: -- or they lost pay. But they have a right to know if action was taken or no action was taken.

CHAIR HOLTZMAN: Right whether any punitive action was taken against the complainant.

MR. STONE: Because if no action is taken, then they have to believe they weren't believed. And if they want to go further, they can. And if action was taken, then they don't have a right to decide what the action was or to complain about it but at least they know they were believed.

CHAIR HOLTZMAN: They may not be able to know the nature of the action. Does anybody disagree here that they should know whether some or any disciplinary action was taken?
MR. TAYLOR: Well, how did you propose
to word that, again, Liz?

LTC MCGOVERN: Would you be
comfortable with that being a sub-bullet, sir,
under this broader that they need to establish
these guidelines?

MR. STONE: No. No, I don't want to
leave it to guidelines. It has to be in addition
to the final disposition that needs to be
up-front. A final disposition has to be able to
get out there. Then, they can have guidelines
about how much more or less they want to do. But
I mean they could say allegation substantiated or
allegation not substantiated. Or they can say
action or no action but there is a final
disposition. They have a right to know that
much. Just like when somebody brings a complaint
in to a prosecutor's office, they know whether or
not they have declined to go forward or they are
going forward. They won't necessarily know for a
long time whether they are going forward on it.
But they will know if they are going forward or
not going forward.

LTC MCGOVERN: So, the Secretary of Defense established a requirement that the complainant be informed of a final disposition, whether action was taken, as well as guidelines clarifying what information about the discipline. Would that work?

CHAIR HOLTZMAN: Well, you could put that, the last part first. I mean you don't have to put this business that just was raised by Mr. Stone first. It could be at the end. But I think something. Why don't you give us language and then we can look at it for the next meeting?

LTC MCGOVERN: Yes, ma'am.

CHAIR HOLTZMAN: Is that okay, Mr. Stone?

MR. STONE: That's fine with me and they can even find out from the Services which variation of what I just said works best, whether it is action, no action --

HON. JONES: Yes, complaint substantiated or not substantiated.
MR. STONE: Or unsubstantiated. But you know you can find out what they prefer to hear but it has to be something like that.

LTC MCGOVERN: But those are separate. You can substantiate but take no action.

MR. STONE: Well, that would mean that the discipline imposed was very light. That's right. But they still have a right to know if they were substantiated or not.

CHAIR HOLTZMAN: Any objection, Judge Jones?

HON. JONES: My only point was I think -- remember from the last time -- and it sort of says it in the first bullet is that it is very -- it is up in the air what can be disclosed, period.

I mean, so maybe what we need to say is we recommend that a victim should always be told X, Y, or Z but because of the problems with the Privacy Act and everything else, I think we have to leave it to the Secretary of Defense to establish guidelines. That is the point, I
think.

In other words, at the moment, I don't
know and I couldn't tell you what you can tell a
victim.

MR. STONE: No.

HON. JONES: No?

MR. STONE: Here is where we are
getting confused.

HON. JONES: Okay.

MR. STONE: Substantiated or
unsubstantiated has to do with what the victim
told -- reported. It has nothing to do with the
perpetrator.

LTC MCGOVERN: Right, the
investigation.

MR. STONE: So, there is no Privacy
Act issue involved.

HON. JONES: Yes, okay. No, I'm
talking about the disposition, once it is
substantiated.

MR. STONE: Well, that's what I meant.
In other words, so that is what I'm saying. They
can play with the language and see which works
but whether the allegation is substantiated or
not substantiated has no privacy implications
whatsoever.

HON. JONES: Okay, good. All right.

CHAIR HOLTZMAN: Well, as long as you
agree with that, Staff, then it's fine. Do you
agree that there is no privacy implication with
that?

LTC MCGOVERN: The way that the
regulations read now is that information be
released to victims to the greatest extent
possible under the law.

HON. JONES: So, it doesn't
specifically say yes, we substantiated what you
told us or no, we haven't.

LTC MCGOVERN: My understanding from
the testimony is that people were told
substantiated or not substantiated. It was what
then happened that wasn't being told.

COL GREEN: I think there is different
issues involved here. I mean if you make a
complaint to an Inspector General, I think you already are entitled by regulation to know the outcome of your complaint. So, that is probably already established within DoD and/or Service regulations.

If I make a less formal complaint, the formality of it, am I entitled to know the outcome of that, may not be as clear.

MR. STONE: Not the outcome.

COL GREEN: I'm sorry, the outcome of the investigation. The consideration of my complaint.

MR. STONE: Okay.

COL GREEN: Not any consequence that results from that but the outcome of the investigation.

CHAIR HOLTZMAN: Well, I think you should check that first. I think it is not the same as it is. Although, normally, with regard to what you say, Colonel Green, I mean it is. But we should definitely confirm that.

But I think the other thing is that to
the extent -- maybe we should say to the extent permitted at present under law, the disposition, whether a disciplinary punishment, whether some penalty was imposed on the alleged retaliator should be disclosed, to the extent permissible under law.

MR. STONE: And it may just be yes or no, or it may be in more detail. But I think that is where the Protect our Defenders were going with their comments, as I understood them. And I agree with them, that if the Service has done a fair evaluation, it shouldn't be afraid to communicate it to the person who made the complaint.

HON. JONES: Well, I mean, again, the only thing is, I couldn't tell you whether you were making a correct or an incorrect decision about what you were disclosing under the Privacy Act because I haven't looked at the Privacy Act and don't understand it.

So, I'm only worried that we are sort of trying to direct them to do something that --
MR. STONE: That is exactly what I worry about, that there officials at all levels of government, not just in the military, who say oh, it gave me my discretion under the Privacy Act; I had better not disclose anything because I don't want to be sued. And that is why you have, even if they are just anecdotal examples, people who are very upset because the person they were dealing with wouldn't disclose anything because the person was so afraid. That is why it needs to say what they can get. They need to be able to come back later and say I'm entitled to know whether I was believed or whether my complaint was found to be substantiated. At least to get that much.

LTC MCGOVERN: And anything other than that DoD established guidelines to clarify so it is standard.

MR. STONE: Yes, fine.

HON. JONES: Right.

LTC MCGOVERN: Are you comfortable with that?
MR. TAYLOR: Yes, I'm okay with that.
I do think it is not quite as well settled as
others think it might be but I think that much is
probably okay.

But disposition, I think goes too far.
HON. JONES: That goes too far.
MR. TAYLOR: But I think
founded/unfounded, substantiated/unsubstantiated,
it seems to me like that is reasonable.

CHAIR HOLTZMAN: Are we okay now with
Recommendation 9?

LTC MCGOVERN: That was 8.
HON. JONES: That was 8.
CHAIR HOLTZMAN: Okay, hearing none,
we accepted 9 with the --

MR. STONE: Eight.

CHAIR HOLTZMAN: -- 8, sorry, with the
changes.
Okay, Recommendation 9.

LTC MCGOVERN: This is addressing the
flag officer, the general officer review of
involuntary separations of sexual assault
victims, to ensure that they are not retaliatory.

The Secretary of Defense will begin tracking implementation by the Services in the fiscal year 2013 NDAA requirement that the general or flag officer review proposed involuntary separation of the Servicemembers who made an unrestricted report of sexual assault within the preceding year.

MR. TAYLOR: I think this is something that DoD SAPRO has already agreed, basically, is a good idea. I remember asking that question during the course of the testimony.

HON. JONES: Yes, right.

MR. TAYLOR: I said, don't you think you ought to be tracking this? And they said, yes, probably should.

HON. JONES: Then we might know whether it was working, right?

MR. TAYLOR: So --

HON. JONES: No problem.

MR. STONE: Well, I don't understand.

Does the 2013 NDAA require them to do that or
only on request?

LTC MCGOVERN: It requires them to do
the review. They are not required to track it.

MR. STONE: To, in other words, keeps
track of all the numbers and report it to
anybody.

LTC MCGOVERN: Right. So --

MR. STONE: So, this would require
them not only to review it but make a record of
their review and keep those statistics somewhere.

LTC MCGOVERN: Yes, sir.

MR. STONE: Okay, so do we say for
annual reporting? In other words, I would like
it to say and just what you just said to me.
That, in addition to their review, which is
mandatory, that they keep the records and report
it in an annual report to the, I don't know, the
Secretary or whomever you want to report it to.

CHAIR HOLTZMAN: Is this going to be
on the form, the sexual assault reporting form?

LTC MCGOVERN: No, ma'am.

CHAIR HOLTZMAN: Why not?
LTC MCGOVERN: So, this occurs when someone --

CHAIR HOLTZMAN: I know but why shouldn't it be on that form? Would that be a good place for it to be?

I file an unrestricted report. Everything happens on that report, investigation, blah, blah, blah. Everything happens on the report on that. I mean to me, the investigation is on that report. And all of a sudden, I am involuntarily separated. That doesn't get on the report. Why not? Should it? I mean, just a question.

MR. STONE: Should it be the last thing, in case it happened?

LTC MCGOVERN: Well, it could take its own form of a retaliation complaint, saying I am being retaliated because they are involuntarily separating me for a personality disorder when really it is because I am a sexual assault victim. They are misdiagnosing me.

CHAIR HOLTZMAN: So that is how it
would then get on the report. Okay, if the victim then decides this was retaliation, then it would then get attached to the report. I got it. Okay, thank you.

MR. STONE: I thought you were asking a slightly different question. I thought you were asking whether or not the person reviewing it is not really in a good position to review it, unless he has looked at that report that everything was on and so, therefore, he is knowledgeable and he is not giving it a quick once over with a summary from the group that discharged the person. He has to look -- oh, by the way, I have got to read this thing. Hmm, this is different than I thought. Looking at a one-paragraph summary is not the same as looking at the record that was there.

CHAIR HOLTZMAN: Would that person have the access to that whole record?

COL GREEN: The general officer that is requesting the review? I mean I am certain the general officer requesting review would have.
When a case is brought to them for review, the underlying concern would be part of the review process.

CHAIR HOLTZMAN: Okay, but since we are not tracking the whole retaliation report, it still might not be there.

COL GREEN: Right.

LTC MCGOVERN: Right but currently, if someone was sexually assaulted and asks for this flag officer review, the general would have, at their disposal the sexual assault investigation.

CHAIR HOLTZMAN: Right, but they wouldn't have the retaliation because we don't have that.

COL GREEN: Right, nothing is tracked.

CHAIR HOLTZMAN: Should we mention anything about that? No? Yes?

COL GREEN: I think if you begin tracking through the other processes, all of that information is then going to be incorporated into --

CHAIR HOLTZMAN: Okay. Okay, I'm
persuaded. So, are we okay --

MR. STONE: It's only whether you wanted a phrase at the end that said after reviewing all the other material related to it, just to make sure it gets --

MR. TAYLOR: Well, I think you have to trust these senior officers to decide what they need, what is relevant. My experience is that most of them want more information instead of less anyway.

CHAIR HOLTZMAN: Well, let's just see what happens.

So, we are accepting 9 as is.

HON. JONES: Yes.

CHAIR HOLTZMAN: Okay, no objection to that.

Okay, number 10.

LTC MCGOVERN: This addresses your concerns about the maltreatment definition which State developed be parallel to the auspices zone like the specific intent requirement. And Nalini worked very hard on this to coordinate with the
Services and get their input, as well, and compared it to the hazing regulation to develop some specific language for your review.

But the recommendation is that the Service Secretaries revise Service regulations on maltreatment, which are unduly narrow.

CHAIR HOLTZMAN: Unduly narrow in what way?

LTC MCGOVERN: With the specific intent requirement.

CHAIR HOLTZMAN: Maybe we should have that a little more descriptive because I don't really understand it. Maybe you have it here but I can't read it.

LTC MCGOVERN: We can add language at the end of that -- specific intent requirement to discourage reporting or otherwise discourage the administration of justice.

If you look at the third bullet, if you all would be comfortable reviewing the proposed language as an alternate definition to offer the Services.
COL GREEN: Why don't you say how you came up with that.

MS. GUPTA: Sure, so I spoke with a couple Services and one of the things that we had discussed at our last meeting was just eliminating the specific intent element. And the Services expressed concern over that because it would make maltreatment very broad and to the point that it could reach behaviors that are just mean and it wouldn't necessarily any more be connected to retaliation. So, it wouldn't necessarily just punish behaviors that are done because a report was made or because someone wanted to make a report.

So, we looked to the NDAA language from the FY14 NDAA and we thought it might be better, instead of that specific intent, to include this language that -- sorry, now I can't find it here.

I was, "...trying to discourage the individual from reporting a criminal offense or because the individual reported a criminal
offense." So, that would be slightly broader than what is currently in the maltreatment regulations but would still tie it back to a criminal offense being reported.

MR. TAYLOR: So, is that latter part of the language from the NDAA?

MS. GUPTA: It was, yes.

MR. TAYLOR: And I had raised a concern about this simply because I was afraid that we were confusing the First Amendment issue and the maltreatment under 93 and it was inconsistent with the NDAA. So, thank you for taking a crack at this.

MS. GUPTA: Another thing that we also did was -- currently under the Service regulations, the act that is defined is -- I will just read out the first part. "Maltreatment, which is treatment by peers or by other persons that, when viewed objectively under all the circumstances, is abusive or otherwise unwarranted, unjustified, and unnecessary for any lawful purpose."
So, we looked at the hazing statute to sort of bolster up that language. And what we recommended or what we included in the recommendation is maltreatment is a form of retaliation -- as a form of retaliation is treatment by peers or by other persons that, when viewed objectively under all the circumstances, is abusive, cruel, humiliating, oppressive, demeaning or harmful. So, it is just slightly more descriptive what the actual act might be.

CHAIR HOLTZMAN: So who has a problem with this?

LTC MCGOVERN: Hopefully no one. The Services, in one of our discussions, we thought the description might actually, paralleling it to the hazing, which is similar misconduct, just a different motive, would be helpful for the Services to have what -- because Article 93 doesn't say what maltreatment is. It doesn't define it. So, the Services have done that for hazing. So, they can do it here for maltreatment in the form of retaliation. So, it is not just
being mean. It is abusive, cruel, humiliating, oppressive, demeaning, or harmful.

CHAIR HOLTZMAN: Why are we talking about an alternate definition? Alternate to what?

COL GREEN: The current -- the definition that the Services have adopted in their regulations is one that requires specific intent. And so, it goes back to --

MR. STONE: It's hard to prove.

CHAIR HOLTZMAN: Right, I understand that. So, maybe it is just make it clearer that a definition of maltreatment that does not require specific intent could stay or would stay.

MR. STONE: Yes, and which would address the concerns.

CHAIR HOLTZMAN: Right.

Well, it seems pretty good to me but I don't know how the other Members of the Panel feel. Mr. Taylor, are you okay?

MR. TAYLOR: Absolutely.

HON. JONES: I am, too, yes.
CHAIR HOLTZMAN: Mr. Stone, I think you are okay.

MR. STONE: Yes, I'm fine.

CHAIR HOLTZMAN: Okay, so without objection, we accept --

MR. STONE: I have one sort of odd thing. I think it is sort of peculiar, I guess, they said they call it maltreatment. It is not very descriptive. I feel like there are 50 things that could be maltreatment. But if that is the term that is used in Article 93, then I guess that is what we use. You know, when you say hazing, that is descriptive of something. When you say maltreatment, I don't immediately think of anything. I don't know what it is I'm supposed to be thinking of, until I read the definition.

COL GREEN: It is also the term that is used in the statute.

MR. STONE: Okay, that is what I mean, then. I guess I am sort of stuck with it. They couldn't come up with a better term.
CHAIR HOLTZMAN: All right, we are up to 11.

LTC MCGOVERN: Yes, ma'am. This is your recommendation that there should not be an enumerated Article for specifically prohibiting retaliation.

It reads: Congress not add retaliation to the Uniform Code of Military Justice as a separate enumerated offense.

And the rationale you all expressed earlier is that commanders seem to have adequate means to dispose of it under Article 92 or for the other misconduct, whether it is Article 93 maltreatment or assault, or whatever it may be.

The Military Justice Review Group then published their report, after our last meeting, and they did recommend establishing an enumerated article for professional retaliation.

CHAIR HOLTZMAN: Why are we including that?

LTC MCGOVERN: We just wanted to add it in there today for your consideration whether
you want to adjust your recommendation, in light
of their proposal and entertain whether a
separate one should be for professional
retaliation or if you disagree that it still is
not necessary.

MR. TAYLOR: Can I ask a clarifying
question, please?

So, is this part of the DoD
legislative program that is now being circulated
as the Department's position?

LTC MCGOVERN: Yes, sir.

COL GREEN: Yes, sir. The proposed
Article 132 on retaliation would target acts of
professional retaliation. So, this is part of
the --

LTC MCGOVERN: And you all have a copy
of that in your papers.

CHAIR HOLTZMAN: And why do we need
it? I mean just curiosity. Isn't there
something that covers professional retaliation
right now? I mean how would it be covered? How
would it be prosecuted?
LTC MCGOVERN: Under Article 92 as retaliation.

CHAIR HOLTZMAN: As retaliation.

LTC MCGOVERN: As disobeying regulation --

CHAIR HOLTZMAN: Oh, it's disobeying a regulation.

LTC MCGOVERN: -- which prohibits retaliation.

CHAIR HOLTZMAN: It wouldn't be the maltreatment.

LTC MCGOVERN: It could be, if that is the underlying misconduct but it would be charged as maltreatment, not as professional retaliation.

CHAIR HOLTZMAN: Right, but an alternative to maltreatment would be Article --

LTC MCGOVERN: Disobeying a regulation, which prohibits retaliation.

CHAIR HOLTZMAN: Okay. And well, I feel very uncomfortable about making any mention of this Military Justice Review Group because we haven't really analyzed why they did this, what
they thought was inadequate. I mean, so how can we opine on that?

LTC MCGOVERN: We wanted to discuss that with you today.

The excerpt from their report is provided. There is not a justification as to why that was included.

CHAIR HOLTZMAN: Well, my recommendation would be just to ignore it.

COL GREEN: I think the Staff wanted to bring it to the Panel's attention that it is a recommendation that directly contrasts one that is also there. So, I mean if the Panel wishes to address that, certainly, we just wanted to bring it to your attention.

MR. STONE: All right. I'm not inclined to ignore it. I don't think we can ignore it. Actually, this highlights the problem that I complained about twice with Judge Effron, that they were not either waiting to hear what we had to say or coming and testifying before us on substantive matters and that we were going down a
road that was parallel to theirs without knowing where we were going.

    My inclination is that they have more military expertise and a broader pallet of responsibility to work with and I'm loathe to ignore their view that it needs a new audible. So, I mean it seems to me that, at a minimum, I would want to say that we hadn't reviewed their recommendation and have no comment on it. And maybe at a maximum, I would want to see if there was a way that our recommendation could say to the extent that their retaliation statute would take this into account, we have no problem with it. To the extent that we are looking at conduct they don't cover, we wouldn't broaden their statute.

    But I don't think it is going to be helpful to people on the Hill to have something DoD sent over on retaliation that is different from them and from us. I think that is a mistake. That is a recipe for having some of the stuff we are doing be ignored.
MR. TAYLOR: You're review --

CHAIR HOLTZMAN: I don't agree with that. They won't ignore it. The only question is I don't think that we are in a position -- right now, we have to produce a report by February first to the Department of Defense. We have just seen this report by the Military Review Commission.

Colonel McGovern says that there is no justification for and no background for the decision that they may establish a professional retaliation offense. Now, how do we have time between now and February first to make any intelligent comment about their recommendation? I just don't see that we can.

I mean I have no objection saying that we just became aware of this and have not had a chance to evaluate their proposal, but I don't think that we can take a position. I mean, if the Panel wants to, obviously, in their votes for that, that's fine. But I just don't think that intellectually, we are in a position to make a
substantive comment. That is what I meant. I didn't mean to necessarily -- but I don't feel comfortable making a comment about it.

MR. TAYLOR: I would just like to add that I agree with the Chair on this. I don't think we should take a position one way or the other on it.

I can think of reasons why they might want to do this. For example, they might want to do this as a public policy matter, to highlight the importance. Or they might want to do it because it will make it easier to track retaliation complaints.

I can think of reasons why it might be a good idea. But on the other hand, this represents a reversal of the report that the Department made to the Congress a couple of years ago where they said we didn't need anything. So, I just don't think we can wade into it intelligently. I think we should acknowledge that we know it is there but take no position on it.
MR. STONE: Is there some reason that we have to comment on it in this report for February and we can't just, on any of these issues that they have come to and say these issues were only made public shortly before this report was prepared and, therefore, we don't make any comment on this issue but we may do so in a future report?

CHAIR HOLTZMAN: I don't think that we want to bind ourselves to that, a future report. This report, our report is on retaliation and we have this already as part of our report, that Congress not add retaliation. And we don't think, by the way, that there should be retaliation with regard to non-professional. I mean Military Justice Review Group didn't address the non-professional retaliation.

So, I don't see that we should -- I mean I agree -- well, I have said it already. I agree with what Mr. Taylor has said, that we should just simply acknowledge that this has been done and say that we are not in a position to,
because it was done in such a late stage, to make a comment on it but note that it is different from the position that we have taken. That's all.

LTC MCGOVERN: We can address that in the report. Then, would you like us to delete that highlighted bullet about the MJRG?

CHAIR HOLTZMAN: If we address it in the report, sure.

How do you feel, Judge Jones? You have been silent.

HON. JONES: Well, you know what? I have been silent only because when I read the phrase professional retaliation, it is much narrower, much less prosecuted, if you will, and very different from what we are discussing when we say that commanders have adequate means with respect to disciplinary action against members of their command who engage in retaliation. To me, that was broader and took in probably the bulk of what is done to deter retaliation or punish it. And it involves ostracism and bullying or
whatever.

So, it just struck me that they have singled out a type of retaliation that is quite specific, our friends in the Military Justice Review Group. And as I think you said, Mr. Taylor, I'm sure they have their reasons for it and we could imagine what they were.

All of that is to say, look, I don't think we should promise to do anything in the future. And I don't know, I suppose we could just -- what are we going to say? Nothing. We have done this. We are aware of what the Military Justice Review Group has mentioned with respect to professional retaliation. We haven't examine that.

CHAIR HOLTZMAN: Right.

HON. JONES: Period.

MR. STONE: That would be okay with me.

HON. JONES: Okay.

CHAIR HOLTZMAN: Well, we haven't had time to examine.
HON. JONES: Well, we haven't had time either, right.

LTC MCGOVERN: Just to clarify for the explanation in the report, your opinion is that commanders have this adequate means at their disposal to take disciplinary actions against social retaliation.

HON. JONES: Honestly, I'm not -- I would not have been including professional retaliation in what we were talking about. Maybe you have keyed in on what I am thinking but haven't expressed very well. Because I don't think of professional retaliation where you actually have somebody who does not get an advancement because they reported something.

When I looked at what we have said here, I think more of the more general types of retaliation that in fact commanders do deal with, probably on a daily basis, for all we know. I don't know whether commanders deal with professional retaliation to any degree. Normally it is --
LTC MCGOVERN: Well, the IG so rarely has substantiated it.

HON. JONES: I know. That is just it. It is such a narrow, small, both in number and frankly, in terms of anybody looking at it or tracking.

So, I mean the more I sit here, the more I think it is probably a good idea what the Military Justice Review Group has come up with but we can't say that. We don't know.

But I don't know that we meant professional retaliation when we made this comment. That's all I'm saying.

CHAIR HOLTZMAN: So, maybe one of the ways to deal with this is to say we have focused on social retaliation and ostracism. The Military Review Group has made a recommendation on professional retaliation. They just made that recommendation and we have not had an opportunity to review and to express an opinion on it.

Something like that.

MR. TAYLOR: I'm fine with that.
HON. JONES: Yes.

MR. TAYLOR: Sure.

CHAIR HOLTZMAN: Mr. Stone?

HON. JONES: I mean I was never just thinking of professional retaliation.

MR. STONE: Yes, right. And the other way to express that with the words here is when we say after each time we say retaliation just say other than professional retaliation. In other words, just point out we are not commenting on the professional retaliation part, which is what they commented on.

LTC MCGOVERN: Maybe it would be more clear just to say that they not add an enumerated offense prohibiting social retaliation. We can come up with language for you.

CHAIR HOLTZMAN: Does that suggest that we want an enumerated offense dealing with professional retaliation?

LTC MCGOVERN: No, ma'am, it is staying silent on it.

CHAIR HOLTZMAN: Okay.
MR. STONE: Yes, right.

LTC MCGOVERN: Are you comfortable with that?

CHAIR HOLTZMAN: I would like to see what it looks like.

HON. JONES: Yes, I mean I just don't think we meant it as part of our bullet.

MR. STONE: Right.

LTC MCGOVERN: And just to --

CHAIR HOLTZMAN: What concerns me, for example, is I don't want to exclude professional retaliation from all of the tracking and all of the rest that we have asked for. So, that is my concern here is that if we exclude professional retaliation in some explicit way from everything that we are doing, who is tracking it?

LTC MCGOVERN: No, ma'am, I don't think --

HON. JONES: It's not going to change tracking, I wouldn't think.

LTC MCGOVERN: This is a very narrow issue just dealing with whether or not it should
be in here.

CHAIR HOLTZMAN: Okay, I just --

that's why I want to look at it and make sure I'm okay.

LTC MCGOVERN: Yes, ma'am.

MR. STONE: Well, it might mean that in the one we previously covered where we talked about tracking that we say retaliation of all kinds, of all varieties, including professional retaliation, so it is clear that that one we didn't mean to exclude.

LTC MCGOVERN: And I believe that is addressed through the report. The first case that they had of professional retaliation from FY12 to FY15 they had one case in FY15. So, it is rare and we don't know the disposition. We know that they recommended action be taken against the colonel and lieutenant colonel but we don't know --

CHAIR HOLTZMAN: Now, did it involve sexual assault?

LTC MCGOVERN: Actually the report was
made by an employee who reported on behalf of a
victim who was sexually assaulted by the
lieutenant colonel. And then that master
sergeant who made the report was retaliated
against and not promoted by the lieutenant
colonel.

And so, it was very interesting. It
wasn't even the victim who made the complaint and
was retaliated against. That is why we have gone
back and revised to make sure that your
recommendations do include both victim and those
making reports.

HON. JONES: Right, not only victims.
MR. STONE: I don't think that is
surprising. The victim is the one who is worried
about retaliation and so they are the most
chilled. And very often, it is somebody else who
hears it and doesn't think that retaliation is
going to affect them. They are not in that chain
of command, normally, or they are not dealing
with that person in an ongoing basis. So, they
are less constrained by the thought oh, gosh, I'm
going to ruin my career.

CHAIR HOLTZMAN: I've been there.

Okay, let's go to number -- so, we are finished with number -- we accept number 11 with all of the qualifications and recommendations and changes we have discussed. Without objection, that will be adopted.

And we are up to Recommendation 12.

LTC MCGOVERN: Yes, ma'am. This recommendation is for innovative training.

The Secretary of Defense and Service Secretaries develop innovative and effective training on retaliation for Servicemembers and commanders, including targeted training that may be used in response to problems of retaliation within an organization.

CHAIR HOLTZMAN: I guess I am a little bit at sea about this. Maybe that is not the right phrase to use. But what kind of training --

LTC MCGOVERN: We received testimony that there is so much training going on on sexual
assault and everything else that there is just training saturation. And so, the discussion was that they need to make sure that they come up with new and innovative ways to ensure that people are being trained on retaliation.

CHAIR HOLTZMAN: I got it. I'm okay with it. Anybody have any comments, questions, objections? Without objection, then, we adopt Recommendation --

MR. STONE: Well, the third bullet does seem to make the point that we were concerned with before that the commanders are going to get trained.

CHAIR HOLTZMAN: You're right.

MR. STONE: So, that seems to take care of the vagueness that I thought there was before. So, they are going to be trained, too.

CHAIR HOLTZMAN: All right. So, without objection, Recommendation 12 is adopted. Now, we are up to Recommendation 13.

LTC MCGOVERN: This is recommending that the Military Whistleblower Protection Act
elements and burden of proof mirror the language of the Whistleblower Protection Act for DoD civilians. That the Secretary of Defense revise the elements of -- elements and burden of proof for reprisal claims made under the Military Whistleblower Act so that they parallel the elements and burden of proof outlined in the Whistleblower Protection Act for DoD civilians.

CHAIR HOLTZMAN: Any discussion, comment, disagreement? Without objection, Recommendation 13 is agreed to. Now, we have potential additional recommendations on retaliation.

LTC MCGOVERN: I believe we have already discussed this, ma'am --

CHAIR HOLTZMAN: Okay.

LTC MCGOVERN: -- when we talked about professional retaliation.

CHAIR HOLTZMAN: So, are we all done?

COL GREEN: Just one point. The x'd out portion, Protect Our Defenders did, in their submission to you, comment on expanding
protections for those who are improperly and involuntarily separated and the prioritization of the medical, a potential medical discharge compared to a separations process. And they made some recommendations to you to consider that.

Again, that is not material or anything that you have heard from witnesses on or even considered in the course of your assessment on retaliation. I think the separations process and the medical separations process are different processes. So, you know the Staff's recommendation or view is that you don't have information on this but we wanted to at least bring that to your attention in terms of a public comment, as to whether or not you would consider it.

CHAIR HOLTZMAN: And are these things within our jurisdiction anyway?

COL GREEN: I think the medical separations process -- I mean, obviously, if it is a collateral consequence of a sexual assault victim, tangentially, but it is pretty far afield
from the study that you have been doing specific
to this.

MR. STONE: I thought we did get
testimony at one of the hearings in the District
Court building in D.C. by a victim who said they
viewed what the person was doing -- as suggesting
that the person was mentally unbalanced and they
terminated the person and he was discharged for
that reason. Then he was very unhappy because he
and the other people like him were then chilled
and feared they were going to walk into a medical
discharge and be sent down that road. I thought
we did hear testimony. I'm not sure that it
wasn't anecdotal but I did think we heard
something.

LTC MCGOVERN: I think what we had
discussed is that the administrative separation
process and medical separations are very
complicated. And to bring in testimony for them
to explain the two tracks and the commanders'
decision-making process at the end in order to
fully consider POD's recommendation would take a
bit of testimony and quite a bit of understanding. So, what we proposed, instead, is to note in the report and in a footnote that you did receive this but your recommendation is that flag officers continue to review as required by the NDAA; that that is a safeguard but it needs to be tracked.

MR. STONE: So, that if I understand you correctly, if a person who reported retaliation was medically discharged, and I don't know if it is within some period of time --

LTC MCGOVERN: One year.

MR. SCROGGS: -- within a year, that would be reviewed by that review process, even though it was a medical discharge. Is that right?

LTC MCGOVERN: Absolutely.

MR. STONE: Okay, then I think we are addressing it. Then, we are saying we don't care which kind of discharge it was. It was an involuntary discharge within a year after reporting the retaliation and, therefore, there
will be some kind of review.

LTC MCGOVERN: Well, they had asked that you all recommend that the medical be given priority over the administrative involuntary separation. And that is just a lot of factors go into that.

MR. STONE: No, but I guess what I am asking is I would like a footnote somewhere --

LTC MCGOVERN: Yes, sir, we have got that.

MR. STONE: -- that says that that process will include not only administrative but also medical blah, blah, blah.

LTC MCGOVERN: Okay.

MR. STONE: Okay? So, that they at least know we took account of it and we do expect to count those.

LTC MCGOVERN: Yes, sir.

MR. STONE: Great.

LTC MCGOVERN: Those are being tracked.

CHAIR HOLTZMAN: Okay. Colonel Green,
anything further?

COL GREEN: Okay, in addition --

CHAIR HOLTZMAN: Colonel McGovern, do you have anything further? No, great.

COL GREEN: Just the report on the retaliation, the draft, again, we have got your changes. And what the Staff will do now is summarize the three major sections of the report, being the Article 120 and your recommendations there; the draft report on that; the retaliation report that you received, we will make the edits that you have recommended and to the summary recommendations there and combine it with the restitution and compensation recommendations and reports previously. We will combine the recommendations and give those to you next week as the combined list of your full recommendations for this report, along with the report.

CHAIR HOLTZMAN: And I hope that there is going to be some careful consideration to the press on this because I do think that these are very important recommendations and they shouldn't
just be buried. We should prepare a proper press release on this and maybe sit down with some of the press that has been covering this issue in the past, whether it is CNN or whatever, so that we can get appropriate coverage.

And these are two really important issues, one on restitution and the issues on retaliation, which have been widely reported and these are important recommendations, not to mention that everybody has worked so hard on it. So, maybe we can discuss that or you can give us that information before next week. But next Friday we are going to reviewing the final version of this.

COL GREEN: Right, the Staff will get the revisions back to you by mid next week and then we --

CHAIR HOLTZMAN: Well, will we need a meeting if we read the report and there are no changes?

COL GREEN: Well, we have other topics. The data analysis, we have Dr. Spohn and
the Staff have been working hard to prepare that
and get that for, obviously, a standalone report
that you are preparing.

CHAIR HOLTZMAN: Got it.

COL GREEN: But depending on as long
as you are comfortable with it, hopefully that
first part in terms of going through the approval
of the report, as we have it, should be fairly
brief.

CHAIR HOLTZMAN: Excellent. So, are
we up to public comment now?

COL GREEN: We are and we have none.

So, unless there are other issues.

CHAIR HOLTZMAN: Well, so then we
adjourned.

MS. FRIED: Yes, the meeting is
closed.

CHAIR HOLTZMAN: Thank you very much,
Panel Members and Staff. Thank you very, very
much.

(Whereupon, the above-entitled matter
went off the record at 2:33 p.m.)
163:5 260:8
adopted 19:11,18
56:17 130:3
167:17 170:8,21
171:1,2 241:7
259:7 260:19
adopting 65:1,5
169:20
adoption 82:8,19
adult 4:15 134:3
adults 145:16,19
advancement
253:15
advances 85:13,15
86:2
adventure 130:17
adversely 195:1
advise 157:11
advised 76:9 111:9
207:2
advisor 1:20,21,21
191:11
advisory 3:10
advocate 5:15,18
87:6
affect 82:6 195:1
258:19
afield 262:22
afraid 77:18 180:14
228:12 229:10
239:9
afternoon 5:22
agency 154:18
213:13
agenda 198:17
agnostic 199:1
ago 99:7 249:18
agree 11:19 12:10
12:12,15 16:19,20
24:2,6 29:5 31:7
31:11,18 36:4
41:6,12 43:1,11
47:14 67:2,16,17
71:3 84:11 87:8
100:14 103:20
114:19 122:4
136:13 137:3
160:6 163:7
165:16,16 182:10
188:16 195:20
204:13 208:19
226:7,8 228:11
248:2 249:5
250:19,20
agreed 13:13 14:9
19:9 20:9 30:11
231:10 261:11
agreeing 12:16
43:2,2
agreement 58:5
158:1 159:3 164:3
164:15
agrees 137:13
ahead 9:7,8 186:18
217:2
aimed 117:17
117:19
157:15
air 1:18 224:15
Alanas 21:17 113:2
113:8 125:3
128:20
alcohol 34:9 38:20
39:19 118:1
120:20 132:3,17
132:22
aligned 62:2
all-encompassing
63:16
allegation 85:9
100:11 193:12
220:17 222:13,14
226:2
allegations 103:16
103:17 191:19
192:16 196:20
202:1
alleged 89:11
116:19 228:4
alleviate 52:8
allow 27:2 118:5
211:8
allows 119:1
alter 11:1
alternate 21:21
149:16 180:13,20
237:21 241:4,4
alternative 8:11
53:9 66:19 103:21
148:22 175:4
245:16
alternatives 158:19
ambiguous 90:7
167:8
amend 17:4,7 18:13
31:19 36:21 41:13
44:22 129:3 131:5
139:8
amended 4:10 9:13
10:14 17:22 55:17
57:17 73:8 167:16
167:18 170:3
199:11
amending 41:7
46:20 47:19 49:7
53:10 125:21
175:5
amendment 4:17
36:16 37:9 98:21
110:6 239:10
amendments 165:5
amounts 114:1
207:21
anal 64:7
analog 132:21
analogy 39:6
131:22
analysis 26:12
61:19 74:16 91:12
109:2 128:19
149:7 267:22
analyzed 245:22
analyzing 155:13
and/or 227:4
Anderson 117:16
anecdotal 124:20
229:7 263:14
angst 50:10
annual 6:9 199:18
200:17 232:13,17
answer 32:9 41:10
99:11 117:14
128:10 131:20
132:1 157:20
167:15 194:8
anus 60:6
anybody 44:11
140:6 207:10
213:6,6 221:20
232:6 254:5 260:7
anymore 50:2
anyway 24:2 90:11
139:21 218:1
236:10 262:18
apparently 34:3,4,9
203:5
appeal 96:21
appealing 191:15
Appeals 56:3 59:1
146:3,12
appear 8:5 27:17
27:20 39:17 68:9
68:9
appeared 40:19
appears 10:12,14
20:12 45:7 46:11
46:17 73:13
190:12
appellate 23:13
24:1
application 121:18
146:10
applied 25:2 145:22
146:19
applies 28:4
apply 35:13 115:1,2
116:14 211:11
applying 192:2
appoint 218:6,7
appointed 217:15
appreciate 5:20
20:17 108:9,11
186:7
approach 32:14
35:15 65:10,11
66:19 97:1 177:5
appropriate 40:17
64:22 102:19
143:14 169:10,17
267:5
approval 268:7
approved 199:12
201:13
(202) 234-4433
Neal R. Gross and Co., Inc.
Washington DC
www.nealrgross.com
April 202:19 210:10
AR 192:19
areas 10:2 33:22
57:5,7,8,19 63:8
63:15 102:12
109:10 166:1
217:8
arena 76:14
arguably 64:13
117:20 118:2,15
138:17,19
argue 129:13
argument 70:16
114:19 118:19
122:6 189:8
arises 74:8
Arlington 1:10
Armed 56:3 59:2
142:18 143:21
Army 1:19 4:5
192:19
arose 157:2 159:15
159:19
arrived 102:20,21
article 2:11 4:17
5:1,7,9 6:14 7:2
7:14 9:12 19:18
19:22 24:16 45:1
45:19 53:11 54:11
58:10 61:20,21
62:6 66:2 73:12
73:16 82:9,13,19
83:22 84:2,5
96:21 102:13
129:22 141:21
142:3,14,15,20
143:3,16 144:1,17
144:21 145:2,13
153:6,12,16 154:6
155:9,10 157:7
158:13,20 159:15
159:18 161:3
163:11 164:8
170:6 172:16,19
173:15 175:5
240:18 242:11
243:5,12,13,18
244:13 245:1,16
266:9
Articles 169:9,13
175:6,9
artifice 78:22
aside 87:8
asked 7:18 67:3
68:21 207:17
256:13 265:2
asking 54:9 81:14
185:6 217:3
231:11 234:5,7
265:8
asks 235:9
asleep 42:17
117:21
aspect 72:1
assault 2:15 4:15
6:3 45:20 48:7,11
76:15 86:9 94:18
95:3,3,4,6,20
105:5 106:22
107:8,11 111:5
121:12 138:22
155:6 179:17
181:1 184:4
186:15,20 187:3,6
187:15,21 189:9
193:19 196:17
199:19 202:3,14
204:9,12 206:10
206:21 207:21
216:17 219:9,21
230:22 231:7
232:20 233:20
235:11 243:14
257:21 260:1
262:21
assault-related 206:17
assault/retaliation 214:5
assaulted 235:9
258:2
assaults 120:18
121:3
assessment 4:13
5:2 151:17 262:8
assigned 216:14
217:19
assigning 217:6
assigns 217:4
assistant 5:15
85:12
assume 115:8
136:11 214:15
assuming 209:11
atmosphere 153:4
attached 85:11
234:3
attachment 187:8
attack 14:17 15:2,3
41:18,20 78:18
118:20 119:1
attacker 10:8
attempt 9:15
attend 203:9
attention 116:8
215:18 246:11,15
262:14
Attorney 1:20,21,21
attractive 85:8
audible 247:6
auspices 236:20
authorities 202:10
authority 73:19
75:10,17 76:1
78:10 79:4,8,18
80:20 84:8 86:17
90:8,12,22 91:1,5
91:6,9,13,14 92:3
92:9,12,15 93:21
94:4 95:18 96:8
97:4 98:7,10
100:7,9 103:17
104:20 105:11
106:1,8 107:1
170:5 191:9
203:15 210:12
229:12 239:3
241:9 258:10
267:16
back 16:4 31:2
32:12 66:4 74:17
80:7 88:9 90:13
91:19 97:12,14
98:18 102:22
106:3 113:3,3
118:20 119:19
131:4,5,21 134:9
139:1 141:11
143:5 146:18
152:16 154:15
155:13 157:17
161:15 165:9,14
176:8,11 178:7
185:21 191:9
203:15 210:12
229:12 239:3
241:9 258:10
267:16
backdoor 51:7
background 103:4
180:2 204:7
248:10
bad 86:20 123:18
badly 124:14
Ballroom 1:9
ban 132:17
banned 120:21
Barbara 1:14 3:13
barely 116:8
base 120:21 121:1
based 119:3,9
176:18 179:2
187:16 195:2
204:6 207:20
216:2
baseline 62:10
basic 170:16
basically 9:16
13:15 46:10 48:19
62:2 63:19 65:2
83:2 93:21 152:22
163:5 231:10
basis 57:11 186:14
219:8 253:19
258:21
bear 113:14 122:21
bears 146:19
beef 138:11
beginning 49:17
77:11
begs 109:2
behalf 258:1
behavior 86:20
113:11 115:3
117:12 153:5
behaviors 238:9,12
belief 76:19 78:21
133:22
believe 17:5 19:14
21:5,6 34:13 45:5
50:10 52:2 55:14
71:12 75:8 77:15
79:14 81:5 89:21
109:10 124:19
204:19 216:3
217:15 221:13
257:12 261:14
believed 86:6,9
166:20 221:14,18
229:13
belong 219:7
belongs 34:21
185:16 201:1
Benchbook 14:19
20:5 75:8
beneficial 84:20
benefit 68:17,18
best 78:16 128:14
182:2,3,5 223:19
better 33:13,18
57:15,17 65:18
75:14 87:3 94:5
102:22 106:21
107:1 108:3 123:1
132:14 133:5
162:18 163:4,18
181:17 204:22
205:12 209:11
229:5 238:17
242:22
beyond 120:6
biased 61:8
big 32:8 40:20
45:17 122:7,15
128:16 192:18
bills 113:19
bind 250:10
biography 3:16
bit 31:21 33:15 43:7
80:1 90:6 101:7
106:11 118:5
181:13 259:18
264:1,1
blah 181:20,20,20
233:8,8,8 265:13
265:13,13
blood 132:3,22
blue 49:2,3 190:12
198:21,22
board 94:8
bodily 45:1,8,13,18
46:5,8,11,20,21
47:3,8 48:2,6,6,7
48:7,10,14 50:22
52:7 53:10 54:15
55:6 85:19 101:22
body 57:9 60:7
70:17 201:18
bolster 240:2
books 144:6
boot 115:3
boss 104:9
bottom 10:15 80:19
181:14
box 195:10
Branch 32:7 154:16
branches 219:7
brand 148:20
break 56:18 57:12
57:14 64:16 72:13
164:6,9 165:7,8
165:10,12,13
brief 268:9
briefly 141:15
167:7
bring 62:20 106:21
107:3,5,6,12,13
107:22 112:2
119:14 246:11,14
262:14 263:19
bringing 86:8 106:3
brings 89:7 145:1
222:17
broad 26:1 27:6
96:3 100:17
111:16 112:15
124:8 143:6,9
145:9 146:10
148:7 151:12
163:3 166:19,20
238:8
broaden 247:15
broader 222:5
239:1 247:4
251:20
broadly 146:1,20
brought 80:16
146:18 149:13
235:1
buddy 189:20
building 263:5
built 8:12
bulk 251:20
bullet 179:2 181:14
188:20 198:10,22
199:1 201:15
206:3 215:9
224:14 237:19
257:256:7
260:10
bullets 179:11,12
185:19
bullying 251:22
bunch 49:17
burden 261:1,4,7
buri 267:1
bu 18:14
223:10
buy 36:6
bystanders 219:8
C
C 57:7 64:6 151:3,3
151:4
CAAF 23:7 59:5,11
call 15:3 78:18
91:10 112:17
135:9 137:14
204:18 214:4
242:8
called 15:1 87:19
135:11 144:11,12
205:8
calling 37:5
camp 96:17 115:3
capable 32:1 40:11
capture 26:1 83:14
124:8
captured 69:20
car 39:9,12 120:9
122:9,10
card 212:16
care 12:20 95:10
213:3 260:16
264:19
career 61:10 85:10
104:11 115:14
137:6 259:1
careful 55:10 134:2
266:20
carefully 36:7,10
172:13
carried 62:5
case 23:7,13 35:12
52:6 56:4 68:1
71:20 74:7 86:9
86:15 88:6 89:3
100:15,22 102:12
106:17 113:2
116:21 124:13,21
125:1,2,3 128:20
135:19 146:3,12
congressional 113:17
congressionally 3:9
Congresswoman 80:11 100:21
connected 238:11
connote 46:6 103:9
consensual 83:5
99:20 95:9,10
169:15
consensus 33:21
33:22
consent 9:12 10:2
10:10 11:7 13:9
13:10,11 14:16,21
15:6,8 21:14 22:9
23:2,18 31:10,22
32:7 33:11 34:7
34:20 35:1,3
41:22 42:5 44:1
46:18 47:5 48:8
48:11 54:12 74:10
78:20 80:2 83:8
84:7 87:12,13,15
88:1,4,18,20 89:4
91:10 97:6,20
98:2 103:22 104:7
111:5 118:11
133:17 168:18
consented 85:18
134:1
consenting 19:17
20:3,8,11,16 22:5
32:2 44:15 80:4
89:5 126:4 145:16
145:19 162:11
consequence 16:7
74:20 227:14
262:21
consequences 40:11
consider 5:21 7:18
11:6 44:14 60:15
65:9 112:13
148:14,18,19
149:20 165:9,14
173:4 262:5,15
263:22
consideration 32:5
175:17 190:4
227:11 243:22
266:20
considered 70:18
75:6 174:10 262:8
considering 44:14
124:3
consistency 102:5
consistency's 101:20
consistent 101:17
102:2
consistently
173:20 200:16
constituted 40:21
constrained 258:22
constructed 111:10
constructive 97:3
construed 156:5
contact 46:8 51:12
55:17,21 56:7
57:16 75:18 79:19
97:14
contains 10:6
142:15
contemplated 75:1
contends 52:15
content 29:15
113:21 163:16
194:18
contents 75:1
context 113:6
167:10 194:2
continual 109:2
continue 6:1
184:21 186:14
211:8 212:19
264:5
continued 188:3
continues 100:5
199:14
continuing 176:19
contradict 127:2
contrary 126:19
129:12
contrasts 246:12
contributions 6:15
control 204:22
controlled 131:22
controversial 11:12
11:13
conversation 90:4
convicted 89:22
129:19 132:6
conviction 26:21
27:2 76:22 99:19
146:3
convictions 130:1
coordinate 236:22
Coordinators 196:17
copies 176:12
copy 5:12 66:1 176:5
176:6 244:16
corps 1:21 5:18
12:3,3 23:12
24:12 28:17 38:17
52:2,14 70:13
77:1 146:11
correct 18:6 22:16
26:7,12 29:8
38:15 41:2 42:8
48:1 53:20 54:22
55:3 58:20 93:11
139:9 148:4,8
150:13 151:10,18
158:21 187:3,4
212:7 214:6
228:17
correctly 122:13
264:9
corresponding 190:7
counsel 13:8 14:6
92:20 125:8 126:1
135:2
Counsel's 85:1
counsels 127:18
count 265:17
country 156:17
couple 52:18
130:14 131:4
144:13 146:5,14
177:2 180:8 238:4
249:17
course 25:13 32:17
80:3 81:18 104:15
132:18 141:17
170:4 214:12
231:12 262:8
court 56:3 58:19
59:1,3,5,10,12
125:3 146:2,8,15
263:5
Court's 113:2
courtroom 118:13
Courts 15:11 17:21
Courts-Martial 7:16
14:13,16 16:8
18:21 141:22
cover 83:5,10 96:3
100:3 153:7,15
181:9 247:15
coverage 267:5
covered 8:13 84:5
86:16 88:7 153:9
169:4 170:5 180:9
244:21 257:7
covering 94:10
267:3
covers 8:13 80:3
244:20
crack 239:13
crafted 147:15
158:5
create 15:22 35:16
153:2 154:5 159:7
200:21 211:5
created 4:9 62:11
creates 84:3
129:14 152:1
creating 208:1
credit 212:15
creeps 26:10
crime 40:10 51:17
144:16
crimes 2:15 6:3
155:6,8 208:18
criminal 5:16 95:12
113:13 146:3,12
189:7,15,21
238:21,22 239:4
<table>
<thead>
<tr>
<th>Term</th>
<th>Page(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>determination</td>
<td>40:17 171:21</td>
</tr>
<tr>
<td>determine</td>
<td>5:4,6 86:1 172:2</td>
</tr>
<tr>
<td>determined</td>
<td>56:5 169:15 171:22</td>
</tr>
<tr>
<td>determining</td>
<td>141:16</td>
</tr>
<tr>
<td>developed</td>
<td>6:5 45:19 69:6 190:5 215:19 236:20</td>
</tr>
<tr>
<td>devil’s</td>
<td>87:6</td>
</tr>
<tr>
<td>devoted</td>
<td>4:18</td>
</tr>
<tr>
<td>dicta</td>
<td>113:10</td>
</tr>
<tr>
<td>dictated</td>
<td>199:21</td>
</tr>
<tr>
<td>differ</td>
<td>62:13</td>
</tr>
<tr>
<td>differentiate</td>
<td>101:1</td>
</tr>
<tr>
<td>differently</td>
<td>30:10</td>
</tr>
<tr>
<td>difficult</td>
<td>74:7 80:16 80:18 104:1</td>
</tr>
<tr>
<td>difficulty</td>
<td>108:9</td>
</tr>
<tr>
<td>direct</td>
<td>228:22</td>
</tr>
<tr>
<td>direction</td>
<td>182:1</td>
</tr>
<tr>
<td>directive</td>
<td>157:1</td>
</tr>
<tr>
<td>directly</td>
<td>43:12 152:12 180:16 181:4 246:12</td>
</tr>
<tr>
<td>Director</td>
<td>1:18,19 5:17</td>
</tr>
<tr>
<td>disagree</td>
<td>65:4 81:18 164:13 172:9 207:9,10 208:10 221:21 244:4</td>
</tr>
<tr>
<td>disagrees</td>
<td>201:6</td>
</tr>
<tr>
<td>discharged</td>
<td>234:13 263:8 264:10</td>
</tr>
<tr>
<td>discharge</td>
<td>262:3 263:12 264:15,20 264:21</td>
</tr>
<tr>
<td>dischargee</td>
<td>56:5</td>
</tr>
<tr>
<td>disagreement</td>
<td>65:5 164:3 167:2,20 201:7 261:10</td>
</tr>
<tr>
<td>disagreements</td>
<td>24:5</td>
</tr>
<tr>
<td>discipline</td>
<td>95:14 221:22 228:3 251:18 253:6</td>
</tr>
<tr>
<td>disclose</td>
<td>229:5,9</td>
</tr>
<tr>
<td>disclosed</td>
<td>224:15 225:5</td>
</tr>
<tr>
<td>disclosing</td>
<td>228:18</td>
</tr>
<tr>
<td>discourage</td>
<td>237:17 237:17 238:20</td>
</tr>
<tr>
<td>discredit</td>
<td>142:18 229:4</td>
</tr>
<tr>
<td>discretion</td>
<td>229:4</td>
</tr>
<tr>
<td>discuss</td>
<td>5:2 6:7 22:19 246:3 267:11</td>
</tr>
<tr>
<td>discussions</td>
<td>24:21</td>
</tr>
<tr>
<td>discussing</td>
<td>73:10 251:16</td>
</tr>
<tr>
<td>discussion</td>
<td>12:9</td>
</tr>
<tr>
<td>do</td>
<td>101:1</td>
</tr>
<tr>
<td>differently</td>
<td>30:10</td>
</tr>
<tr>
<td>difficult</td>
<td>74:7 80:16 80:18 104:1</td>
</tr>
<tr>
<td>difficulty</td>
<td>108:9</td>
</tr>
<tr>
<td>direct</td>
<td>228:22</td>
</tr>
<tr>
<td>direction</td>
<td>182:1</td>
</tr>
<tr>
<td>directive</td>
<td>157:1</td>
</tr>
<tr>
<td>directly</td>
<td>43:12 152:12 180:16 181:4 246:12</td>
</tr>
<tr>
<td>Director</td>
<td>1:18,19 5:17</td>
</tr>
</tbody>
</table>

(202) 234-4433

Neal R. Gross and Co., Inc.
Washington DC
www.nealrgross.com
hesitation 69:1
hey 42:22
higher 40:2, 14
93:19 114:17, 22
115:19 136:9
highest 58:19
59:11
highlight 138:16
249:10
highlighted 21:16
129:8, 10 139:19
251:7
highlights 246:18
Hill 247:18
Hines 1:20 9:1, 9
11:19 12:22 13:1
13:18, 22 16:14
19:13 23:9, 11, 15
25:1, 5, 11 26:7, 17
27:11, 14, 17, 20, 22
28:2, 8, 14, 22 29:2
29:12 30:19 33:17
45:3, 4 47:1, 21
50:12 51:3 55:13
58:13, 16 59:1, 8
62:9, 16 63:18
64:3 72:11, 20
73:15 77:11 82:7
91:22 92:16, 18
93:6 101:9, 12
110:13, 17, 18
117:13 121:8, 11
121:15 122:1
123:5, 8 124:19
126:21 128:5
138:9 140:2 141:3
141:4 157:14, 19
158:8, 13, 22 159:5
159:8, 11, 14, 18
160:21 166:3, 9, 14
166:16 167:6
168:1, 14 169:3, 7
170:1, 15 171:9
172:17 174:5
175:3
hiring 120:22
history 76:17

Holtzman's 179:2
homicide 39:9, 10
120:10, 13
Hon 1:10, 13, 14
8:19 9:7 11:8
12:17 13:19 15:13
18:3, 7, 10 19:9
22:22 23:10, 14, 16
30:1, 7 32:11, 18
34:19 36:14 42:9
44:6, 17 48:4, 17
48:19 49:1, 6, 9, 16
51:1 53:1, 13, 18, 22
55:9 58:2, 15
59:15, 21 61:9, 12
65:7, 15 67:17
70:10 71:22 72:6
77:10 84:15, 18
87:15 88:4, 8, 19
89:1, 8, 10 90:13
90:17, 20 92:14, 17
93:5 94:15, 21
97:18, 21 98:8, 14
98:16, 20 101:5
103:3, 7 106:2, 5
107:12, 15, 17, 22
109:22 110:3
112:22 114:12
117:5 120:5 123:2

247:18
251:7
252:18
253:3, 17, 22 256:4
256:10 257:2, 20
259:2, 17 260:6, 14
260:18 261:9, 16
261:19 262:17
265:22 266:3, 19
267:18 268:4, 10
268:14, 18
283

(202) 234-4433
Neal R. Gross and Co., Inc.
Washington DC
www.nealrgross.com
submitted 77:1
82:17
subparts 103:18
subsection 51:16
53:13 57:3 73:11
74:1 75:14 167:12
167:17 169:14
170:7,21 171:2,8
171:10
subsections 56:20
56:21 57:2 117:19
subsequent 148:16
substance 41:20
65:4
substances 38:21
substantial 64:5
121:20,21
substantially 10:21
11:1 27:7,9
substantiate 224:5
substantiated
220:17 222:13,14
223:22 224:22
225:10,20 226:2,3
226:15,19,19
229:14 254:2
substantiated/un...
230:8
substantive 67:20
152:1,3 246:22
249:1
sudden 233:10
sued 229:6
suffered 86:11
sufficient 17:11
35:4 74:20
sufficiently 216:15
216:19
suggest 53:15
80:13 97:7 106:8
106:9 142:7 177:5
185:12 201:4
255:17
suggested 57:3
106:16 125:21
165:5 174:21
suggesting 47:15
69:11 186:6 263:6
suggestion 18:19
41:13 43:15 51:22
66:10 67:14 72:9
suggestions 81:16
98:12 99:5 182:14
suggests 106:11
219:3
summarize 9:2
266:8
summarized 7:9
8:2 126:21 164:22
summarizes 6:5
summary 8:8,12,17
61:18 176:5,14
234:12,16 266:12
summer 85:2
superior 93:20 99:8
supervisor 207:8
209:17 211:19
214:3
supplement 9:5
supplemental
21:12 24:14,18
support 9:19 12:14
12:19 70:21 87:4
183:14 186:7
supported 16:10
supporting 127:8
179:11,12
suppose 116:18,19
192:8 193:7 198:4
252:10
supposed 81:8
197:12,13 198:5
206:9 242:16
Supreme 59:3,4,10
113:2 125:3
sure 7:5 14:7 22:7
22:11 29:8 30:14
44:3,3 59:9 72:12
77:19 90:9 101:5
108:8 112:9 117:4
126:10 147:22
161:20 162:6
179:5 191:6
195:19 197:3,11
201:18 209:15
217:2 236:5 238:3
251:9 252:6 255:2
257:3 258:10
260:3 263:13
surgical 42:12
surprising 258:15
sweep 111:17
T
tailor 182:1
tailed 83:9
take 19:7 43:14
48:10 71:1 72:13
82:6 89:3 101:7
118:15 121:16
131:5 132:2 136:6
141:6 164:6,10
165:7,8 190:16
194:13 205:11
214:8 224:5
233:16 247:13
248:19 249:6,21
253:6 260:15
263:22
takeaway 75:12
taken 16:13 30:11
48:13 95:10
152:12 176:7
220:19,20,22
221:7,8,10,13,15
221:22 223:5
251:3 257:17
takes 12:20 120:7
187:22 189:12
197:8 198:15
205:17 209:22
210:22 212:2,5
222:1 230:1,7
231:9,14,19 236:6
239:5,8 241:20,21
244:6 248:1 249:4
250:20 252:6
254:22 255:2
team 211:6
technology 162:19
tee 141:5
teed 211:3
Television 4:5
tell 17:10 31:21
51:11 114:5 128:9
132:3 180:9 204:3
212:14 214:7
<table>
<thead>
<tr>
<th>2012</th>
<th>4:17 78:3</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>231:4,22</td>
</tr>
<tr>
<td>2014</td>
<td>4:11 85:2</td>
</tr>
<tr>
<td>2015</td>
<td>176:9 210:9</td>
</tr>
<tr>
<td>2016</td>
<td>1:7 177:12</td>
</tr>
<tr>
<td>2242</td>
<td>26:15,18,21</td>
</tr>
<tr>
<td>22nd</td>
<td>142:5 145:6</td>
</tr>
<tr>
<td>25</td>
<td>147:13</td>
</tr>
<tr>
<td>268</td>
<td>2:17,19</td>
</tr>
<tr>
<td>2910</td>
<td>184:3 186:22</td>
</tr>
<tr>
<td>2013</td>
<td>231:4,22</td>
</tr>
<tr>
<td>2014</td>
<td>4:11 85:2</td>
</tr>
<tr>
<td>2015</td>
<td>176:9 210:9</td>
</tr>
<tr>
<td>2016</td>
<td>1:7 177:12</td>
</tr>
<tr>
<td>2242</td>
<td>26:15,18,21</td>
</tr>
<tr>
<td>22nd</td>
<td>142:5 145:6</td>
</tr>
<tr>
<td>25</td>
<td>147:13</td>
</tr>
<tr>
<td>268</td>
<td>2:17,19</td>
</tr>
<tr>
<td>2910</td>
<td>184:3 186:22</td>
</tr>
<tr>
<td>2013</td>
<td>231:4,22</td>
</tr>
<tr>
<td>2014</td>
<td>4:11 85:2</td>
</tr>
<tr>
<td>2015</td>
<td>176:9 210:9</td>
</tr>
<tr>
<td>2016</td>
<td>1:7 177:12</td>
</tr>
<tr>
<td>2242</td>
<td>26:15,18,21</td>
</tr>
<tr>
<td>22nd</td>
<td>142:5 145:6</td>
</tr>
<tr>
<td>25</td>
<td>147:13</td>
</tr>
<tr>
<td>268</td>
<td>2:17,19</td>
</tr>
<tr>
<td>2910</td>
<td>184:3 186:22</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>7</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 2:11 34:20 167:22</td>
</tr>
<tr>
<td>168:1,9 219:2</td>
</tr>
<tr>
<td>73 24:20,21</td>
</tr>
<tr>
<td>74 24:20</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>8</th>
</tr>
</thead>
<tbody>
<tr>
<td>8 8:7 41:19 168:13</td>
</tr>
<tr>
<td>168:15 219:13</td>
</tr>
<tr>
<td>230:12,13,17</td>
</tr>
<tr>
<td>875 125:4</td>
</tr>
<tr>
<td>8th 147:4</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>9</th>
</tr>
</thead>
<tbody>
<tr>
<td>9 55:14 230:11,15</td>
</tr>
<tr>
<td>230:19 236:13</td>
</tr>
<tr>
<td>9:06 1:10 3:2</td>
</tr>
<tr>
<td>92 84:2,5 153:13,16</td>
</tr>
<tr>
<td>158:13 159:15</td>
</tr>
<tr>
<td>169:13,16 175:9</td>
</tr>
<tr>
<td>243:12 245:1</td>
</tr>
<tr>
<td>93 82:13 159:18</td>
</tr>
<tr>
<td>169:14,17 175:9</td>
</tr>
<tr>
<td>239:11 240:18</td>
</tr>
<tr>
<td>242:11 243:13</td>
</tr>
<tr>
<td>93(a) 82:10,19</td>
</tr>
<tr>
<td>83:22 93:15 96:21</td>
</tr>
<tr>
<td>172:5 174:9,14,14</td>
</tr>
</tbody>
</table>
CERTIFICATE

This is to certify that the foregoing transcript

In the matter of: Public Meeting

Before: U.S. DoD Judicial Proceedings Panel

Date: 01-15-16

Place: Arlington, Virginia

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

[Signature]

Court Reporter

NEAL R. GROSS
COURT REPORTERS AND TRANSCRIBERS
1323 RHODE ISLAND AVE., N.W.
WASHINGTON, D.C. 20005-3701
(202) 234-4433
www.nealrgross.com