UNITED STATES DEPARTMENT OF DEFENSE

JUDICIAL PROCEEDINGS PANEL

MEETING

FRIDAY
NOVEMBER 18, 2016

The Panel met in the 14th Floor Executive Conference Room, One Liberty Center, 875 North Randolph Street, Arlington, Virginia, at 9:00 a.m., Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT:

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

WITNESSES:

Colonel William Pigott, Jr., U.S. Marine Corps
Colonel(R) William Orr, Jr., U.S. Air Force
Captain Andrew House, U.S. Navy
Lieutenant Colonel Mary Catherine Vergona, U.S. Army
Lieutenant Colonel Angela Wissman, U.S. Marine Corps
Stephen McCleary, U.S. Coast Guard
JPP STAFF:
Captain Tammy Tideswell, U.S. Navy - Staff Director
Lieutenant Colonel Patricia Lewis, U.S. Army - Deputy Staff Director
Mr. Dale L. Trexler - Chief of Staff
Ms. Julie Carson - Legislative Liaison and Staff Attorney
Ms. Nalini Gupta - Staff Attorney

OTHER PARTICIPANTS:
Ms. Maria Fried, Designated Federal Official (DFO)
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MS. FRIED: Good morning Panel Members. Thank you for being here today. I would like to welcome everyone to the Judicial Proceedings Panel's 24th public meeting. My name's Maria Fried. I'm the Designated Federal Official to the JPP. The JPP's a congressionally mandated Federal Advisory Committee.

Publicly available information provided to the JPP is posted on the JPP website at www.jpp.whs.mil. Reports issued by the JPP are also posted on the website, as are other materials, to include transcripts of past public meetings. The Department has appointed the following distinguished members to the Panel:

The Honorable Elizabeth Holtzman, who serves as the Chair of the JPP; the Honorable Barbara S. Jones; Vice Admiral Retired Patricia Tracey; Professor Tom Taylor; Mr. Victor Stone. Members' biographies are also available at the JPP website.
The Center for Prosecutorial Integrity, Protect Our Defenders and Lieutenant Colonel Jeffrey Palomino, Chief of the Air Force Appellate Defense Division, submitted written comments for consideration by the JPP. Those comments had been provided to the Panel Members and are publicly available on the JPP website. Thank you. Madam Chair.

CHAIR HOLTZMAN: Thank you very much Ms. Fried, and good morning to everyone here. I would like to welcome the participants and everyone in attendance today to the 24th meeting of the Judicial Proceedings Panel. All five of the Panel Members are present here today.

Today's meeting is being transcribed, and the full written transcript will be posted on the JPP website. The Judicial Proceedings Panel was created by the National Defense Authorization Act for Fiscal year 2013, as amended by the National Defense Authorization Act for Fiscal years 2014 and 2015.

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 amendments to Article 120 of the UCMJ in 2012.

Today's session will include an update on the recent and proposed revisions to the Manual for Courts-Martial from the Department of Defense's Joint Service Committee on Military Justice. The Panel will then deliberate on the topic of victim's appellate rights. We've invited representatives -- misread.

We've invited representatives from each of the Services to be present to answer any service-specific questions that might arise during these deliberations. The Panel will conclude with a planning session to discuss priorities and topics for future meetings through the remainder of our term which ends on September 30th, 2017.

Each public meeting of the Judicial Proceedings Panel includes time to receive input
from the public. We have received no requests for public comment at today's meeting. Thank you to the service representatives who will be present during our deliberations and to those of you in the audience for joining us.

The JPP is pleased to hear from Colonel William N. Pigott, the United States Marine Corps, who serves as the Chair of the Joint Service Committee on Military Justice.

Thank you very much, Colonel.

COL. PIGOTT: Good morning Madam Chair, distinguished Panel Members. My name is Bill Pigott. It's an honor to be here with you this Friday. Sitting next to me is Major Harlye Carlton.

We both work for Major General Ewers in the Marine Corps Judge Advocate Division, and we are here in our capacity, as in Harlye's case, she's the Executive Secretary for the Joint Service Committee, and I've got the distinct honor and privilege to be chairman of that group.

Behind me we've also got
representatives from our working group and our voting group that meet routinely to take care of the Manual for Courts-Martial and military justice matters in the Department of Defense.

Okay. If I may, I've got a few housekeeping notes to address up front before I get started. We are a deliberative and pre-decisional body, hopefully everyone can hear me in the back, and the DoD Office of General Counsel is the release authority for all information relating to the Joint Service Committee.

We will answer questions to the best of our abilities, but there are certain answers that I'm going to have to get back to you on to research, and I would respectfully request that I may be permitted to do that, and that's simply to make sure that I get the answer correct and we make a record of it and I will need to discuss any of those responses with the DoD Office of the General Counsel.

Additionally, while we are Marine
Officers here today we're this Joint Service Committee. The third housekeeping matter is we have copies of the brief. I think there's 12 slides up there that we're going to roll through. We've got copies for the folks behind us as well as you all, and the other neat thing that I wanted to lead off with, I'm reminded, ma'am, of when I was taught to make presentations when I was a Second Lieutenant in 1990, and they always talked about having an attention-getter and I've got one for us this morning.

I'm going to pass this around for everybody to take a look at. On November 14th, Brigadier General Donovan, he used to be the Staff Judge Advocate for the Commandant of the Marine Corps. He actually became a judge advocate, a lawyer after a couple of tours in Vietnam. He was a lieutenant colonel when he transitioned.

But he donated this first edition of the Manual for Courts-Martial in 1951 to us and while he has a very, very distinguished career,
was a great patriot, he had shared with me this week when I spoke to his 60th graduating class from the Basic School, he spoke to us about how every officer had to buy this for $3.50 and he also talks about this idea that it was the first of its kind, and when it was introduced, it was trumpeted as a revolutionary reference book.

So what we intend to do tomorrow morning is, I want to put that in the mail to the Naval Justice School. It's their 70th anniversary, and that thing is going to be put on display there. That will tie in nicely when I get into the portion about the 2016 Manual for Courts-Martial that was implemented by President Obama via executive order at the end of September.

So there it is, and you all can take a look at it as well when we're done with it. Okay. So this morning I'm going to provide an overview of the JSC to include why we exist and who we are. Then I'm going to discuss generally, ma'am, how we operate. This will include a
discussion of the sources of military law and the approval authorities for changes to those sources. Last, I will discuss some of the recent changes to the Manual for Courts-Martial.

I'd like to turn first to an overview of the Joint Service Committee, referred to hereinafter as the JSC. We were created by the Department of Defense Office of General Counsel in response to Executive Order 12473 of April 14, 1984, which required the Secretary of Defense to cause the Manual for Courts-Martial to be reviewed annually.

Now in response, the Secretary of Defense signed DoD Directive 5500.17, Roles and Responsibility of the Joint Service Committee on Military Justice of May 3rd, 2003 and that was recently certified current on October 31st, 2006. The JSC assists the DoD in assisting the President of the United States in fulfilling responsibilities to ensure the Manual for Courts-Martial and the UCMJ achieve their fundamental purpose of a comprehensive body of criminal law
Under the direction of the General Counsel, the JSC is responsible for reviewing the manual annually and proposing amendments as necessary. The JSC is comprised of members of each of the armed services, the Air Force, Army, Coast Guard, Navy and the Marine Corps. It consists of a voting group, a working group, a chair, executive secretary and advisors. We're very, very lucky to have all of those folks working with us.

Now the voting group is made up of the top military justice policy members in each Service, and nothing leaves the Joint Service Committee without receiving a majority vote from our voting group. The working group is made up of one to two members from each of the Services in the ranks, between lieutenant and captain. Those are O-3s as well as lieutenant commanders, majors are O-4s, and we also are lucky enough to have a handful of Navy commanders, Coast Guard commanders and Army lieutenant colonels, Marine
lieutenant colonels supporting us.

The working group receives its guidance from the voting group, and I would like to tell you that in all of these years of active duty, they are the smartest judge advocates that I have ever encountered in 26 years of active duty. They're brilliant, and they truly are our best and brightest.

Now the chair and executive secretary positions rotate every two years. The Marine Corps now has got this honor. We've got the job for another couple of months. We're going to hand it over to the Navy in January 2017. Additionally, the JSC has three advisors, one from the Court of Appeals for the Armed Forces, one from the DoD Office of General Counsel and one from the chairman of the Joints Chiefs of Staff Office of Legal Counsel.

We rely heavily on the advice of those individuals, especially Mr. Clark Price and Mr. Dwight Sullivan. I don't know if they're here today, but if -- in the event they're not, I want
to thank them publicly for everything they do for us. Membership on the Joint Service Committee is also a collateral duty for all individuals.

I'll now turn to an overview of what we do and how we do it, beginning with the discussion of the sources of military law and the approval authority for changes to those sources. The Uniform Code of Military Justice is the statutory source of military law, and Article 6 of the Uniform Code of Military Justice states that the president may prescribe the rules for pretrial, trial and post-trial procedures, and they must be consistent with the Uniform Code of Military Justice.

The rules that the president has promulgated are contained in the Manual for Courts-Martial. The Manual for Courts-Martial is comprised of five parts. You've got the articles. I'm sorry, we've got the preamble up front, the Rules for Court-Martial, the Military Rules of Evidence -- we refer to those as the MREs -- the punitive articles and the non-
judicial punishment procedures.

The president is the approval authority for amendments to these five parts of the manual, and those changes are promulgated via executive orders. Now there's also supplementary materials contained in the manual. These includes a preface, a table of contents, discussions, appendices to include the analysis and an index. The approval authority for changes to discussions and appendices is the DoD General Counsel, and those changes are published via the Federal Register.

As recently clarified in Executive Order 13740, September 16th, 2016, these supplementary materials do not have the force of law. Turning to how the JSC recommends changes to the manual, the JSC may receive input for what to consider during the course of its annual review from a number of methods and sources.

The primary way is by analyzing statutory changes and determining whether implementation is required in the Manual for
Courts-Martial. Another way is through our annual call for proposals. Each year, the JSC puts out a call for public comments on ways to amend and improve the Manual for Courts-Martial via the Federal Register, and simultaneously requests input from the Services.

This call for proposals always results in numerous proposed amendments to the Manual for Courts-Martial. Just this past year, we received recommendations from professors at law schools from across the country, as well as our citizens, former Judge Advocates. Another method for receiving the input is through recommendations from congressional panels such as the Response Systems to Adult Sexual Assault Crimes Panel.

They have been tasked to the JSC via, and through the DoD Office of General Counsel. The JSC also receives input through its study of case law updates, as well as proposals that go directly to the executive secretary via the JSC's public websites. I meant to put it in there. What is our website?
MAJ. CARLTON: It's jsc.defense.gov. We'll provide that to anybody who would like it.

COL. PIGOTT: It's a very, very nice website. I urge you to take a look at it. During the course of our annual review, the JSC will review the proposals received, as well as any other changes recommended by members of the voting group, and the working group will draft proposed changes to the rules.

At the end of the calendar year, the JSC will publish any proposed changes to the manual, those being either changes to a part of the MCM or any supplementary materials in the Federal Register for a 60-day period for comments from the public. Simultaneously, the Services will push out the proposed amendments within their Services to include school houses, in our case the Naval Justice School, trial judiciaries, trial counsel assistance programs, defense bars and special victims' counsel and victims' legal counsel organizations.

After review of the comments, the JSC
will take a final vote on the proposed amendments and will submit a proposed executive order to the DoD Office of General Counsel, and should the president eventually sign the proposed executive order, the relevant parts of the manual will be amended and the JSC will submit the proposed corresponding amendments, the supplementary materials and the DoD Office of General Counsel for approval.

Once approved, these amended supplementary materials will be published in the Federal Register, and I'm going to go ahead and speak for our voting group. I can tell you that that last portion, about the president eventually signing that executive order, is one of the most exciting and fascinating aspects of serving on this committee.

So with that, it's only going to take me another 20 minutes to get through the remainder of my material. Are there any questions from the Panel at this point about what the Joint Service Committee's role is within the
Department of Defense. Anything at all?

(No response.)

COL. PIGOTT: Okay. Thank you, Madam Chair. Now I'd like to transition the discussion to the changes since the 2012 Manual for Courts-Martial, and we are very, very proud to talk about our three most recent executive orders. Since the 2012 Manual for Courts-Martial there have been three National Defense Authorization Acts. They have amended the Uniform Code of Military Justice, five executive orders amending the parts of the Manual for Courts-Martial and five Federal Register notices containing changes to the supplementary materials.

JSC attempts to assist the field in keeping up with these changes via the website. Once again, it's jsc.defense.gov, where we hang the source documents for these changes. Also, we've got historical executive orders that have amended the manual and updated inserts for the Rules for Courts-Martial, Military Rules of Evidence, the Uniform Code of Military Justice
and the punitive articles.

JSC, I promise you Madam Chair, is working very diligently through the weekends and late into the evening with the 2016 Manual for Courts-Martial. The first of three executive orders, I've got the first one up on the slide behind you all that I'd like to discuss is Executive Order 13696 of June 17th, 2015.

Many of the changes resulting from FY '14 National Defense Authorization Act may be found within this executive order. There are many, many changes contained within Executive Order 13696. Therefore, I respectfully recommend reading it in its entirety. But if it's all right, I'd now like to cover a few key provisions of that executive order.

First, many of the Article 6b's victims' rights requirements were incorporated throughout the manual with this executive order. This included incorporating the victim's right to notice, the right not to be excluded and the right to be reasonably heard including, where
appropriate, the right to be heard through counsel.

For example, the Rule for Courts-Martial 305, which covers pretrial confinement, the EO added provisions regarding the victim's right to be reasonably heard, which includes the right to reasonable, accurate, and timely notice and the right to confer with a representative of the command and counsel for the government.

Additionally, the rule states that the right to be heard includes the right to be heard through counsel and the right to be reasonably protected from the prisoner.

Second, Rule for Courts-Martial 405, rules for preliminary hearings were substantially amended. RCM 430 Alpha regarding disclosure of matters following the direction of preliminary hearing was added. These changes to make preliminary hearing requirements comply with FY '14 National Defense Authorization Act amendments to Article 32, these changes reflect Article 32's requirement that the preliminary hearing
transition from a discovery-like tool to a probable cause hearing with a limited scope and purpose.

Third, changes to Rule for Courts-Martial 702 covering depositions. This reflects the amendments to Article 49 which limits when a deposition may be ordered, and conforms with Article 32 providing victims a right to decline to testify in Article 32s.

Specifically Madam Chair, RCM 702 states a deposition may be ordered whenever, after preferral of charges due to exceptional circumstances of the case. It is in the interest of justice that testimony be taken and preserved for use at a preliminary hearing or court-martial.

It goes on to state "A victim's declination to testify at a preliminary hearing or a victim's declination to submit to pretrial interviews shall not, by themselves, be considered exceptional circumstances."

Fourth, RCM 1001, pre-sentencing
procedures was amended in RCM 1001 Alpha, which addresses crime victims and pre-sentencing was added and implemented Article 6b's requirement that victims have the right to be reasonably heard at a sentencing hearing relating to the offense.

RCM 1001 Alpha provides the procedures and definitions necessary to implement this right, and defines the right to be reasonably heard in non-capital cases, as having the right to make a sworn or unsworn statement and that upon good cause shown, the military judge may permit the victim's counsel to deliver all or part of the victim's unsworn statement.

Fifth, RCM 1107, Action by a Convening Authority, implemented the numerous changes to Article 60 and the corresponding limitations to convening authority post-trial actions.

And last for this first executive order, the first of three that we're going to cover this morning, Military Rules of Evidence 513 and 514, they cover the psychotherapist-
patient privilege and victim advocate-victim and Department of Defense Safe Helpline staff-victim privilege respectively were both amended.

Both of these rules were amended to require a military judge to make certain threshold findings prior to reviewing such matters in camera. This change to MRE 513 was required by the FY '15 National Defense Authorization Act. While not required the FY '15 National Defense Authorization Act, the threshold adopted by MRE 514 was modeled after the Rule 513 threshold.

Breaking away from my prepared testimony for a moment, we were invited to meet with the pro staff of the Senate Armed Services Committee earlier this week, where Mr. Barney and Mr. Leeling back-briefed us on the recent trip out west through California, Hawaii, and Okinawa, where they met victims' advocate, defense counsel, trial counsel and even a couple of judges they spoke with out there, as well as staff judge advocates, and according to Mr.
Barney this executive order and the changes that were implemented are working.

Okay. So now I'd like to turn to the next executive order. This one is No. 13730 of May 20th, 2016 versus the change to RCM 104, Unlawful Command Influence, which once again was required by the National Defense Authorization Act. This time it was from FY '16. RCM 104 was amended to prohibit giving a less favorable rating or evaluation to any special victims' counsel because of the zeal with which such counsel represented any client.

Second, RCM 306, Initial Disposition. This was amended to require that, for alleged sex-related offenses committed in the United States, commanding officers and convening authorities provided the victim of the sex-related assault the opportunity to express his or her preference as to jurisdiction.

While not binding, commanding officers and convening authorities, they all consider such views prior to making disposition decisions.
This is also an FY '15 National Defense Authorization Act requirement. So we hear of it rising out of two National Defense Authorization Act requirements.

Third, RCM 705, that addresses pretrial agreements. We amended this to require that wherever practicable, prior to accepting a pretrial agreement convening authorities provide the victim an opportunity to express views concerning the pretrial agreement terms and conditions.

If provided, the convening authority must consider those views prior to accepting the pretrial agreement. Of important note, this change is consistent with the Response Systems to Adult Sexual Assault Crimes Panel, or RSP, Recommendations 54 series, which focused squarely on victim input into pretrial agreements.

For the benefit of anyone who was not aware, and there was a time when I was not aware of this, the RSP was a congressionally-mandated panel, asked to conduct an independent review and
assessment of the systems to investigate, prosecute and adjudicate crimes involving adult sexual assault and related offenses.

Fourth, RCM 1109. That covers vacation of suspensions of a sentence. This was modified to comport with changes to RCM 405. Vacation proceedings, as we all know, are used when a convicted Service member violates a provision of a pretrial agreement, and the convening authority decides to vacate the suspended sentence.

RCM 1109 used to refer to RCM 405, preliminary hearing with respect to procedural rules. However, those rules were no longer applicable after the 2015 changes to RCM 405. Therefore, it was necessary to provide new procedural rules for vacation hearings to include adding a provision that any victim of the underlying offense for which the probationer received a suspended sentence or any victim of the alleged offense that is the subject of the vacation hearing has the right to reasonable,
accurate and timely notice of that vacation hearing.

Fifth, RCM 1203 addresses review by a court of criminal appeals that was amended to delegate the authority for establishing the means by which Article 6b(e), *Writs of Mandamus*, are forwarded to the courts of criminal appeals through The Judge Advocates Generals.

Sixth, Military Rules of Evidence 304(c) was amended and implements the requirements of the FY '16 National Defense Authorization Act requirement to conform to the rules governing the admissibility of the corroboration of admissions and confessions in the trial of criminal cases in United States district courts.

CHAIR HOLTZMAN: Colonel, I just want to interrupt one second, because since you alluded to the Response Panel, I want to alert you to the fact that three of the culprits partially responsible for the work of that Panel are sitting in this room at this moment,
including the Honorable Judge Jones, who was the Chair of that Panel. I was a lowly Member of the Panel, and the very esteemed staff director of the Panel, Colonel Ham is sitting here today. Just be aware of that.

COL. PIGOTT: I will. Actually, the Colonel did a lot of great work in the Military Justice Review Group. A lot of great ideas out there and I think that's -- it's important that we respect one another's views and the collaboration is key, so we're all trying to do the right thing.

CHAIR HOLTZMAN: Thank you, Colonel. You may proceed.

COL. PIGOTT: Thank you, ma'am. Thank you very much. I'm almost done with the second executive order, so please bear with me. I was required to have this testimony typed up. So would you like me to go back to 304(c)? I almost got through with that. I know I've got one more point, so I got the last point.

All right. So unless there's any
questions on 304(c), I'd like to just hit on this last executive order. It's the third one that we have up there on the slides behind you. That's Executive Order 13740 of November 16, 2016, last week. It gives you an idea of the dedication, the time and effort that this working group is putting into this collateral duty, which oftentimes seems like a primary duty, right.

Okay. Now this implements portions of FY '12, '14 and '15 National Defense Authorization Acts. First, Part 1 of the manual, the preamble was amended to clarify both the naming convention for the manual and that the supplementary materials do not carry the force of law.

Second, RCM 701 and 703, which are discovery and production of witnesses and evidence, were respectfully amended and incorporate the FY '14 and '15 National Defense Authorization Act requirements, that defense counsel must request any interview of an alleged victim of a sex-related offense through the
victim's counsel and to conduct any such interview only in the presence of government counsel, counsel for the victim or the victim advocate, if requested by the victim.

So I think the point there Madam Chair is that the work that we're doing for our victims, and on behalf of them, that provision demonstrates that it's evolving in the right direction. It's very positive.

Third, Rule for Courts-Martial 906, Motions for Appropriate Relief. This was amended, this rule was amended to clarify the distinction between unreasonable multiplication of charges and multiplicity. I can tell all of -- all of you serving on this Panel that I struggled with that as a captain 15 years ago.

Specifically to quote from the analysis accompanying this change, that multiplicity and unreasonable multiplication of charges are two distinct concepts. Unreasonable multiplication of charges as applied to findings and sentences is a limitation on the
prosecution's discretion to charge separate offenses, and unreasonable multiplication of charges does not have a foundation in the Constitution, but is instead based on the concept of a reasonableness and is a prohibition against prosecutorial overreaching.

Now in contrast, multiplicity is based on the double jeopardy clause of the Fifth Amendment and prevents an accused from being twice punished for one offense if it is contrary to the intent of Congress. The charge may be found not to be multiplicitous but at the same time it may be dismissed because of unreasonable multiplication.

Fourth, in general Part 4 of the Manual for Courts-Martial no longer lists the lesser included offenses. Instead, practitioners are to reference the newly promulgated Appendix 12(a), which was approved by the General Counsel and published in the Federal Register just a couple of weeks ago on November 8th, 2016.

Appendix 12(a) provides a non-
exhaustive and non-binding list of lesser included offenses. Actually, it was just a couple of days ago. A great job. Fifth, to conform with case law, paragraph 3(b) for Article 79 was amended to state that military judges may, *sua sponte*, instruct on lesser included offenses.

This means that even if either party fails to request a lesser included offense, the military judge must instruct the members about any available lesser included offenses.

Fifth, RCM 1203 addresses review by a court of criminal appeals. Turning to this again. Oh, I'm sorry. I'm at 11. Sixth, this EO provided the elements, explanations and examples, specifications for Article 120 rape and sexual assault generally.

120(b) is rape and sexual assault of a child, and 120(c), other sexual misconduct, as amended by the FY National Defense Authorization Acts. All right.

Seventh, modifications reflect the elimination of consensual sodomy as an offense
from the Uniform Code of Military Justice. Eight
Eighth, for Article 134, the general article, it is
made clear that specifications must allege the terminal elements that the conduct be prejudicial to
good order and discipline or of a nature to bring
discredit upon the Armed Forces, and now this
is a result of changes to case law.

For 9 and 10, we have a couple of new Article 134 offenses, which are Article 134, animal abuse and Article 134, indecent conduct. Taking each in turn, animal abuse now provides a comprehensive offense where the animal no longer must be a public animal. Again ma'am, just deviating from the script for a moment, Mr. Sullivan sent us the blog from the National Humane Society earlier this month that was extremely positive about this particular addition to Article 134, animal abuse.

It was really neat to see that, and it demonstrates to all of us that the American public is paying attention to what we're doing. Then, the other Article 134 offense that I just
mentioned briefly was indecent conduct. It includes offenses previously prescribed by indecent acts with another. This was deleted pursuant to Executive Order 13447 of 1 October 2007, except that the presence of another person is not required.

Eleventh, Article 134, Pandering and Prostitution. This was broadened to include any sexual act rather than just intercourse for compensation. Like the executive orders discussed here today, it is important to read Executive 13740 in its entirety, and most of these executive orders are anywhere from 90 to 100 pages long.

So this is my last paragraph here. I'd like to wrap up and assure the Panel, Madam Chair, that the last few years have been a time of an immense amount of change to the military justice system, and change is good. We're embracing that change. The Joint Service Committee has been very, very busy proposing changes to the manual to implement and be
consistent with statutory changes, Panel recommendations, case law updates, public and Service comments.

It's not in the script, but we are going to have that 2016 MCM through Defense Digital Service. That's going to be available on the internet, and we believe that will go a good way in promoting transparency of what we do, military justice.

But in turn, the Services have been busy pushing these changes down and out to the respective fields, and ma'am I couldn't be more proud of the committee and I'm honored to be here. I want to wish you all a Happy Thanksgiving and I want to thank you for what you do for us. That's all I've got, subject to questions.

CHAIR HOLTZMAN: Thank you. I'll start with -- thank you very much, Colonel. Mr. Taylor.

MR. TAYLOR: First of all thank you very -- excuse me. Thank you very much for being
here today. Thank you for your testimony and your service. When you decide as a group how to address the priority in which you tackle the issues, what kinds of factors do you consider?

And I'm particularly interested in that, because I noticed in this last EO that you talked about, that it implemented parts of the FY '12, '14 and '15 National Defense Authorization Acts, and one might say well why are you just now implementing a FY '12? So how do you think about how you do the work and how you order it and how you prioritize what you're going to do?

COL. PIGOTT: Yeah. That's a great question, and I think it would be all right if we talked briefly about the proposal log and the action log, and I'd like you to just take a minute to explain to them how that works.

MAJ. CARLTON: Absolutely, and this is Major Carlton, and just a note as well about the most recent executive order. The changes that were included in that one, I know it may seem like a surprise to see FY '12, '14 and '15 in
there, but those changes were originally put out for public comment in October of 2012 in the Federal Register.

So, sometimes it may not be so much that the JSC is prioritizing, so much as the amount of time that it takes to just go through the review process to signature. But if there is -- so that's just to address the one kind of issue that you had brought up, sir.

But in terms of other types of priorities, we'll certainly look at whether an NDAA has an implementation deadline. So that will get it the highest level of priority if something in an NDAA has a this must be implemented by the President by this date. That will have a very high priority obviously.

Any NDAA provision will also have the highest priority, and then beyond that we'll take a look at everything and put it in our action and proposal logs. So on our JSC website, we have all of our internal SOP procedures up so that you all could see them and you'll see that there's an
action log and proposal log, where we keep track of every single proposal that we get in, discuss it as a working group, discuss it as a voting group, move things to the action log, which means we're going to be setting those for potential movement onto an Executive Order or some other way for implementation.

MR. TAYLOR: So as part of that, do you make value judgments about some issues being more important than others, and therefore put them in a different bucket and treat them ahead of others that might seem to be less important, or is it more of a first-in, first-out --

COL. PIGOTT: Well, it's certainly not first-in, first-out, sir. I will tell you that we rely on our advisors to assist us as we prioritize that work. How many, as an example, what's the current number in the action log and the proposal log?

MAJ. CARLTON: I believe we received over 50 proposals this year. Most of them make it to the action log but as a collateral duty,
there's only so much time that we can devote. So we certainly -- we certainly have to prioritize in some way, shape or form. Like Colonel Pigott was saying, we rely heavily on the advice of our advisors.

MR. TAYLOR: Who are these advisors that you're referring to?

COL. PIGOTT: This is -- I had mentioned to them in the brief. This is Mr. Clark Price from CAAF, Mr. Dwight Sullivan from OGC, from SECDEF's office and then our -- who's the Lieutenant Colonel from --

MAJ. CARLTON: Lieutenant Colonel Quituga, sir.

COL. PIGOTT: Quituga. I just have a hard time saying her name. She advises us from the chairman's legal office. All very, very bright folks. Mr. Price a retired Colonel, a lot of experience as a judge.

Same thing with Mr. Sullivan. They're there for all these meetings, and we simply cannot give all of these proposals priority.
There's just simply not enough time in a 168 hour work week. Hope that answers your question.

MR. TAYLOR: Yeah. Just one final question, if I may. When you have your internal discussions about implementation, do you basically make these decisions by consensus, sort of like the joint staff is accused of doing, where eventually everybody has to come on board to the same common denominator, or do you just take a vote?

COL. PIGOTT: Well, we take a vote and there have been times, you know, and I think that point that I made up front about being pre-deliberative and pre-decisional. I'm not supposed to get into that portion of it, but I can tell you that there is disagreement. There is quite a bit of debate on these proposals.

Obviously, we're not so much from the National Defense -- if at all, Authorization Acts. One of the hardest things, Madam Chair, is to not harm the collaboration between the Services. So there are different views that
come to the working group and voting group, and that is a challenge, to debate that continue to collaborate and move those proposals forward. So and I can't comment on the way the Joint Staff operates.

MR. TAYLOR: I understand. I appreciate that. Thank you.

JUDGE JONES: I just have one question really. Thank you for your briefing. It was very thorough. Is there a sense, and you may not be able to comment on this, that from time to time, there is a tremendous amount of legislative change going on here and it's not only hard to keep up with but is there a sense that it's too much, too fast.

COL. PIGOTT: So I can tell you that we're working through the legislative proposals and changes. It was outside the scope of the testimony this morning, but this military justice review group, which my colleague represented with Judge Effron, put together a very detailed report which will be a quantum leap for the Manual for
Courts-Martial and the Uniform Code of Military 
Justice, and we're very anxious to see what 
happens with that, the National Defense 
Authorization Act when it gets implemented. 

There's a lot going on. There's a lot 
going on, and I will tell you that we are doing 
our level best to be responsive and expedient and 
getting it done. But there's a lot of work that 
goes on with this. It's, you know, where I 
talked about that portion that it's a collateral 
duty, it's more than a full time job for the 
voting group and the working group. 

But I'm confident that we're getting 
it done. I would certainly like more personnel. 
I'm just kidding. No, that point that I had made 
éarlier about the multiplication of charges and 
multiplicity, I'm not kidding. As a brand new 
judge advocate, I struggled with that and we 
could not figure that out. 

I was so proud of this working group 
that are behind me. But it's that level of 
talent and expertise that works on this
committee. They figured it out, and I was saying on the ride over here that quite frankly, Your Honor, for us this might be the most, the very most important thing that we've done on active duty. I'm very, very proud of this group.

VADM TRACEY: Thank you for your testimony and thank you for your service, and for what you do. I have just two questions. I think you called it an action log. You process things and they end up in the action log. How often and to what extent are items in that action log not able to be completed in the course of a single year, and do they then lapse over into your follow-on next year's review.

COL. PIGOTT: Okay. I understand that question, Admiral. Thank you ma'am. Is it possible to pull up the website from here. If I was a better Chairman, I would have had that up there on the screen, because we can actually pull it up and show you, to give you the exact number, or I could come back to the Admiral with the specifics.
VADM TRACEY: Actually, I'm not looking for exact number. Can you just give me a sense of is it common that you don't actually finish all the actions that you decided were a priority?

COL. PIGOTT: Not at all.

VADM TRACEY: You typically clear out the action log in a year?

COL. PIGOTT: Yes. So the harder, ma'am, the harder point for the deliberation is moving it from the proposal log to the action log. So it's very clear to that working group once it is in the action log that we expect results, and work those to completion so am I missing anything on that?

VADM TRACEY: So then perhaps the clarification for me is the -- if an item is in the proposal log and not moved to the action log, is it a dead proposal? Is the fact that it didn't move to the action log mean that it's no longer being worked?

COL. PIGOTT: Go ahead, Major Carlton.
please.

MAJ. CARLTON: Yes ma'am. So every once in a while we'll get a proposal that has either been recently reviewed by the voting group or is already actually in implementation, or is counter to a policy that we know is coming down. So in those cases, those are usually the ones -- it's really that type of level, where it's really not feasible to move into the action log.

In those cases, we do always get back to the individual who submitted the proposal, and let them know the status of their proposal, and that it has -- that because of whatever reason, it wasn't moving into the action log. Then we also let them know if things do move to the action log.

So we try and keep a good, open, transparent communication with those who do submit comments.

VADM TRACEY: I'm sorry. I think I heard three things that end up happening. One is a set of things that are either overtaken by
events, they've already been reviewed or there's something happening that will make that counter to policy. There's a set of things that move to the action log, and there's a bucket in the middle that are -- what's in that bucket?

MAJ. CARLTON: Sorry ma'am, I may not have been clear. So things either stay on the proposal log and don't go anywhere, and that means no action will be taken on them, or they move to the action log. If something moves to the action log, that just means we're going to study it further. But if it doesn't move to the action log, then it's done there, and we'll let the proponent of that comment know that.

VADM TRACEY: Colonel, you made the point that in one of the executive orders the fact that the supplementary materials did not have the force of law. Can you talk very briefly about what issues gave rise to needing that clarification? What's the effect of that clarification?

COL. PIGOTT: I honestly don't know.
I'm going to turn to Major Carlton. I'm sure you know the legislative history.

MAJ. CARLTON: So, there was in the preamble, which is kind of opening to the Manual for Courts-Martial that was promulgated by the president, there's always been a discussion there that says the discussions, the supplementary materials, since those aren't promulgated by the president, they don't have the force of law that something that's promulgated by the president does.

It's non-binding, it's helpful, it's guidance, and there wasn't anything that was specifically happening that made it necessary to do that. It was just to help practitioners understand the difference between a discussion that doesn't require presidential approval and the rule that it's supplementing, which would require presidential approval.

So it's just to help folks understand the approval levels for changes, and just to really make it clear that discussions, analysis,
those types of things aren't binding in and of themselves, although they may refer to something that is binding. It may refer to another Rule for Courts-Martial or a UCMJ article, which would be binding, but the discussion itself is not binding.

MR. STONE: I must say I was -- I guess I'm still a little bit confused with the role of the Joint Services Committee. I don't know if you've gotten a chance to review our earlier hearings, but it was no secret that many times we had presenters tell us when we asked what was happening in a particular area, that they would say oh, well we can't act on that until the Joint Services Committee acts, and it's tied up there.

We got that many times, and I guess it seems to me looking back now that a lot of the discussions and conclusions that were raised here were from the earlier Response System Panel wound up going to congressional authors of the NDAAs instead of the Joint Services Committee taking
actions on their own, which again it might -- I
was thinking that they were log-jammed.

Hearing you today, you just said it's
more than a full time job, but everybody's
collateral duty. It makes me wonder whether or
not one of our recommendations should be that
there should be a core of two or three people who
are full time Joint Service Committee Executive
Staff, to keep things on track and moving along,
that that wouldn't help everybody and I just --

I mean I don't know if there is a core
that's full time, but if there isn't, it seems to
me we might want to consider that, to help the
situation out generally. I don't know if you
want to comment on that, or tell me if there is
some, one or two full time people.

COL. PIGOTT: So Mr. Stone, thanks for
the question. I leaned over and mentioned to
Major Carlton a moment ago that we're going to
get back to you on the first portion of the
question, which questioned a log jam back there,
because I'm not specifically aware of that. So
I'd like to come back to you all with an answer on that. Do you know the time frame of this, to help me narrow this down when we go back to research this?

MR. STONE: Well, I think it goes back to the first question that was raised, that we get commenters who are telling us about problems. Admittedly, they're individual problems, not necessarily systemic problems but some are systemic in the various Services over all the time we've been meeting, and suggestions are thrown out and like you say here, until they get into an NDAA and then some of the NDAA Fiscal Year '12 and '13 and you know, it takes that much time to get through.

Where we're thinking isn't a couple of months enough? So I mean I don't have a particular time frame, but I just feel like, and maybe the log jam is that you're having different Services to deal with, and therefore that each one of them has to go up and down their chains so they can talk about it.
But I guess what I'm saying is, might the Joint Services Committee be helped and be able to push things quicker if they had a core executive staff director who kept putting out schedules and meetings and proposals, and doesn't get affected by their other job, which admittedly might have a much higher priority issue going on in the Defense Department? They say I have to put this aside. This other thing is way higher priority.

So I guess I'm asking whether that's something we should try and facilitate for the future.

COL. PIGOTT: Okay. Well, I appreciate the recommendation and the comments, and I want to assure the Panel that there's no log jam up there, period. I'm going to come back to you all with a detailed answer and I'm going to demonstrate that factually for you, and Madam Chair, I'd like a couple of weeks to do that.

The other thing that I would like to say is we're not looking for help. We're very
grateful that Congress directed us to establish billets for Victims' Legal Counsel and we've done that. So we have the -- and we have everything that we need and it would be disingenuous for me to be speaking to you as Chairman of this committee to suggest that I'm up here looking for additional judge advocates.

I can't speak for the TJAGs or the SJ or the Commandant, but we have what we need, and it is because they are so bright and so sharp that we're able to get through this. But I want to reiterate there's no log jam, Mr. Stone, period.

MR. STONE: Thank you. Then my other question goes again a little bit more substantively to what the Joint Services Committee does that I haven't understood. This Panel sent me early on, like more than two years ago to the Charlottesville, Virginia, training, whole week training for the special victims' counsel where we heard lots of speakers.

One of the things that came up time
and time again, that it struck me as odd that the Manual for Courts-Martial doesn't deal with, and still to this day doesn't, is that we had speakers from every Service telling me that when they got into a court-martial, they didn't know where they were supposed to sit, stand. They didn't have a table for them.

Some of them would go sit in what was the equivalent of the members box, like a jury box. Others were not even in front of the bar of the court. They had military judges who didn't know whether or not to serve them with pleadings and some did and some didn't. They had military judges who didn't know whether or not they should be hearing victims' counsel because they didn't have guidance, and they themselves may have just rotated into that position.

So they didn't have a lot of experience in it, and these were all -- I would have called them housekeeping rules, and they varied not only by judge but by Service. I was sort of saying well, I assume some of that
housekeeping stuff is exactly what a manual will, you know, work out.

Am I wrong? Isn't that something that should be in a Manual for Courts-Martial, so people know when they can file a pleading, when they're going to get a copy of a pleading, how they get a copy of a pleading, where they stand or sit? I mean it seems to me those aren't substantive so much as they go to, in Article 6b, that victim's rights be treated with fairness and dignity, and their representatives were at sea.

I still don't see anything in the Manual for Courts-Martial that talks about those procedural housekeeping kinds of things.

COL. PIGOTT: So the practice, the victims' legal practice is evolving, and there are growing pains that are associated with it. I can't speak for the other Services, but I know the Marine Corps, the Navy has orders implementing how this process is going to work. So I would ask the Panel for patience as this process evolves.
I had mentioned that Barney and Mr. Leeling commented about how well things were going out west, and how pleased victims' legal counsel were, actually volunteering for these positions and they continue staying on there. But I'd also like to take a closer look at it and come back to you on it.

So if there's some specifics, we'll get up with Mr. Sullivan and OGC's office. We'll take a look at it and we'll come back.

CHAIR HOLTZMAN: Just a quick question, because our next subject is going to be reviewing the issue of rights on appeal with respect to victims of sexual assault. Have you considered any issues with regard to that?

COL. PIGOTT: Ma'am, I'm going to come back to you with an answer on that. So it's -- we're looking at sealing records currently and beyond that, that's all I'm aware of. So I'd have to come back with -- come back.

CHAIR HOLTZMAN: Any other questions?

MR. STONE: Just if the judges, for
example, at the appellate level, some of whom testified here the last couple of meetings related to this, were telling us how time-consuming it is and they barely have enough time to read pleadings and some of them don't think they have time to read additional pleadings, if they needed to adjust the number of people who are appointed or schedules or whatever, is that something that Joint Services Committee would look at, or is that the individual Services, to make sure that the judges have the time to read victims' pleadings, is something that the Joint Services Committee would get into or not?

COL. PIGOTT: Sir, the premise, the assumption is that the judges, you're hearing that the judges doesn't have enough time to work?

MR. STONE: That's what they were telling us.

COL. PIGOTT: Personally, I'm surprised. I've got to look at it. Never served as a judge. I'm surprised by the comment and question, but I'll take a look at it.
CHAIR HOLTZMAN: Since there are no further questions, I want to thank you very much Colonel, Major, for your time and your input, and we look forward to receiving the answers you've promised us. Thanks very much.

COL. PIGOTT: Thank you very much.

CHAIR HOLTZMAN: We'll take a --

COL. PIGOTT: Again, Happy Thanksgiving in advance.

CHAIR HOLTZMAN: Happy Thanksgiving to both of you too, and we'll take a five minute break.

(Whereupon, the above-entitled matter went off the record at 10:04 a.m. and resumed at 10:23 a.m.)

CHAIR HOLTZMAN: I think our next subject is to deliberate on victims' appellate rights. And I think the staff has been kind enough to help us break down these issues one by one.

CPT. TIDESWELL: Yes, ma'am. At Tab 7.
CHAIR HOLTZMAN: Tab 7. And we have quite a few questions to answer. The first one is, what do you think is the -- it's Tab 7, but we're at page 7, isn't that right? Victim participation on direct appeal. That's the first issue and the first question.

I guess the first question is, victim participation on direct appeal, should victims be allowed to participate on direct appeal? Why don't we just start the discussion on that?

CPT. TIDESWELL: Ma'am, if you don't mind --

CHAIR HOLTZMAN: Oh, go ahead.

CPT. TIDESWELL: -- would it be okay if I, just for the record, introduced --

CHAIR HOLTZMAN: Oh, yes, sure.

CPT. TIDESWELL: -- our Panel?

CHAIR HOLTZMAN: Sorry. Yes.

CPT. TIDESWELL: I know you've permitted us as a staff to sort of break with what I'll call JPP deliberation tradition, and so we are fortunate enough to have several members
from the armed forces who are specialists in the appellate world. And if you don't mind, Colonel William Orr, U.S. Air Force retired, is the former Chief Judge of the U.S. Air Force Court of Criminal Appeals; Captain Andrew House, U.S. Navy, is the Director of the Navy-Marine Corps Appellate Defense Division; Lieutenant Colonel Mary Catherine Vergona, U.S. Army, is the Chief, Policy Branch, Office of the Judge Advocate General, Criminal Law Division; Lieutenant Colonel Angela Wissman, United States Marine Corps Reserve, is the Deputy Officer in Charge of the Victims' Legal Counsel organization; and Mr. McCleary is the Senior Military Justice Counsel for the United States Coast Guard.

CHAIR HOLTZMAN: Thank you. Welcome to all of you. Please forgive my inexcusable oversight in not introducing you immediately, and we really appreciate your willingness to help us think through these issues.

So we're at Issue 1, which is, should victims be allowed to participate on direct
appeal? And I think there are -- staff has outlined the testimony received in favor and the testimony we have received in opposition. Should we begin to discuss this? Anybody support allowing victims to participate on direct appeal? Need a minute to read it?

Yes, Mr. Stone.

MR. STONE: Yes. When a victim's right is at issue, either because it has been granted below and it's now one of the issues on appeal, or it has been denied below and it is one of the issues on appeal, then because their issue was a legal issue before the court below and that issue was on appeal, then that party has to have a right to defend their position on appeal, so that the same level of participation that they had below they get on appeal, and the court is benefited by hearing the party who has a real interest in the right that was granted or not granted say their piece.

At the most basic level, if the courts are going to allow amicus briefs to cover that,
then this issue about whether it is burdensome or not fair carries no weight with me, because whether it's a direct brief or an amicus brief it is still going to be something that the people are going to read and want to answer.

But, more importantly, the point about victims' consideration and dignity is that they know that when their right was at stake they got a chance to say their piece. And on appeal, the work of writing that brief is going to be done by the special victims' counsel, and reading an extra pleading isn't going to take anything like the time it takes to write it. And arguing it for 10 or 20 minutes, if there is an argument -- and there often isn't -- is also not going to be a tremendous incursion on the system.

So I think in order for victims to feel like they've been dealt with fairly, when their issues are raised on appeal -- and, typically, that's only going to happen when they were raised below, either because they prevailed or they didn't prevail -- when their issues are
raised, they should have a right to file a pleading. It is much less time-consuming and resource-intensive than it is at the trial level where the judge and the victim's counsel can go on for an hour or say, "Well, do you have any testimony about it?" At the appellate level, it is very cut and dry.

So I really don't see how there can be fairness for a victim unless you're going to let them either defend the win they had below or -- if they wish to, or complain about the right that was deprived of them.

And there may well be times -- this doesn't come up often. If you look across the country, I'd be surprised if three or five out of 100 cases a victim even wants to participate on appeal, because their issues are typically not the dispositive ones. And of those five times, I'll bet some of those times they are happy with what the prosecution did. It totally satisfies them.

They don't feel like they have
anything they need to add. But where they do have something to add, in a few cases where it comes up on appeal, I don't see how, as a matter of due process or fairness to victims, you're going to be consistent with Article 6b if you don't allow them to file a pleading.

CHAIR HOLTZMAN: By the way, let me just -- just a matter of clarification of procedure. This question doesn't implicate -- I mean, assume we answered this in the affirmative, we would still have to answer the questions of which victims would be allowed to participate, and the mechanism used to allow, and so forth.

So this doesn't answer all the questions. So I just want to point that out, just by saying this we haven't resolved the other questions.

But, Judge Jones, you wanted to say something?

HON. JONES: In a situation where you're only going to be on appeal when the defendant loses and the government wins, right,
in a situation where government wins, defendant loses, you're on appeal, but in -- but now to the subset, the victim's information was not suppressed, so it came in, okay, to the trial, then I don't know what interest the victim would have on appeal.

The victim might want to say, "That was a wrong ruling," but -- do you see what I'm saying?

MR. STONE: Oh, yes. Yes, I do.

HON. JONES: So it seems to me in that instance it is -- first, you know, it's not -- it's not a scenario that is going to occur, I don't think. What would be the victim's interest be in that situation?

MR. STONE: It's hard for me to want to encompass all hypotheticals. But let's say it was a victim's prior history of being involved in other sexual escapades. Last time we took an example of, oh, this victim was in, I don't know, a whole bunch of orgies in the past and got disciplined for it, let's say.
HON. JONES: Right, right.

MR. STONE: And let's say that it came in, and it seems to me if that was going to be an issue on appeal it would have to be the defense complaining that it shouldn't have come in.

HON. JONES: Right. So why --

MR. STONE: It's always possible --

HON. JONES: I'm saying at that stage I don't know why -- what the victim would --

MR. STONE: I don't either, but it would be up to their counsel and them to say whether or not, you know, did they have anything to say, and, you know, what -- is it persuasive? I mean, it's hard to prejudge in each situation what a victim wants to say or how long they want to say it. And often they want to say it just because they can't get over the offense and move on with their lives unless they've said it.

It may well be something that all the judges and everybody in the courtroom already knows, but they feel the need to briefly say it. And in an appellate pleading, if they want to
file another pleading, you know, what you're positing is a situation where it's not going to make much difference. That's true. I think that's absolutely true.

It won't always -- and maybe in a majority of cases the judges will already have thought of those considerations, but that's the point, just like the defense counsel is going to raise arguments that the appellate court may see even before they were raised. But if you're going to give the victims the dignity to have their say, then if they want to say something they should have a right to file.

And there's no question in my mind there's lots of times when a victim's counsel says to the victim, you know, "We'd do better to sit this out, both at the trial level and the appellate level. I don't think you want to raise this because," and I have been in that situation, and some of my victims say, "Oh, you're right, I hadn't thought of that. Yeah, let's not raise it."
So, I mean, there is no question that that can happen. But it seems to me that doesn't even become a discussion unless they know, just like in the trial court, it's -- if it was an issue in the trial court involving this victim and that issue is up on appeal, then potentially they have an interest in it. What they will say or whether they will want to say anything, that goes to them and their counsel at that time.

HON. JONES: Yes. And the other scenario is, of course, the government won and they also won on the suppression issue, so the information was never disclosed. And they get up on appeal -- and I guess what you're saying is the victim should be able to put their two cents in, if it's an issue at all, in the appeal. Period. No matter the posture.

MR. STONE: Well, see, that's a much easier one. The government, at the trial level, said, "This information about the victim's background is not relevant, it shouldn't come in," and it doesn't come in. Now, on appeal, the
appellate panel may say, "Well, that was a very close decision, and, frankly, we think it would have been a fair decision if it came in."

And sometimes the victim -- the government counsel will say, "Well, that's right. We don't feel that strongly about it. We didn't feel that strongly below. We took the position, but we didn't feel that strongly." And basically they concede that maybe it should have come in, and now they are arguing it was a harmless error and they could well lose it and have a remand.

And the victim may want to say, "Whoa, it wasn't an error at all." So the victim's position about whether or not it should be disclosed if there is a remand is often going to be different than the government who may feel they had more than enough evidence and they could easily retry the case.

HON. JONES: Well, I mean, I think that sort of is an example of a problem I have, maybe just because I grew up in a different system. I think there can only -- there really
should only be two parties. We have talked about this before. And I think the government's interest is to make the decisions they think they must make in order to obtain justice in this case and obtain a conviction against someone that has been charged of a crime.

And so I just -- you know, kneejerk reaction -- worry about having a third voice in the appeals court in precisely that type of situation.

MR. STONE: You see, I think that --

HON. JONES: Also, it is not as though the victim isn't heard beyond the trial court. They have mandamus, and that goes to the appeals court, and there is a decision there. So there is already an appellate response to the victim's objection. So I don't -- I just worry about the third voice in what is a two-party situation.

MR. STONE: Okay. Well, I just --

HON. JONES: And I worry about -- I worry about the government's right to decide what is the best course for this case.
MR. STONE: You're right. We have a philosophical disagreement. The Congress has changed 18 USC 3771 last year to make clear that the word "mandamus" does not have the traditional mandamus. It has been changed in the federal statute, and they have a right -- victims have a right to go up on appeal, as an ordinary appeal, not as a mandamus, with ordinary appellate --

HON. JONES: No, no. Yes. No, no, no.

MR. STONE: -- rules applying.

HON. JONES: Right. I'm not saying --

MR. STONE: And that interlocutory --

HON. JONES: -- they do have that right.

MR. STONE: Right. But that interlocutory appeal --

HON. JONES: Whether it's called a mandamus or not, it goes up to the appellate court.

MR. STONE: Exactly.

HON. JONES: And an appellate panel
makes a decision on that victim's appeal.

  MR. STONE:  But that interlocutory appeal is much more disruptive than a post-conviction appeal, and I don't think --

  HON. JONES:  Well, but that's --

  MR. STONE:  -- we would want to encourage interlocutory appeals by saying that's the only appellate remedy.

  HON. JONES:  A victim certainly wants to make the interlocutory appeal, and we are giving them that right.

  MR. STONE:  I know, and a lot --

  HON. JONES:  Because otherwise they are not going to be able to stop something when it matters. So I'm just saying the victim has a tool right now and --

  MR. STONE:  They don't in the scenario you just gave. They won below. They are only about to lose on the appellate level, and it is going to go back for a new trial. So all I'm saying is that it -- that same right that you would give them if they lost below they should
have if they won below.

And since nobody that we heard come before us said that they shouldn't be allowed to file an amicus brief, that that seems to be an available alternative, it seems to me that concedes that there is going to be another voice on the appeal. I mean, I think Article 6b and, in the civilian setting, 3771, have put us past the -- just like in the trial court, the victim now has a right to counsel and a right to be heard by the judge as a third party.

You can't give somebody that right and either grant their rights or deny their rights at the trial level, and then say, "Oh, but it stops there." And you can see, on an interlocutory basis, they have it. So it seems to me all we're doing is recognizing that due process should give them the same leave at the appellate level.

CHAIR HOLTZMAN: Can I just ask a question here? What is the system right now with regard to federal criminal trials? How does it work? You have the interlocutory appeal on
questions such as privilege and confidentiality of records. What happens in those cases?

MR. STONE: Well, it starts with standing at the district court level. Victim's counsel, under 3771, have standing in a district court. Even though there is a prosecution and defense counsel present, they have independent standing to argue about those victim's issues you mentioned -- confidentiality, privileges, et cetera.

And if they lose that, and they believe that the judge has not followed the law, they have the right to try and get an interlocutory appeal under ordinary appellate rules of appeal.

CHAIR HOLTZMAN: Okay. And the same situation applies in the military; is that correct?

HON. JONES: I believe so.

CHAIR HOLTZMAN: Okay.

HON. JONES: Yes.

CHAIR HOLTZMAN: Now, so how are we
going -- what is the proposal in terms of expanding that right? What we're saying here is that now after the -- whatever interlocutory appeals have or haven't been taken, and there is a judgment or a conviction below, now the proposal is that the victim be able to participate, even if the victim -- even if the victim's position was sustained below, the victim still would have a right to appeal on -- if the government is appealing, and maybe --

MR. STONE: No, the defense would.

CHAIR HOLTZMAN: Whoever is appealing, whoever is appealing, for whatever reasons, whatever, or cross-appeals, or whatever, that the victim would also have the right to participate in that appeal process separately by raising the arguments, because maybe the government doesn't raise the argument completely or maybe the victim is not satisfied with the way the government has raised the argument, maybe the -- or whatever reason.

So you're saying that that should
happen. My question to you is, what happens now in the civilian world in terms of the federal criminal justice system? Does the victim right now, in the federal criminal justice system, get the right, after conviction, to participate in the appellate -- direct appellate process.

MR. STONE: There have been a few cases where the victim has moved to leave to intervene. There is a 7th Circuit case that comments on it. Federally, I don't think that the issue is resolved, but we heard Meg Garvin say that -- and it's in the materials from last time -- that there is somewhere between six and eight states that allow victim participation, and then there's a lot of states where it's unsettled.

I don't think there are states that bar it -- I don't think they've addressed it that way -- but that there are six or eight that allow it. I think that your analysis has to be sort of parsed out in the sense that where the victims lose, there is an appellate process for them.
That's the interlocutory process.

But where they win below, the question is, do they get to defend that win if the parties don't want to defend it on appeal? That's the issue. That couldn't have been defended by them on an interlocutory basis because they won below.

The material was considered privileged, and it didn't come in. And now, on appeal, both sides are saying, "Well, maybe that privilege decision was wrong, but it's harmless anyway." And the argument is only whether it's harmless and it's going to get a new trial. And they're saying, "It wasn't harmless, and it wasn't wrong."

CHAIR HOLTZMAN: Right. But that's not my question. My question is, what I'm trying to get at here, is not only the substance of what would happen, but where the military would be positioning itself vis-à-vis the rest of our criminal justice system in the United States.

That's all -- that's my only point here, which is, you know, how far are we going to
be differentiating, how far is the military going
to be differentiating itself from the rest of the
criminal justice system in the United States?

That doesn't mean that it's a good
thing or a bad thing. I'm not putting any value
judgment. I just want to know -- that's what I'm
trying to establish for myself. I know it's --
that's my question.

HON. JONES: I think Mr. Stone and I
agree. It is not done in the federal system.
Victims are not being given leave to intervene,
and they are not arguing in the federal courts.
I mean, again, it may be a good or a bad thing,
but right now --

MR. STONE: But part of the reason the
federal system is, you could say, not facing this
issue and six or eight states are, is because
like the military, which provides special
victim's counsel, only six or eight states
routinely provide some mechanism for victims to
get counsel.

So in the vast majority of cases, both
in federal court and in most of the states, the victims don't have counsel. And having been victimized, it doesn't even occur to most of them to go spend thousands of dollars to go, on top of the injury they suffered, and hire counsel to fight these issues out.

So that's why it only has come up in a handful of states, because that handful of states and Military Services make a victim's counsel available at the trial level. That's why it is -- it is not decided in multiple places.

CHAIR HOLTZMAN: So going to your point, Mr. Stone, why isn't the right of intervention on appeal a satisfactory solution?

MR. STONE: Okay. I think the answer to that is what we've seen and heard from the prior experts here, and also federally why the statute had to be changed from -- saying the federal statute had to be changed from mandamus to the rules of ordinary appeal, because judges are overburdened and they are used to a history.

As Judge Jones says, they are all
brought up in a system of two parties before them, and their reaction it seems to me is, well, we've got two parties who are adversarial. They will take care of it. We don't need more, another brief here, even if it's not being argued.

And so the result is that's what they found in the federal system, and they had to change the standard, and that's what we heard in the military, that they have -- they file writs, extraordinary writs, to bring the issues up, and the writs are denied without explanation. That's the problem, that they are denied without explanation.

HON. JONES: Well, I mean, the experience I have had, even when it used to be called mandamus -- and I'm not talking about sexual assault now. I'm talking about an emergency motion made by, let's say, the defendant himself, but it could be a third party. Those go to the 2nd Circuit, and they are decided -- they try to decide them in three days, and
they come back and sometimes there is an opinion.

I'm just saying it's not -- there is a procedure to halt a trial, and the circuit will do it if they get that emergency petition, and they will be quick because they know they don't want trials to --

MR. STONE: Well, that also highlights, I might add, a difference between the military and the federal civilian process. In the federal civilian process, typically the victim has control over their own privileged records. And if they don't want to turn them over, they play the card of, I'm not turning them over. You want to hold me in contempt, you can. I'm not turning them over, and I'll take up the contempt. I'll litigate it that way.

In the military, there is at least two reasons that doesn't work. The first is that a lot of times those psychological records are in the possession of -- they're not in the possession of the victim, they're in the possession of a military officer in a military
hospital, and the victim can't say, "Don't turn over the records." They can only argue about whether they are admissible because they don't have the ability to stop them from being turned over because it's a much more all-encompassing system.

So they can't go that contempt route.

And the second thing --

HON. JONES: I'm confused.

MR. STONE: -- which is --

HON. JONES: I thought that --

MR. STONE: -- that they didn't want to go the contempt route -- I'll just finish this thought -- is because that is going to be in their record forever. And they like the military and they want to stay there, so to them it matters if they are going to have a contempt citation against them in their military record.

In civilian practice, how many people care if a federal judge, you know, wanted to hold them in contempt over some privileged record? It is not going to affect their career. So the
military has -- it's an in-house -- it's a much more closed system, and so a more regularized way for them to challenge what they won below -- not what they lost, what they won -- makes some sense.

You can limit the number of pages that they file. You can limit the amount of time -- the cases aren't argued. I mean, you can limit that if you want by rule. That's fine. But they've got to have some way -- I mean, if you want to say the pages are -- that the victim on appeal only gets the same number of pages they would if they filed a mandamus petition, that's fine, which typically is half of what a party gets, because they have a more limited scope that they are going to.

But it gives them the right to be sure what -- that, a) they can't go into contempt, they didn't own those records; and b) they don't want it on their record. So it regularizes how they can challenge what they want, defend what they want is typically what it is.
HON. JONES: I'm not sure I quite understand the distinction you're making. Whether it's civilian or military, the victim is concerned about the disclosure, the public disclosure of these records. They have the same right now, correct, to go for an interlocutory appeal? Even though it used to be called a mandamus.

MR. STONE: That's where they have lost, where they have lost. But when they have won --

HON. JONES: All right. So you're saying that, when they win, we can't trust the government who prosecuted the case to want to continue to get that affirmed.

MR. STONE: It isn't trust. They have different interests. The prosecution is looking at all of their cases and maybe saying, "Well, for the greater good here, if they have to give up these records, we think it's worth it to go forward with the case."

HON. JONES: To go back and retry it.
MR. STONE: To retry it and turn this over.

HON. JONES: And admit error.

MR. STONE: And the victim -- and I have had victims say to me, "If you're going to turn my records over, I'm going to back out of the case altogether." You know, 10 years ago, and this is just a hypothetical, "Ten years ago when I was young and stupid, you know, I tried to commit suicide. I don't want everybody knowing that, that when I was 17 years old I tried to commit suicide. They will all look at me differently. I don't want them knowing it. If they're going to know that, I'm going to tell the prosecutor I am going to be -- I'm not going to testify at trial."

So, I mean, they -- they can have a different interest, whereas the prosecutor is trying to maintain, you know, the integrity of behavior, both civilian and in the military, so they may say, "So what? It's 10 years ago." But the victims feel very differently.
HON. JONES: I think it's -- what you're talking about is a situation where the prosecutor decides, "Okay. I'll take -- I will agree that there was error and go back down and retry the case."

MR. STONE: Right.

HON. JONES: How often is that going to happen? I think you are raising an issue that is going to be so -- you know, an insignificant number of times, if ever. Prosecutors go into the appeals court, and if they've won below they are going to keep winning, or try to win, on the same arguments they made. They are not going to confess error. I mean, I --

MR. STONE: What you just told me is that --

HON. JONES: -- I can't even imagine they would.

MR. STONE: Right. So maybe the victim's brief is only going to be filed in one out of 1,000 cases. But I'm saying the fact that they know they could is what allows victims to
feel that their rights are being honored in the
system.

And sometimes, by knowing that a
victim could file a brief, it means the
prosecutor is going to talk to the victim's
counsel, and they may have a discussion that
causes the prosecutor to take a little tougher
position on that, which makes the victim's
counsel say to the victim, "We don't need to file
because he agrees with us now. He now has a
reason. He sees us as a participant."

HON. JONES: Well, I --

MR. STONE: That's why I said at the
outset, this isn't going to come up often, but it
is going to come up. It does come up.

HON. JONES: But we are creating a
system where it has become -- it will be routine.
That's what I am thinking. Every victim now will
also have the right to appeal, and they are going
to have victim's appellate legal counsel.

And so we're creating a new, you know,
system, and maybe -- I think I'm right that it
will come up zero to no times where they either
haven't had a chance to get an appellate decision
in an interlocutory situation or, as you say, the
government has won, so they haven't lost their
privacy interest.

And you are hypothesizing a situation
where the government is going to decide, "I'm not
going to fight for this. I am going to confess
error and retry the case," and, you know, I just
don't think it's going to happen. But for that
one instance where it might happen, we are
creating an entire new set of machinery, if you
will, in the appellate courts. I mean --

MR. STONE: I don't think we are
creating a new set. We're saying, if you lost
below, you have an interlocutory remedy. If you
won below, you --

HON. JONES: You have a right to
appeal.

MR. STONE: -- you have a right to
defend your win, if you want to, if it makes
sense, if it's even an issue on appeal and
CHAIR HOLTZMAN: Mr. Taylor, you have been sitting on the sidelines here. Why don't you help enlighten us?

MR. TAYLOR: Based on my lack of experience in litigation, I should be on the sidelines. But I have enjoyed the discussion, and my main concern about this particular issue I think Judge Jones has just voiced, and that is that when a decision is adverse to a victim, at the trial level there should be an immediate means for that individual to have it reviewed by someone else.

And it just seems to me that if we are fairly confident that that is going to happen almost all the time, then we -- this is a solution in search of a problem, because otherwise I really don't know why we would create a system that is so far apart from those that we try to model ourselves after; that is, the federal criminal system.

So that's kind of where I am on this
right now. But I do think there are other aspects to this that we will address in the later questions which have to do with what happens if a criminal court of appeals at the Service level denies a *writ of mandamus* and then the question becomes, well, is CAAF going to look at it?

I mean, that is more concerning to me, that the appeal -- the interlocutory appeal gets shut off at a level where, in my opinion, there is right good reason to make it go higher, to the court of appeals.

MR. STONE: Maybe I can address what I think was in there to explain why this is somewhat like the first example.

MR. TAYLOR: Okay.

MR. STONE: If the defendant -- I'm sorry. If the victim loses their right of privacy in their psychological records, in a typical case, there is the interlocutory appeal to address it. If they win, okay? But then they lose it on appeal, and it comes back for a new trial. There is already a dispositive ruling.
No trial judge is going to say, "Wait. You
didn't get to argue this at the court of appeals.
Now you want to tell me it's wrong. But I have a
court of appeals ruling, and I have to follow
that. I'm not even going to look at it again.
It's the law of the case."

They have lost it entirely. They
never get to argue it, because they want it -- or
it may not have even been hotly contested the
first time, and it only got reversed without them
having any input, and that's over. And I can't
imagine a court then taking a second appeal over
an issue they just decided because now, on the
remand, the victim says, "I never got to say two
words about this."

I mean, that's the scenario that you
are positing. If they don't get to say something
the first time to defend it, it's going to be
over for them.

CHAIR HOLTZMAN: Mr. Taylor?

MR. TAYLOR: But if I understood some
of the testimony we have heard in the last two
sessions, there would be an option, assuming there is notice that this is an appellate issue, for the victim -- victim's counsel to file an amicus brief at that point, so that they would have an opportunity to be heard. Am I not correct that that -- that that --

MR. STONE: Well, they have to ask permission for an amicus brief, and that is part of the problem, that this permission question, it's not routine. They have not been getting permission -- whether it's mandamus, whether it's amicus briefs, they have not been getting permission to file.

And I myself am just -- in a civilian setting, I just had a court deny permission to file. You know, do I know why? No. They didn't write an opinion. But once you have to go with permission, it means the person whose right is at stake does not have one chance to litigate it. It is going to be over for them.

CHAIR HOLTZMAN: Just to clarify that, as a factual matter, is that the testimony we
had? I don't recall that amicus briefs were being denied. Now that may be my faulty memory.

CPT. TIDESWELL: No, I believe we heard testimony that -- I think one of the judges said they always read all of the findings that --

CHAIR HOLTZMAN: Okay. So I just want to clarify that issue. I mean, we have no testimony, is that correct, that amicus briefs are not being permitted, that a request to file an amicus brief by a victim in a sexual assault case is being denied? We have no testimony that that is happening.

CPT. TIDESWELL: Not that I'm aware of. No, ma'am.

CHAIR HOLTZMAN: I mean, do we have -- I mean, we have experts here. Great.

COL. ORR: I'm the appellate court guy.

CHAIR HOLTZMAN: Okay.

COL. ORR: I can tell you that they are always read. And if they are denied, it is not necessarily -- it is generally -- you almost,
de facto, decide whether or not it is going to be case dispositive. So -- or a factor in the case before you deny it.

And they do -- routinely in the Air Force, they actually do write a reason why. It's not just a --

CHAIR HOLTZMAN: So, in other words, what you're saying is that there might be a denial --

COL. ORR: Yes.

CHAIR HOLTZMAN: -- of leave to file an amicus brief.

COL. ORR: Yes.

CHAIR HOLTZMAN: But that is only after having read the amicus brief?

COL. ORR: Absolutely.

CHAIR HOLTZMAN: And decided that the point that is being raised is not relevant or not --

COL. ORR: Or is already captured in the government's brief.

CHAIR HOLTZMAN: Okay. And what about
the other Services?

COL. ORR: I can only speak to the Air Force, but I know, just from talking to the other judges, we all read them. And the benefit of the amicus brief is is it comes right to the top. If you file without it being a mandamus in the ordinary course of business, it doesn't have the same priority as an amicus brief.

CHAIR HOLTZMAN: Okay. Sorry. Judge Jones, I was interrupting you.

HON. JONES: I mean, I think in a -- you go to a trial or a pre-trial stage, and what happens is the defense wants to put in evidence, or -- which will disclose and violate the privacy interests of the witness, the victim, right?

The victim is there. The victim has appellate counsel, and at that very stage is certainly on notice of what the issue is, and the counsel files briefs, has standing before the trial court, and the -- and if they lose, that's when they get to do their interlocutory appeal.

So I don't think it's a situation
where they're not aware of the issue or haven't had a chance to -- to put their position in. I thought you were saying it could just happen, and now all of a sudden they would have been denied any chance to put their two cents in.

MR. STONE: That's right. In other words, it may have not been hotly litigated below. It may be that defense counsel subpoenaed the records, the government objected, and the defense counsel said, "Well, since I'm not getting to see them, I note my objection, Judge." Enough to raise it on appeal but not enough to have a whole hearing and have the victim say their piece and why they think it is or isn't relevant, why it is or isn't, for example, a valid privilege, that it is just confidential, it's not a privilege. I mean, that happens all the time. And most of the time, you know --

HON. JONES: You know, it's -- I'm sorry, then. It's just not my experience that way, but --

MR. STONE: I understand that.
HON. JONES: Yes.

LT. COL. WISSMAN: I've got a note from Air Force VLC that they have been denied --

HON. JONES: I'm sorry. I can't hear you.

LT. COL. WISSMAN: I have been -- I've got a note from Air Force victims' counsel that they have been denied a right to file amicus at CAAF and at the Air Force Criminal Courts of Appeals. So that has happened in their Service.

HON. JONES: So we have a conflict in the testimony?

COL. ORR: I'm not saying they're not denied, but I think you're reading too much into why they were denied. If the -- if you're looking at an amicus brief, and the reason that the Air Force court has said you have to file an amicus brief, because we only have three -- two options.

It's either the appellant or the government, when it comes up, or then there is everybody else. There is no, really, third
option. So the only way you can take the
document is by forms of amicus, because we only
have -- the construct that we have at this time
only has two options -- appellant, government --
or the appellate and the government. Those are it.

If anyone else wants to address the
court, the only option left is through the amicus
brief. And that's why they are taking it that
way. But they take them, they consider them, and
they decide, is this something that is not
already covered? Is the amicus brief helpful?

MR. STONE: I don't understand how you
deal with people who are ordinary witnesses who
decide not to testify and get thrown in the brig.
Don't they have an appeal?

COL. ORR: Ordinary witnesses that --

MR. STONE: Yes. Who decide that in
a court-martial that they are not going to
testify because they don't like what's going to
come out that they are going to have to testify
to.
HON. JONES: So if they get held in contempt and kept in the brig, I'm assuming they have appellate rights.

MR. STONE: Well, they didn't start out as --

HON. JONES: But that's because they're in jail.

MR. STONE: Well, but they start out as witnesses. They're not a typical defendant. I mean, there are always extra parties --

HON. JONES: But that's their own --

MR. STONE: -- based on people who are witnesses.

MS. FRIED: In the military, though, if you are held in contempt, then you are violating an order, a lawful order to participate, in which case now you have committed a criminal offense, and you will be tried separately for the offense you have committed, not as far as the court-martial of the other person for which you didn't want to testify. That's just a point of clarification.
There is no such thing as contempt per se in the military system. You failed to follow a lawful order, and now you've committed a criminal offense, and you will be adjudicated separately and apart from the other parties.

MR. STONE: Right. So --

MS. FRIED: Your own offense.

MR. STONE: Right. It has nothing to do with the original crime. It's like a crime upon the court, and so they have converted it into something they used to. But we are trying to work out on behalf of victims something that the military is not used to.

I mean, if -- I'll tell you what I find upsetting about what -- you know, what we're discussing here, that, well, we're going to read the amicus brief, and if we don't think it's relevant we will deny it, even if we say so.

The victim wants to know that they have been heard. I really don't understand why a court would read the brief and then say, "And we're not allowing it to be filed." You're not
going to allow the amicus party to argue anyway. If that comes from a victim, that is precisely the lack of respect that the victim's new statutory rights are meant to contradict, that you read the brief and you say, "Well, we don't think we have to allow the brief, because we don't think it's on the right issues."

The victim just wants to know they've been heard. They don't have to win. They don't have to, at least in military appellate courts, argue. They just want to know that someone is seeing what they had to say. And when you say, "We're not allowing the brief to be filed," they assume it means you're -- just like when you instruct a jury to ignore something, they're being ignored. And that's really one of the key things here. The victims continue to get ignored.

And just because we're recognizing them at the trial court level doesn't mean, especially it seems offensive to me, that they then can be ignored at the appellate level.
There is no more investment of resources if you're going to read the brief anyway.

COL. ORR: I cite you to the Kastenberg case, LRM-Kastenberg. This is exactly my point. That was a victim who wanted to be heard, and the judge said no. It went to the appellate court, they were heard, and it went to CAAF and they were heard there.

MR. STONE: Because the writ process worked there.

COL. ORR: Yes.

MR. STONE: But the writ process, we heard from all the Services, is not working well. Maybe only a few of the mandamuses came up and have a problem, but the writ process is definitely not working well. It happened -- that case came up because it was one of the few we were extraordinarily lucky that they entertained the writ.

COL. ORR: As an appellate judge, we got mandamus all the time.

MR. STONE: But now we have to --
COL. ORR: They are not always granted as well. They're just not.

MR. STONE: You know, but the other response to that is, LRM is no longer good law. The CAAF said it isn't, that they never should have taken the case. That's what EV holds. That was a mistake. I mean, that discourages appellate judges from taking writs. So, I mean, the CAAF can't look at any one case as the way it did at LRM.

HON. JONES: Maybe since we have our experts here it would be good to hear exactly what you think the law is right now with respect to when a victim witness is -- wants to go to the appellate court because of an adverse decision with respect to privacy interest.

I was under the impression that they have the ability to do that, whether you call it a mandamus or an ordinary appeal to the next military appellate court.

COL. ORR: The current state of the law is they will be heard, and their mandamus
HON. JONES: They will be heard and --

COL. ORR: They can be heard -- under

a mandamus, under Article 6b, they will be heard.

Period. Not even in dispute.

MR. McCLEARY: At the moment, ma'am, there is a bit of an uncertainty that was created by EV v. Martinez that in terms of whether or not a victim can bring the matter up to the Court of Appeals for the Armed Forces, that arguably is grounded in, you know, what the basis for the victim intervention and the appeal -- or the application for a writ is.

EV v. Martinez talked about the writ being grounded in Article 6b. Arguably, if the reason that the victim was bringing forward for the right that they are seeking to pursue or protect is linked directly to, for example, a particular rule of evidence, I don't know that EV v. Martinez would preclude that.

They were basically pointing out that the language in 6b only states that if you're
applying for a writ of mandamus because of the language in 6b that, since it doesn't reference CAAF, we can't hear it. It's not included within our jurisdiction.

CHAIR HOLTZMAN: So are you saying, in essence, that there are kind of two issues here. One is -- forgive me for a second, Mr. Stone. One issue is that the right of a victim witness to get mandamus if 412 has been -- if he or she believes 412 is being misinterpreted -- misinterpreted or 513 is being misinterpreted, is squishy, that we don't -- you know, there could be circumstances in which that would be denied even -- even though there was a legitimate -- I mean, the court wouldn't hear it, or they would - - I mean, what is the ambiguity here that you're talking about now?

That every case doesn't get solved in favor of the victim? Or is it that there are standards for review, for even taking the matter, that are problematic? I'm trying to understand what is going on here?
Because, I mean, I think we are trying to grapple with two things. One is the point about mandamus itself, is that working properly so that the interlocutory appeal aspect is being handled properly? And then there is a separate question, which Mr. Stone very properly addressed, which is what happens aside from the interlocutory appeal, and should there be this other right of appeal?

So since you raised the question about mandamus, maybe you could just raise that -- we could put that aside for the moment, but that's a very serious issue if you're saying it's not working.

MR. McCLEARY: I can give you what I understand right now, and we -- the Coast Guard had to litigate this relatively recently in front of CAAF on basically the flip side of Martinez. We had a Coast Guard Court of Criminal Appeals writ that was granted based on the victim's application, which then the defendant appealed to CAAF.
And CAAF initially granted the accused's request to review the substantive issue as to whether or not the writ should have been granted, and then specified to the government, the victim's counsel, and then the accused's counsel, address the issue of whether or not they have jurisdiction to hear this. We are basically building off of EV v. Martinez.

And when we were looking at it and trying to build our brief, I think, at least the way I understand it, is that there are -- I don't -- EV addressed Article 6b and its explicit statement that there is, you know, a right for victims to file an application for a writ of mandamus under Article 6b.

What it didn't address, and what I think is perhaps unresolved is, does the All Writs Act permit a victim to have a separate basis to bring a writ application because of, for example, there were -- in the case that we were dealing with, it was psychotherapist's records.

Does MRE 513 provide them a basis to
complain and bring a writ application under the All Writs Act, or does Article 6b basically occupy the entire field? And then does, you know, EV v. Martinez in statements that -- you know, since CAAF isn't explicitly mentioned, it's not within the statutory jurisdiction of CAAF to hear those kinds of writ applications?

CHAIR HOLTZMAN: Okay. Well, that's really a big question that you've raised, a biggie.

MR. McCLEARY: Well, to some extent, it may be --

CHAIR HOLTZMAN: Maybe we should just postpone the resolution of that until after we finish the resolution of the other question, unless somebody wants to interrupt the order of that.

HON. JONES: I would like to start with that.

CHAIR HOLTZMAN: Oh, you want to start with that. Okay. That's fine.

HON. JONES: Well, my concern is I am
sitting here talking about how a victim has this interlocutory right, and it -- it informs my opinion about the rest of the argument.

CHAIR HOLTZMAN: Fine. So we can --

HON. JONES: If it's not clear right now that a victim can actually bring under a 412 theory or a 513 theory this *writ*, or whatever you want to call it, to the next -- to the appellate court, that's what I thought we had already established.

COL. ORR: It is established that it can get to the Service courts. All EV stands for is that CAAF said that because of the language in the statute itself that they cannot hear, because the Service court was there --

HON. JONES: It's just the level. I --

COL. ORR: Okay.

HON. JONES: It's just the level. It's not that it's not being heard.

HON. JONES: Okay.

COL. ORR: As the statute is written
today, they believe that it does not give them
the authority to review the decision of the
Service court.

CHAIR HOLTZMAN: So that could be a
recommendation that we agree on that we could
move forward on. Did you want to say something?
All right. So we can go back.

Okay. So aside from the question of
whether CAAF is actually taking these *mandamus*
interlocutory appeals -- and we will get to that
issue in Issue Number 3 -- we are right back to
Issue Number 1, which is victim participation on
direct appeal.

I mean, I guess where I'm coming out
on this -- and it's a very difficult issue
because I think -- for me they are conflicting
considerations. One is I agree very much with
you, Mr. Stone, that if this decision is going to
be made somehow by the appellate court, there
ought to be input from the victim.

On the other hand, we have seen in
part of our -- I'm a Member of the JPP Subcommittee, and we have done some traveling around the country and the world. And let's just put it this way: there have been serious unintended consequences as a result of the various changes that have been made so far.

And so while this has a very appealing -- appealing message, the proposal to provide a direct appeal, I think that it could create some very serious unintended consequences. For example, you say, well, we're talking about a very small number of cases. But it may now be a matter of ethics for every victim's counsel, for example, to file an appeal.

And what does this do to -- because those issues can be raised by the prosecutor, and probably in an overwhelming number of instances will be raised by the prosecutor, what does it do to the view in the military that this is a system that is not stacked against the defendant? There are also very, very important considerations with regard to that.
So I'm -- I have to say that I'm really quite torn about this, and I don't have a clear path forward. And you just came in at the right moment, Admiral Tracey --

(Laughter.)

CHAIR HOLTZMAN: -- to give us your views about -- if you want to --

VADM TRACEY: -- against the defendant?

CHAIR HOLTZMAN: Yes. About -- we are just on Issue 1, which is, should victims be allowed to participate on direct appeal? And I think Mr. Stone has made some very eloquent and important arguments in favor, and Judge Jones and Mr. Taylor -- I'm not going to characterize the arguments because they can do it better than I can -- have raised concerns, and I'm just saying I'm in the middle. And so I don't know if you have a view to express on this.

VADM TRACEY: I'm not sure I understand what direct appeal is as the non-lawyer in the group.
CHAIR HOLTZMAN: Good.

VADM TRACEY: So --

MR. STONE: It's really jurisdiction.

Do victims have jurisdiction on appeal if they want to say something as a matter of right, or are we going to relegate them to having to file it as an amicus brief or a writ, but particularly an amicus brief? This is when they have won below and they are trying to defend what they won. Are we going to tell them you don't have a right to file it? Probably you can file it as an amicus brief.

The same document, the same argument is going to be made to the appellate court. The same judges are going to read it, they are going to give the same amount of time to reading it, but it's really whether the victim is going to feel like, yes, they recognize I have standing because I have an interest that won below versus, well, you can file something and we'll decide if it's relevant.

It is really the jurisdictional issue,
because the same -- the defendant -- whether the defendant sees it as a brief that the victim had a right to file, or a brief that they filed that was allowed as an amicus, if it's a telling point, they are still going to want to read it, and they're going to write a page or two in answer to it.

So, I mean, the issue is going to be there, and the question is, does the victim get told, yes, you had the right to litigate below and you have the right on appeal? Or are they going to tell them, you had the right below, but you don't necessarily have that right on appeal? Which is what the status is now.

MS. CARSON: Can I just clarify what our little piece of the program here is? And that is that Question A is, should victims be allowed to participate on direct appeal? The point that is getting at is post-conviction as opposed to the right to participate during the trial, which is the interlocutory right. So that's kind of where we're trying to go with that
CHAIR HOLTZMAN: And I just want to raise one question here with Mr. Stone. Maybe this will clarify it for me a little bit more. If we were to say at some point -- if we were to -- if this committee were to recommend, for example, that CAAF, which is the appeals court for all of the Services, could take jurisdiction in mandamus cases, and, therefore, would be in more of a position to elucidate the law and elaborate the law with regard to 412 and 513, don't you think that that would be a substantial assistance in terms of giving guidance to the lower courts that they may not have now in terms of resolving some of these issues that you may want to appeal, or not?

MR. STONE: Yes, that would be of some guidance. The trouble is, CAAF takes very few cases. They told us they take, in the course of a year, a couple dozen cases out of thousands at the Service courts of appeals. They said they don't have the capacity to look at them all.
So, I mean, it takes a long time before CAAF reaches a lot of the issues, and a lot of these issues are fact-dependent. They are not worth CAAF's time. They are worth an appeal, but they are not worth CAAF's time.

So, I mean, that -- I don't want to make CAAF start looking at, you know, cases they would not otherwise ordinarily take. I just -- you know, and, again, if the -- there is limitations in the subparts of our Issue 1 that are very important.

It is only victims, the particular victims, whose issues -- I'm sorry, whose rights or interests have been raised on appeal. If nobody raises an issue that affects the victim on appeal, then they -- that excludes them from filing a brief. They have nothing to do with the appeal. And it's not every victim; it is only a victim whose rights are at issue on the appeal. And that's actually pretty clear from what the defense counsel raises.

They are going to talk about the
records of a particular person or they're not.
So, I mean, if there were 10 victims, it's very
likely that most of those 10 have no -- you know,
unless the defense counsel is raising the records
of all 10, which is not typical.

So it is limited to a person who has
an interest that has been litigated below.
That's who we know it is. It's the victim whose
interest has been litigated because you can't
defend something on appeal that you haven't
litigated below. You have to do it based on what
the judge ruled. So, I mean, it's -- the
category of people and what it is, is small.

HON. JONES: Well, and it also can't
be raised on appeal unless it has been raised in
the court below, which means, I think, that the
victim has the right to this mandamus procedure
in the next appellate court. And what we were
just talking about, it's very little different
than the Supreme Court and the circuits. In the
trial court, in a district -- in a district
court, when that mandamus petition -- you know
this, Mr. Stone, I don't mean to be trying to, you know, talk -- talk to you about these issues -- it goes to the district court. It doesn't go to the Supreme Court. They don't take it.

So for that same reason -- and they don't take a lot of cases. As we all know, you probably -- as good an idea it would be to have CAAF decide these things, and they probably will on the individual case that really, you know, gets their attention, it wouldn't -- you don't want CAAF taking all of these.

So the victim gets an interlocutory appeal to the appropriate service appellate court, and that court decides. And that's going to be the court presumably -- isn't that the first court that then will also look at the ultimate appeal?

MR. STONE: You've gone back to the interlocutory appeals before the conviction when you talk about --

HON. JONES: Right. I have.

MR. STONE: Once we do that, then --
see, I think that confuses the issue. Yes, the victims have an appeal when they lose. The question is: do they have any interest in the appeal when they have won? I mean, I think that is a basic part of due process everywhere.

HON. JONES: This will bring you up to date.

MR. STONE: When you've won --

HON. JONES: And then my only point is, I think the situation where --

MR. STONE: -- do you get to defend your win?

HON. JONES: -- the government is not going to defend its conviction, which included a ruling in the trial court that these records were not going to be permitted into evidence or that testimony wasn't going to be permitted, I don't think -- I really don't think that that situation is going to occur frequently enough to set up a whole new appellate machine. That's all.

MR. STONE: Well, I mean, I --

HON. JONES: I don't even know that we
have victims' legal counsel who might actually have to qualify, then, to do appellate work. Maybe they're all qualified to also do that. I just don't know.

MR. STONE: I mean, but, you know, I was a federal prosecutor, as people who look at my bio, for a long time. I'll just leave it at that. And I did almost exclusively appellate work for a couple of decades.

And I know that the issues that the government wants to defend on appeal are typically narrow ones, and they may not overlap with the victims' issues. I mean, I don't -- I don't know if there were individual victims -- when there was the complaint after conviction of Senator Stevens of Alaska, I don't know if there were individual victims who suffered from the way various people gave and received bribes, but the government decided to drop the whole case when it got to appeal.

HON. JONES: Well, that's a very different -- that's a very different --
MR. STONE: All I'm saying is the victim's interest is not always the same as the government's.

HON. JONES: Yes. But we're talking about, I think, a class of victims here where the extraordinarily important issue, which is why we are trying to protect victims, is the privacy interest. And it's always an important -- almost always an important part of this type of case. That is my point.

And so it's -- it's going to go to that interlocutory level. Fine. Let's go -- let's assume the government wins. They prevailed on their arguments about privacy. They get to that next -- the court. That court will, nine times out of 10, honor the decision, if there was an interlocutory, right, that ruled in the favor of the defendant.

But even if that didn't occur, maybe they just won with the trial court and never went to the interlocutory appeal. I don't see a government prosecutor ditching that issue because
it's too important.

MR. STONE: They don't have to ditch the issue. Suppose they argue it and they just simply lose on appeal and the case goes back for a new trial. It's the law of the case that that 412 or 513 material is going to be turned over. It's not going to be relitigated with a new interlocutory appeal the second time and the victims never got to say anything.

CHAIR HOLTZMAN: Just to follow up on your argument, but the answer, then, is that the point you're making, then, the implication of it is that in every single case -- in every single case -- the victim should file a brief because you never know what is going to happen on appeal. Isn't that it?

MR. STONE: No. The victim is going to take a look and see whether they think --

CHAIR HOLTZMAN: That's exactly it.

MR. STONE: -- their position has been adequately stated.

CHAIR HOLTZMAN: Well, I mean, yes,
and they may -- right. They may think it is adequate. But they don't know what the court is going to do, and so they say, well, why not put in another two cents or another 10 cents? I mean, and that goes back to the point I raised earlier. Is this going to be a question of responsibility, ethical responsibility, of the special victims' counsel to add --

MR. STONE: Aren't they going to have to do that if they file an amicus brief? I don't understand why that's any different, either procedurally, except for the fact that they don't have a right to do it, or in terms of what it's going to cover if they're going to file an amicus brief.

Special victims' counsel is going to feel obligated to do it on behalf of the victim if they don't think -- if they think the case could be reversed on the 412 or 513 ground. The court is still going to read it, we heard, even before they decide whether to allow it to be filed. And defense counsel, if they think there
is something valid there that they didn't see in the government's brief, is going to respond to it.

So in terms of substance, the same thing is going to happen. The only difference is whether the victim is going to have a right to file a brief and it is going to stay filed, or the court is going to say, "Well, we've read the brief. And since it doesn't state anything different than the government's brief, we're not permitting it to be filed."

CHAIR HOLTZMAN: Okay.

MR. STONE: Which is sort of a slap in the face of the victim.

CHAIR HOLTZMAN: Right. But I think the point you were making, that this is only going to be a small number of cases, is not going to be accurate. It is going to be -- well, most of the cases, maybe not all of them.

MR. STONE: You don't have 412 or 513, in most cases, in the military.

CHAIR HOLTZMAN: No. I'm talking
about most of the -- I mean, we are only talking about sexual assault cases.

MR. STONE: Right.

CHAIR HOLTZMAN: Yes. And in those cases, in all of the five -- in almost all of the 512 -- I mean, 513 cases and 412 cases, these issue are going to be raised on appeal. That's what is going to happen.

LT. COL. VERGONA: Ma'am, if I may just add --

CHAIR HOLTZMAN: Yes, sure.

LT. COL. VERGONA: -- the caseload now is about 50 percent sexual assault cases. So these issues are routinely litigated. So the volume of cases are going to be more than a few years ago. So these cases -- I mean, it is going to be a significant amount, because of how many we're taking to trial.

CHAIR HOLTZMAN: Anyway, going back to Admiral Tracey.

VADM TRACEY: So I am -- universally throughout this I am not persuaded by what the
workload issues are for the appeals court. That isn't a factor in my mind in terms of whether we're protecting the rights of the defendant and of the victim. So the workload has not been a factor for me in whether these are good decisions or not.

What is the practice in civil courts with regard to appeal rights of the victim?

MR. STONE: We discussed that briefly. Most civil courts don't provide victims' counsel like the military does. So you only have a handful of states -- Maryland where I practice is one of them -- and, you know, Oregon, Utah, Arizona. There's a handful of states where victims' counsel are regularly involved in the case.

As a result, most states don't -- haven't even addressed whether victims should have a right to file a brief when a victim's issue is on appeal after a conviction. But six or eight states have and allow victims to do it. Federally, they haven't addressed the issue.
either.

VADM TRACEY: So this would be a lot of new ground for -- this is plowing new ground.

MR. STONE: It's because we provide those counsel at the trial level that the issue is sort of ripe for us to discuss. If we didn't have it litigated at the trial level, the appellate court would say, there is no record. There is nothing for us to take here. Nobody made a record.

But you are making a record now, and you have a lawyer, and the question is, when the lawyer wins, is there ever a situation in law when you win and your issue is on appeal that you don't get to say, I'd like to defend that? And I don't think the answer is yes. I think the answer is there is no situation where you don't get to defend your win on appeal.

VADM TRACEY: Is that consistent with your understanding as well?

HON. JONES: No situation?

VADM TRACEY: Except in federal.
HON. JONES: I mean, I go back to the notion that there are only two parties in a criminal case. And I don't -- from a practical standpoint, I don't see the situation coming up where the government's won below. The victims' privacy rights have been respected, and all of a sudden the government is not going to argue what they've argued before and isn't -- hasn't or isn't continuing to consult with the victim.

And it -- I do believe that if we start in the appeals court now having a victim's right to also appeal, if you will, then we're creating machinery, a whole extra process that is -- that I think really isn't necessary because there is an interlocutory appeal.

And I don't see a big danger where the government's won below and the victim is concerned they are not going to win in a court of appeals because the government is going to, you know, not argue it correctly or strenuously. I just don't think it's worth it, I guess is the bottom line.
MR. STONE: How is that different from what we used to have at the trial court, which was there were two attorneys -- only a prosecutor, only defense counsel -- and if the victim's privacy came up, the prosecutor argued on behalf of it and the judge made a decision, and the victim's counsel and the victim really had nothing to say about it, and the judge made the right decision. And, if not, you might have the prosecutor go up.

I mean, that same logic suggests you don't need special victims' counsel at the trial level either, and that they change the paradigm of two attorneys in the courtroom.

HON. JONES: Look, we're in a world that is changing. I don't have a problem with victims' counsel in the courtroom. It's new. I don't know, frankly -- and it may be necessary with some counsel; it may not be necessary with other government counsel. But the bottom line is, I don't think it's at all necessary at the appellate level, and it's an extra set of
procedures and more lawyers' time.

You know, we have a tremendous number of resources that we're putting into victims' counsel right now. And I think that that's -- this is going to be more routine. Okay. Now we have to file the appeal brief. That's what I'm worried about, and I don't think it's necessary.

CHAIR HOLTZMAN: Do you have any other comments or questions?

VADM TRACEY: I think the last time we met I commented on the fact that we did seem to be modifying the purpose of the appeal from something that was the defendant's recourse to something that became -- now it's a victim's recourse. So, you know, I think I'm in line with the judge that that's not what the intention was.

CHAIR HOLTZMAN: Mr. Taylor, are you pondering, or are you about to say something?

MR. TAYLOR: No. I mean, I, of course, enjoyed the discussion about the values that are involved. I tend to approach one of these, I suppose, as a public policy professor
from the viewpoint of conflicting values, both of which are very important.

And I think in any situation like this, if you're looking to affect the outcome of what is best for the public good, I think that there are procedures in place that have been explained and that we have understood that provides about all the protection that most victims are going to be able to use with a particular situation.

And given the unintended consequences that you referred to, Madam Chair, and also what we know just about life in general, it seems that it is a somewhat uncertain future to just put this out there and then see what happens to it, given what we know about the requirements that you mentioned on the part of defense bar to say, well, am I being -- am I somehow failing my client if I don't recommend that you pursue this course of action, and then creating perhaps another super structure within the appellate world just to deal with the -- with these types
of cases.

So I'm persuaded by Judge Jones' arguments in part, but very sympathetic to Mr. Stone's arguments about ensuring that the system we do have -- and I think this is a little bit about what you're saying because this was my concern when we started this conversation -- that the system we do have in place is actually working for victims, that we don't need any new procedures to ensure that they are in fact getting what they need out of the system, the protection they need.

I'm as concerned about that, I suppose, as I am creating a new system that seeks to solve the problems that I think we perceive in the current system.

MR. STONE: The two reactions I have to that is, on the one hand, victim dignity and fairness goes to whether the victims feel subjectively that the process is fair. And for them to know that they have counsel at the trial level but nothing at the appellate level seems to
me goes against that.

Now I, obviously, did not travel around the country. I was not on the subcommittee or invited to travel around. I didn't hear whatever those other practical considerations are.

But even assuming there are such considerations, I think that one way to modify this if you're worried about there might be a brief filed in every case, is for us to recommend that there be -- they have the right to participate on direct appeal, and then you say to add any arguments or citations not already before the court.

In other words, make it clear this is not to file a me-too brief to something that is already there. And that allows counsel not to feel, oh, they're going to say I was not a good counsel because I didn't file anything. In other words, I have no problem narrowing the scope to add arguments or citations not already before the court, because, as I say, the victim may well
have a different view. I see that in federal court all the time.

MR. TAYLOR: Just to respond briefly to that, I mean, it is always a problem, as I tell my students who are grappling with how to solve these kinds of problems where we've got various alternatives, to pick the right criteria. And the criterion that you seem to be focusing on more than anything else, with respect, is how the victim feels subjectively about the way things turn out.

And that fairness issue is a very tricky criterion to think about because there are other parties involved with the fairness equation, and not the least of which is the accused in a case. So I guess there is a point at which I can say you can -- that argument only works so far for me.

MR. STONE: The accused is going to face a brief even if a mandamus brief is filed. Even if it's not -- if the brief is filed and is not allowed, it's lodged with the court and they
don't accept it for filing because the defense
counsel is going to have to file a brief opposing
the filing of the *mandamus* brief. I see that,
too. They have to get in the case because the
victim's counsel feels, if he doesn't see what is
already up there, as defending his client that he
has something to say.

So all those issues about fairness to
the defendant or time and writing the brief and
the judge is -- that's all up there anyway. That
is not going to change.

VADM TRACEY: It does sound as if the
approach you're suggesting is primarily to give
the victim another belt-and-suspenders sense of
confidence that the system is being fair to the
victim. I'm with Mr. Taylor on that, that that --
it's -- and I agree with you that it's highly
likely that a victim will see the appellate court
as another place where they may lose, they just
won, and that this is just another place that
they may lose. And any lack of transparency
about that process will contribute to that
perception on the part of the victim, highly unlikely that a victim actually understands the appellate process or its purpose or the foundation. So it is a bit of a dilemma.

But I think one of the things we talked about was whether part of the special victims' counsel's responsibilities would be to educate their client on what the process is past conviction, what are the things that happen past conviction, and how are they protected?

And, you know, they may not ever believe they are fully protected, but it may not be possible to overcome that issue.

CHAIR HOLTZMAN: Well, anybody have anything else to say? Are we ready to vote? Do we want more time to reflect? Do we take a five-minute break? I mean, what -- how should we proceed now?

VADM TRACEY: Can we take a five-minute break?

CHAIR HOLTZMAN: Okay. Let's take a five-minute break. Good.
(Whereupon, the above-entitled matter went off the record at 11:40 a.m. and resumed at 11:53 a.m.)

CHAIR HOLTZMAN: Before we commence, I just want to ask a question again about how the system works. So let's say that there has been a 412 issue raised in the trial court, and that has been fully litigated. And the government's position, which is to keep the 412 information out, has succeeded.

On appeal, that trial record is going to be before the appellate court, is that correct?

COL. ORR: Yes, that's correct.

CHAIR HOLTZMAN: So the arguments that the defense counsel has made -- I mean, the victims' -- special victims' counsel has made with regard to 412 is going to be in the record on appeal.

COL. ORR: That is correct.

CHAIR HOLTZMAN: And as I understand it, the rules in the military appeal process
require the appellate courts to read the whole record.

COL. ORR: That is correct.

CHAIR HOLTZMAN: Is that correct?

COL. ORR: Yes.

CHAIR HOLTZMAN: So the arguments are going to be before the appellate court, as I understand the process. Mr. Stone, do you have a comment to make about that?

MR. STONE: Well, just that when you have an extensive record -- I know I have had extensive records, and as my bio shows I was even an immigration judge for a while. When you have what could be hundreds of pages, yes, you read it, but you're reading with a purpose, and usually the purpose is the issues that have been raised.

So, yes, if something jumps off the page at you, you might see it, but you're looking to answer the questions that have been raised on appeal and to see if there is something that affects them one way or the other. So if the
issue is not raised, it may be buried there, but it's a lot harder to see.

LT. COL. VERGONA: In addition, Mr. Stone, in the military, the military appellate courts also specify issues. So independent of what the defense appellate counsel or what government appellate counsel has responded to, once it gets to the court, and a court -- and a judge has got cases assigned to him or her, then he is required to read it front to back. And if he sees any issues, he can specify the issues. So they are absolutely not limited to what is raised to their level.

CHAIR HOLTZMAN: Okay. Before we vote or decide whether we're going to vote, Mr. Stone suggested that Members of the Panel, since you have heard us talk, I think only -- may want to make a comment.

I think the only thing they may comment on -- Ms. Fried, please correct me if I'm wrong -- is if we made a factual error, if any one of us. Certainly, I could definitely be
guilty of that, but nobody else on the Panel.

But if there are any factual errors to correct into our argument, we would -- is that really what you want us to get at, Mr. Stone?

MR. STONE: Yes. To see their reaction to everything we've been saying.

CHAIR HOLTZMAN: Well, I don't know if they can give us their reaction.

MR. STONE: If they have a short --

MS. FRIED: They really can't comment on it. They can't be part of the deliberations. They can only speak to facts and clarification based on --

MR. STONE: Whether we overstated or understated a fact.

MS. FRIED: Right. Or if something was not accurately stated, they can clarify it and come to a specific --

MR. STONE: Right.

MS. FRIED: -- if needed. But they cannot get involved in any deliberations. That's the purview of only the Panel Members.
CHAIR HOLTZMAN: So if there is anything that anybody wants to point out, we would very much appreciate --

LT. COL. WISSMAN: I just wanted to --

CHAIR HOLTZMAN: -- clarify something, if we have been misleading in our comments or factually erroneous.

LT. COL. WISSMAN: I just wanted to clarify that we are aware of cases where victims' counsel have filed to -- have asked to file an amicus and have been denied that amicus opportunity. So, again, that motion to file is very brief. So it just gives the court a brief idea of what that amicus would be, if they are able to file. So not in every case is -- is a victim's counsel able to file an amicus brief.

And, also, that amicus brief is -- it's not representing the victim. It's representing a party, a policy interest, so that amicus brief --

HON. JONES: I'm sorry. A what interest?
LT. COL. WISSMAN: That amicus is following a policy interest. It's not representing a particular victim; it's representing an overall interest, not a particular victim.

CHAIR HOLTZMAN: Could you explain that or give an example?

LT. COL. WISSMAN: It's not -- so you're filing that this -- this overall -- that if you change -- this ruling in 412 or this ruling in 413, if you agree with what the defendant wants, it is going to have overall type of ramifications, not in particular on this particular victim. So you're looking at a policy interest brief, not a particular party.

MR. STONE: Not the application in the particular case.

LT. COL. WISSMAN: Yes.

MR. STONE: But the board rule.

CHAIR HOLTZMAN: Is that because of the rules with regard to amicus briefs, or is that just how it works?
LT. COL. WISSMAN: Yes.

CHAIR HOLTZMAN: I see. So that's how it works in the -- amicus briefs work in the military.

LT. COL. WISSMAN: Yes.

CHAIR HOLTZMAN: Does any other Member of the Panel want to clarify or --

LT. COL. WISSMAN: And there is also --

CHAIR HOLTZMAN: Oh, sorry.

LT. COL. WISSMAN: I'm sorry. Another thing, there is also -- for the amicus brief, in the appellate rules, it is already understood that it is not a me-too brief. So we're not -- that is already in the rules, so a brief that would be filed would be something different. So we already had in the rules that it should not be a me-too brief.

CHAIR HOLTZMAN: Thank you. That's very helpful. Anybody else want to make any -- yes, sir, Captain.

CPT. HOUSE: And please tell me if I'm
asking something that I'm not supposed to ask. I just want to clarify -- I'll have to go back and brief to my superiors. I want to -- what you're going to vote on is whether or not a victim should have the right to participate in a direct appeal? And what you mean by that is a post-conviction appeal by the defense. Is that correct?

HON. JONES: That's what I think we are voting on.

MR. STONE: As an appellee -- in other words, they don't get to set the issues, they don't bring that appeal, it is just if an appellant raises a victim issue, which they might not do.

CPT. HOUSE: Okay. Thank you.

CHAIR HOLTZMAN: Okay. Any other comments that anybody -- I mean, factual corrections or clarifications. Yes, sir.

MR. TAYLOR: Madam Chair, if I could, I would just like to go back and just be sure I understood that correctly. So is that true for
all the courts of criminal appeals, the way she stated the role and the function, the limitations, if you will, on an amicus brief, was that true for all Services?

COL. ORR: That's certainly what the rules say, but they don't necessarily brief like that. I mean, they are pretty generally pointed to the case.

HON. JONES: Well, I was going to ask that question. I mean, when you see amicus briefs, they are obviously for one side or the other on the issue. So it's sort of hard to write an amicus without letting your feelings be known about how you think the merits should come out in the case before you.

So is it any different? I mean, I heard what you said and I don't disagree with you. But in practice, is it any different?

COL. ORR: No. And the other thing is, not everything that comes before the court -- filing does not always equate to a win. And I think that sort of makes it difficult for victims
to say, we heard you, but we already have that information. And sometimes that is interpreted as we don't care or your voice doesn't matter.

MR. TAYLOR: Is the Army the same?

LT. COL. VERGONA: As far as I know, sir. I can't say 100 percent sure.

MR. TAYLOR: Thank you.

CHAIR HOLTZMAN: Okay. Do we feel ready to vote on this issue, or do we want more time? How do we feel?

MR. TAYLOR: I'm ready.

HON. JONES: I'm ready.

CHAIR HOLTZMAN: Okay. So how should we phrase the motion? Should we say should -- should -- I'm sorry. Does anyone have language --

HON. JONES: I was just going to say, allowed to participate. I think we -- I think we were talking about should a victim be allowed to appeal a conviction. I mean, because we are giving them a standing of direct appeal, right?

MR. STONE: No, no. They are not
appealing. It is whether they can participate as an appellee. They're totally different. They don't get to raise the issue or frame the issue.

HON. JONES: Oh, no, no, no. I'm sorry. Yes, you're right. But we're still talking about them being able to participate.

MR. STONE: As an appellee.

HON. JONES: Right.

MR. STONE: When an issue is raised --

HON. JONES: As a party in --

MR. STONE: -- affecting them. It doesn't have to say as what. It just has to say as an appellee. When an issue is raised affecting them, the victim.

HON. JONES: Okay.

CHAIR HOLTZMAN: Well, we're not yet on the -- when they can -- that part is, assuming this passes, then we'd have to really focus on exactly when they could participate. So that's really a shorthand when the issue affects them. We haven't really gotten to that part yet.

MR. STONE: At least we've got to say
as an appellee. They're not an appellant ever in this process that we're talking about post-conviction.

VADM TRACEY: Is that different from the way the question is phrased?

CHAIR HOLTZMAN: Yes, right. Should victims be allowed to participate on direct appeal? I think that that is -- doesn't that solve that problem? I guess it doesn't solve the issue about participate, because it doesn't solve the issue that you raised, Mr. Stone, which is that they can't raise the appeal themselves. That's what you're saying.

MR. STONE: Right.

CHAIR HOLTZMAN: The appeal has to be raised by the defendant.

MR. STONE: They didn't get to raise the appeal.

CHAIR HOLTZMAN: Once the defendant -- so maybe this A should read, once a defendant has brought an appeal, comma, should victims be allowed to participate in that appeal? Should
any victim of a crime -- is that a fairer way of stating it?

HON. JONES: Well, I mean, you could participate by filing an amicus. I just think participate is too broad.

CHAIR HOLTZMAN: I see. Okay. Should victim be allowed --

MS. FRIED: Does the victim have standing to file --

CHAIR HOLTZMAN: Forget standing. We don't want standing. Bad word. Victim -- may the victim --

MR. STONE: Does victim have standing to file a pleading in that case?

CHAIR HOLTZMAN: That's too technical. Should victims be allowed to file a brief? What about a brief?

MR. STONE: Well, that's what a pleading is. I mean, but sometimes --

HON. JONES: Well, let me ask this question. If they lose at that level -- again, the government, let's say they're aligned with
the government and the victim has filed a brief
and has appellee status, then they have the right
to appeal to the next higher court, right? We're
talking about giving them standing in the
appellate process.

MR. STONE: Well, except CAAF doesn't
think so right now. That's the question we
postponed because in --

CHAIR HOLTZMAN: But it's also a
question that I think shows the problem with
giving, you know, someone who is not the -- look,
you have plaintiffs and defendants here, you have
the government and the defendant. I think that's
-- when you give a third party, right, the victim
witness, appellate standing, then they are a
party in the appeal.

And then it goes on up to the -- and
maybe the government decides not to -- not to
take it any further. Do they get to then go to
the next court? I mean, I'm just trying to play
this out.

MR. STONE: Not unless we change the
CAAF rule, because CAAF doesn't want -- CAAF has ruled there is no jurisdiction. They don't care what you are --

CHAIR HOLTZMAN: Well, what this language addresses, should victims be allowed to initiate -- initiate --

MR. STONE: No.

CHAIR HOLTZMAN: Excuse me. Should victims be allowed to initiate -- oh, that doesn't give you what you want, right. Okay. Sorry. No, no, no. We have to --

VADM TRACEY: Well, if we modified it the way Mr. Stone originally said, once a defendant has brought an appeal, should a victim be allowed to initiate, is that where we were going with that?

CHAIR HOLTZMAN: Yes. I don't know. That doesn't allow -- because we want them to --

MR. STONE: To participate as an appellee.

MS. FRIED: Right now, the government is the appellee in appeals when the appellant --
when the victim is appealing. But when the defendant is filing an appeal, he is the appellant; the government is the appellee.

MR. STONE: Right.

MS. FRIED: If you call the victim an appellee --

MR. STONE: There's two appellees.

That's what happens in Maryland.

MS. FRIED: I would give them the same -- yes, I just don't know about that standing issue.

CHAIR HOLTZMAN: Well, what about just saying -- once a defendant has filed an appeal, can the -- is the victim -- should the victim be allowed to file a brief on direct should the victim --

MR. STONE: In response.

CHAIR HOLTZMAN: In response, yes.

Okay.

MR. STONE: That's actually very good, because if no victim issue is raised, there is nothing for them to respond to.
CHAIR HOLTZMAN: Okay. So that would be the language. Somebody have that language? Do you want to read it to us, Captain?

CPT. TIDESWELL: Once defendant has brought an appeal, should victims be allowed to file a brief in response?

CHAIR HOLTZMAN: Okay. All in favor, say aye. Opposed? Okay. The nos have it.

Let me just say, Mr. Stone, and anybody else, that you are certainly permitted to file an explanation of your views, dissenting views, or any comment you want to make with regard to that.

Okay. So I guess -- do we need to go to the other points? Oh, I know what we wanted to do. I mean, is Point B -- has that -- that has already been decided, right, Point B? So we don't have to go to that.

Issue 2, which is victim privacy issues, what should the process be for appellate counsel review of sealed materials in the record of trial?
MR. TAYLOR: Madam Chair, could I suggest that, if we're going to do another issue before lunch, we go to Issue 3?

CHAIR HOLTZMAN: Yes, that's right. That's good. That's a good point, yes, because we were just focused on that. Right. Issue 3.

Yes. So we're going to skip now to page -- to page 13, Issue Number 3. Should victims be allowed to appeal a writ denial to CAAF? A writ denial being the interlocutory appeal. That's what we're talking about here. Are you with us, Admiral Tracey?

VADM TRACEY: This is -- I'm not --

CHAIR HOLTZMAN: This is going to the highest court.

VADM TRACEY: Understood.

CHAIR HOLTZMAN: Which right now doesn't -- it's not clear that it has the authority to take an appeal -- let's -- okay. Let's go back. You started at trial court -- this is trial court, and a judge has allowed -- or has allowed medical records to come in, 513
medical records. And the victim has taken a
mandamus interlocutory appeal. That is denied.

Right now, the victim -- that's the
end of it. And this would make it clear that the
highest military court could hear that appeal.

Did I state that correctly?

(Laughter.)

CHAIR HOLTZMAN: Whew. It has only
taken three years. Okay. So you -- okay. Do we
need any discussion of this? I mean, we sort of
talked about it already. Does anybody want to
make any comment, further comment?

HON. JONES: I just wanted to ask a
question. Am I right that CAAF has already
decided -- that's their guidance to the world
that they are not -- they don't have
jurisdiction. So we would be giving them
jurisdiction.

CHAIR HOLTZMAN: Right.

HON. JONES: Okay. Got it.

COL. ORR: That's right.

HON. JONES: Okay.
COL. ORR: We would be tweaking the statute.

HON. JONES: Correct.


So should we do 2 now or have lunch? Okay. Lunch it is. All right. We come back after lunch and we'll do Issue 2. Is that it? Do we have 4 also? Yes, we have 4, too. Okay. Maybe we'll only take a half-hour for lunch, so we can -- yes. Okay.

(Whereupon, the above-entitled matter went off the record at 12:10 p.m. and resumed at 12:52 p.m.)

CHAIR HOLTZMAN: Ms. Fried, I think we are ready to recommence. May we do so?

MS. FRIED: Yes.

CHAIR HOLTZMAN: Thank you. I think we are up to Issue 2: Victims' Privacy Interest During Appellate Counsel Review of Record of Trial.
I think the issue here, if I can summarize it, or maybe Captain, why don't you summarize it? Then, I know I can't be making a mistake.

CPT. TIDESWELL: Yes, ma'am. I think the SVCs and the VLCs expressed concern about how appellate counsel were handling the sealed records. They were part of the record of trial when they reached the appellate level. There is a discussion as to what the options would be on how those sealed records would be handled.

CHAIR HOLTZMAN: Right, could you just summarize them for us, please?

CPT. TIDESWELL: Yes, ma'am. So, one option would be Rule for Courts-Martial 1103A, which is sort of the current governing rule, which allows the counsel to examine the sealed materials but only if it is reasonably necessary for proper fulfillment of their responsibilities. So, there is a standard --

HON. JONES: Is this trial, appellate --

-- I'm sorry.
CPT. TIDESWELL: This is at the appellate level.

HON. JONES: At appellate level.

CPT. TIDESWELL: So, the record of trial goes up. The materials are sealed. Now who and how do you get access to those materials?

Yes, ma'am.

CHAIR HOLTZMAN: And Option 1, isn't that the present system?

CPT. TIDESWELL: Yes, it is.

CHAIR HOLTZMAN: And under the present system, if I am right, appellate counsel can see the sealed materials.

CPT. TIDESWELL: Yes, ma'am. Now, in your --

CHAIR HOLTZMAN: I'm sorry. Counsel for the defendant, appellate counsel for the defendant --

CPT. TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: -- can see the sealed materials.

CPT. TIDESWELL: Yes, they can.
CHAIR HOLTZMAN: And that is kind of the real nub of the issue here. Isn't that it?

CPT. TIDESWELL: Right.

CHAIR HOLTZMAN: Okay.

CPT. TIDESWELL: And then if you look, I believe each of the Services have different rules as to how that actually occurs.

MR. STONE: Tab 6.

CPT. TIDESWELL: Tab 6, right.

CHAIR HOLTZMAN: And so Option 1 is the present system.

CPT. TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: Option 2, what is that?

CPT. TIDESWELL: Would be to modify 1103A to give more proper guidance. In other words, maybe an attempt to standardize. You would have to do so, I would suspect, under an executive order because it is an RCM. It is 1103A.

CHAIR HOLTZMAN: And what would be the substance of the change?
CPT. TIDESWELL: I think you could decide whether or not there had to be a showing. And then -- or do you have the judge do an in-camera review before it is permitted? Do you allow the clerk of the court to handle the records and you go to that individual to gain access?

But I think the second option would probably give you a more standardized approach, so it would impose upon all the Services to handle the records, the sealed records the same way.

MR. STONE: Can I ask a question about the comment you just made?

CPT. TIDESWELL: Yes, sir.

MR. STONE: I'm a little bit confused. If the Air Force is currently doing this, as to say you don't get them automatically unless you file a motion and they decide that you need them, then why do we have to -- wouldn't the Air Force be -- don't they have to be in compliance with RCM 1103A? In other words, if they can do it
that way under RCM 1103A, can't all the Services?

COL. ORR: Could I clarify that? What the Air Force does is -- it is not a decision as to whether you get it or not. It is a decision as to whether you are the appropriate person to get it or not.

So, say for example you have a trial where you have multiple victims, if your client, as an SVC is not -- if those charges, they were found not guilty of it, then you do not get access to those records. But it is very clear that 1103A says, ultimately, a defense counsel is a reviewing authority and they will get the records.

MR. STONE: So, if there is only one victim, then that Air Force rule really doesn't matter. They are going to get it.

COL. ORR: Correct.

MR. STONE: Oh.

LT. COL. VERGONA: And ma'am, if I may interject. I am one of the working group members of the JSC and I just wanted you to know that the
JSC has looked at this issue and we have -- we do have some recommended changes that are being proposed. Unfortunately, I can't tell you what those are.

CHAIR HOLTZMAN: To RCM 1103A.

LT. COL. VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: Okay. So, I guess the first question is if we put this for -- if we try to capsulize this issue in a proper way, the first issue is whether the present system, however -- whatever the small variations are Service-by-Service is correct or whether we want to change, recommend a change in the present system whereby defense appellate counsel gets access to the records on appeal that have been sealed below.

Is that really the first question? Do you agree or disagree with that? Is there a discussion on it?

MR. TAYLOR: Well, perhaps you could help us here, Colonel, a little bit. My understanding of the summary and also the
testimony is that the Air Force practice is that there is a motion to have access to the records, which is then followed by an in camera review by the court and then the decision is made. So, I thought the nub of the issue for at least part of the people who testified was whether or not appellate defense counsel should be given access to the records carte blanche or whether there should first be an in camera review by a judge to be sure that it was appropriate to do so. But please help us.

COL. ORR: No, it really is less of a review than what you are stating. It is -- we are concerned that some of the cases have multiple victims. And SVCs may want -- appellate defense counsel wants access to certain -- to the records of victims that don't really apply. Because it says, I want all the sealed records that were not admitted at trial. Those records may not apply to the offense in which the appellant was convicted. So, that is the in camera review, as to what your client was
convicted of. You get those but you don't get everything that was sealed.

MR. TAYLOR: Well, that is a different impression from the one that I had and I am not sure what others remember about the testimony because I thought it was a more substantive review to determine --

COL. ORR: Well, 1103A is pretty clear. They are a reviewing authority and because an appellate defense counsel, as it is written, is considered to be a reviewing authority, the court doesn't have any authority to deny them to see it. That's correct.

MR. TAYLOR: To say no unless a party shouldn't receive it for the reason you just stated.

COL. ORR: That's correct.

CHAIR HOLTZMAN: Right. So, as I understand it, the real question here is whether there ought to be -- as I understand it now, under RCM 1103A, defense counsel -- defense appellate counsel gets, basically, automatic
access to sealed records. Or should there be some limiting process, either some kind of showing first or some kind of review, in camera review, or something else?

In other words, the automatic access, should that be continued? Do we want to recommend that that be continued or changed? I think that that's really it. And if we want it - then, of course, you could also consider changing some of the practices. But that basic concept that the sealed records become available to you, if they are relevant to the issue on appeal, should we just -- is there further discussion of that or do we just take a vote?

Anybody want to talk about it?

MS. GUPTA: Ms. Holtzman, can I make one clarification?

CHAIR HOLTZMAN: Yes.

MS. GUPTA: While appellate counsel can access the materials, they cannot disclose it to their clients. So, it is just the counsel that will have access.
MR. STONE: Well except -- see that makes almost no sense to me. If they don't understand the relevance because they are appellate counsel and they weren't trial counsel, they may well have to talk about it indirectly with their client, in order to understand what was sealed. And if they are going to have to argue about it, it is going to be in a brief that they are going to file. And at that point, everybody is going to see it.

So, if it is truly relevant and at issue, it is going to -- the sealed material is going to come out.

MR. McCLEARY: They sometimes file briefs under seal.

COL. ORR: You file it under seal.

MR. STONE: Without consulting with their client?

COL. ORR: I don't know about that. I'm just saying just because defense counsel has seen the record, doesn't automatically mean the information is now open.
MR. STONE: No, it opens the door to it. You are right. It doesn't automatically mean it but it opens that door.

LT. COL. VERGONA: Certainly, at this point, you cannot reproduce the materials. There are -- each of the Services have internal court rules on how they get access to it. They are allowed to have access to it but how they get that access to it and then what the limitations are once they have reviewed those materials.

MR. STONE: I think before we vote I would just make the comment --

CHAIR HOLTZMAN: Please.

MR. STONE: -- this is an area where the military is way behind all the courts in the country. I'm not aware of any court where, when a record is sealed at the trial court level, there is an automatic access without a motion and briefs and an in camera review to unseal it.

So, I think this is an area that they are -- maybe they are harking back to many years ago or different practice, but it is not in step
with what people expect when a record is sealed. For judges' review only on appeal, that is what they expect.

LT. COL. VERGONA: If I could just suggest that at the trial level it depends on the type of evidence. 412 evidence is going to have the defense counsel -- the accused is there and hears the hearing. The victim is there, if they choose to be there, and it is fully litigated. And after that hearing, that is sealed but it is materials that both parties had access to and was able to see.

Then, you do have the category of sealed materials that perhaps had an in camera review, the 513 materials that, when the military judge looked at those, he or she may have decided no, there isn't anything relevant in here. No one at the trial level is going to see that and those materials are also sealed.

So, you do have a very unique, two different situations going on with the one rule to cover both situations.
CHAIR HOLTZMAN: And then you also have the third situation, isn't that right, where the trial court has decided he or she does not want the requested materials to be reviewed.

LT. COL. VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: What happens to those materials on appeal?

LT. COL. VERGONA: But in those materials, the trial judge would have never gotten them because you would have had --

CHAIR HOLTZMAN: Okay, so they are not sealed. So, they are not part of the record.

LT. COL. VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: Nobody could look at them.

LT. COL. VERGONA: But you do have the situation where the 513, the judge would have looked at it and decided to disclose some of those materials.

So, a portion of those would still be sealed and then the materials that were disclosed would be fodder during the trial, subject to
other rules of evidence.

CHAIR HOLTZMAN: Unless there were some mandamus or intermediate action taken.

LT. COL. VERGONA: Something like that, yes, ma'am.

MR. STONE: What would happen to the category of roles, if any of you know if, let's say during the case that the locale of the sexual assault was important but it was in a highly classified location, let's say overseas that the military didn't want to disclose somehow, either the operations room or the guy's specialty or whatever, and it was classified for national security reasons? Would the trial judge say I don't want to see it or would he see it and seal it and would that be available on appeal? What would happen if that is the case?

CPT. HOUSE: That is a national security case?

MR. STONE: Yes.

COL. ORR: Different rules.

MR. STONE: Okay, so we don't have to
worry about that option here.

I mean I'm not bringing it up in the context of a disclosure of national security. I mean in the context of the sexual assault, the two people working there, one assaulted the other.

CPT. HOUSE: If there is going to be classified information revealed during that trial --

MR. STONE: Yes.

CPT. HOUSE: -- or as part of the evidence, it is going to be a national security case.

MR. STONE: Okay.

CPT. HOUSE: By its nature. There are special rules and special things for that.

MR. STONE: Okay, so we don't have to worry about that piece.

CHAIR HOLTZMAN: Does anybody else have any comments to be made with regard to having defense appellate counsel have access to the sealed records -- we are talking about 513.
These are health records, basically, that we are talking about on appeal which have been sealed as part of the record below without judicial or other kind of intervention.

VADM TRACEY: If a brief is filed subsequent to the defense counsel, appellate defense counsel reviewing the sealed materials, if a brief is filed based on those materials, is that brief required to be sealed or it can be sealed?

COL. ORR: It can be sealed.

VADM TRACEY: So, it is not required to be sealed.

COL. ORR: Generally, it would be sealed. It is talking about sealed information that would need to be sealed.

HON. JONES: Can I just -- this isn't something that I have ever dealt with. Let me ask this.

CHAIR HOLTZMAN: Go ahead.

HON. JONES: If the judge takes the sealed materials at the trial court level and he
is going to make whatever, or she, whatever decision they do, does the defense lawyer not already know those records or have seen them at the trial level?

MR. STONE: Normally they don't know the records, both in military and civilian practice. And the answer that the judge says, typically is, if you want to read these records, you have to give me some independent basis to open them up. And defense counsel always say, well I can't have a basis until I see the records. And the judge says no, no, no.

But these are presumptively sealed. They are confidential. They are under one of the rules, whatever. So, you have to --

HON. JONES: I'm sorry, I meant the special victims' counsel. Because it is a new role in the trial court.

MR. STONE: Oh, okay.

HON. JONES: The government doesn't see the records. The defense doesn't see them. Does the special victims' counsel see them?
MR. STONE: It depends. It depends on who is holding them. I think it depends on the judge. I was in a civilian proceeding in Montgomery County and we had some sealed records that were psychological counseling records and they were in the hands. And maybe this is like the military. They were in the hands of a third party. The school system had them. So, I didn't know exactly what was in them. The school system was saying these are psychological counseling records. They had to know what was in them. I didn't. But on behalf of the client, I was saying, but judge, that is not appropriate here. And then the judge took about an hour break and my supervisor said why don't you get a release from your client and at least look at them.

HON. JONES: Well, that's my take --

MR. STONE: Well wait, wait. You have got to hear the end of this. I got a release from my client to look at them. And when we came back on, I said judge, I have a release here from my client. I would like to see the records. The
judge said no, I'm not giving them to you, either. And the judge didn't give me the records either because she said I don't think anybody needs to see them; I don't think they are relevant. And then the judge actually recused herself from the case because she had reviewed them and she thought that they might be prejudicial.

And we wound up with a new judge. We wound up with a new defense counsel because this defense counsel had inadvertently reviewed them. I never reviewed them. We had the same prosecutor, too.

So, I mean the judge felt that reading them was inappropriate for anybody to decide this case. And so that is why I think it depends on the judge and how you go. The victims' counsel --

HON. JONES: Anyone can go and get their own records if they sign a release, right, and give them to their lawyer.

LT. COL. VERGONA: Yes, ma'am.
COL. ORR: And that is how we typically see this issue arise is --- it's the VLC raises the trial motion to block distribution of the records. So, they have seen those records and have been provided those records by their client. That is how we normally see the situation.

CHAIR HOLTZMAN: And so what happens, if you missed this part of the proceeding, what happens is that yes, at the trial level, defense counsel doesn't get to see them. But at the appellate level, the appellate defense counsel gets to see these records. That is the difference.

HON. JONES: How is the defense counsel supposed to be able to argue this motion with the trial court, if they don't even know what they are arguing about?

LT. COL. VERGONA: They do have their client, ma'am, that may have some information that they could --

HON. JONES: Well, I can see it in a
412 but --

LT. COL. VERGONA: Well, they would know it for a 513.

HON. JONES: For a 513?

LT. COL. VERGONA: Yes, ma'am.

HON. JONES: Okay. So, generally, they would know generally why they asked for it in the first place, is what you are saying?

LT. COL. VERGONA: Yes, ma'am, absolutely.

HON. JONES: Okay. So, the only issue now is whether it should as a rule, now states, I gather, automatically go to appellate counsel, defense counsel.

CHAIR HOLTZMAN: Defense counsel, yes.

LT. COL. VERGONA: Yes, they have a right to see it, defense and government.

CHAIR HOLTZMAN: Right, and the arguments on both sides, you were clear, one side is that, obviously, from the point of view of defense counsel, I mean they are not -- they don't have the close relationship with the
They probably don't have any relationship with the client. They just get to - they walk in and they see it under very constrained circumstances. This gives them opportunity, just in case there is a miscarriage of justice to see what is happening. And from, of course, from the victim's point of view, their point of view is, why should anybody see these records, even if they are protected, even if they are never disclosed to any other parties. Why should anybody have any right to see them?

MR. STONE: Well, and even worse, it is hard to understand that there isn't, certainly in some cases, going to be communication back if there is a remand for any other circumstances going to be communication back of what is in the records.

CHAIR HOLTZMAN: Well, that's speculative.

MR. STONE: Yes.

CHAIR HOLTZMAN: I mean the fact of the matter is that wasn't -- you know the issue
is just the fact that victims feel that they have
the right to absolute privacy of these records
from anybody, even on the appellate level. Even
in very narrow circumstances.

HON. JONES: I just think the
defendant has a right for his counsel to be able
to make the possible argument for him in this
situation at the appellate level. And if he
can't argue, without having had the opportunity
to see these records, then it is a defendant's
right. We are weighing here against an
individual's right to privacy. I don't think
there is a contest there.

CHAIR HOLTZMAN: Does anybody else
have a comment? Are we ready to vote?

VADM TRACEY: It seems that the in
camera review at the appellate level should have
struck the balance between both the defendant's
rights and victim's right if you did a parallel
to what had happened at trial. With an in camera
review, you would get a balance between the two
sets of rights.
MR. TAYLOR: So, we're basically going
to vote on Option 2, which is to modify RCM or
whether or not to.

CHAIR HOLTZMAN: Well, I guess that is
-- the question would be should the present
practice be -- should we recommend a change in
the present practice under which, at the
appellate level, defense appellate counsel gets
to review the sealed records below without a
judicial intervention? I think that is a fair
way I am trying to --

VADM TRACEY: I didn't understand what
was the difference between Options 2, 3, and 4?
It just seems to be --

CHAIR HOLTZMAN: I don't either. I
mean these may have to deal with --

MS. GUPTA: Option 2 and 3 is -- so,
Option 4 is the in camera review that we have
been discussing. Options 2 and 3 are more under
the Navy-Marine Corps procedures and the Army
procedures, there isn't even a motion filed. You
just have to make a request to the panel or the
panel secretary, the secretary or the clerk. So, it may be something in-between.

CHAIR HOLTZMAN: I don't want to get to the details of how the request is made. I am talking about the broad principle first.

If we approve -- obviously, if we say we want to recommend a change that you have to apply to the court for sealed materials, then we can review that. But whether you make a motion, you don't make a motion, we should decide that second as opposed to the first thing. The first principle is whether the basic principle that we now have, whether we want to recommend a change in that so that the defense appellate counsel cannot automatically, without judicial -- at the outset, automatically get access to the sealed records, that have been sealed in the case below.

Do you have a better way of saying it?

Please --

CPT. TIDESWELL: No, ma'am but I do have a point. I do believe we heard testimony specifically from multiple, from the appellate
defense divisions, from the various Services, that they, of course, do not want that. And it sort of almost dovetails into what we heard from Judge Baker in that judges in the military at the appellate level may not be as seasoned and experienced as judges in the civilian sector. And I think the defense bar expressed concern about that. In other words, in the military, it is a tour for us, typically. We are not tenured judges.

So, there is a difference in experience levels of what you might see in the civilian sector from a judging perspective.

CHAIR HOLTZMAN: The defense counsel was supposed to engage in this.

CPT. TIDESWELL: Yes, ma'am, correct. They want to maintain access. They believe only they can best advocate on behalf of their client.

CHAIR HOLTZMAN: Ready for a vote? Anybody --

So, all in favor of retaining the present system, as I explained it before, say aye
and those opposed say no. So, aye if you are in favor of retaining the present system.

(Voting.)

Opposed?

(Voting.)

It looks like three noes and two ayes. So, the motion is rejected. We are going to change it. okay.

So, now, how are we going to change this? What are the options for changing this, an in camera review?

CPT. HOUSE: Did we flesh out what we mean by in camera review? Are we talking about the fact that either the judge or a clerk ensures that this appellate defense counsel is working a case where there is a 513 issue that is an issue in the case and therefore needs access or it is either an in camera review where a judge actually reviews the records and makes a decision about whether or not the defense should get the records. Because that is a big distinction for defense counsel.
CHAIR HOLTZMAN: Correct. You phrased it very well. I guess we could take it in order.

MR. STONE: We just rejected current practice. So, that includes the Air Force practice that it is just oh, that is a victim involved in the appeal, you get it.

CPT. HOUSE: But that is not really current practice. Current practice is our defense counsels have to go to the clerk and say I am the defense counsel in the newer case and the issue in the newer case is the 513 denial; I need to see the records.

MR. STONE: All the records.

CPT. HOUSE: I need to see the records so that I can make a decision as to whether or not the military judge in the lower court made a mistake in denying these records to my client.

MR. STONE: Right.

CPT. HOUSE: So, it is not automatic access in the sense that they have to go to somebody and demonstrate that they are counsel on an appropriate case and that that issue is an
issue in the case.

MR. STONE: That just means they are not a stranger walking in off the street.

CPT. HOUSE: Exactly. It is not automatic access.

MR. STONE: But that is not what we are talking about. What we are talking about --

CHAIR HOLTZMAN: Well, no. I mean we could talk about it. He is saying what are we talking about when we are saying that we want an in camera review? Does that mean that the judges are reviewing the substance of the sealed records in determining whether they are relevant for defense counsel to obtain?

MR. STONE: Yes.

CHAIR HOLTZMAN: Or, are we saying that the level of review is a lesser level, which would be simply to ascertain whether, without looking at the actual records, making sure that the defense counsel who is requesting these records is in fact the defense counsel, that the issue that he or she is asking about is an issue
in the case and not just a fishing expedition in that sense? I mean maybe -- it is not the same level of review by a judge. The first one that we mentioned you actually will have to have, I don't know whether it is one appellate judge or a number of appellate judges who are going to be sitting and reviewing the sealed record. I mean I guess we could get to that issue later but they would actually have to review the sealed record to determine whether it is relevant and necessary. It is not even relevant. I guess they just saw whether it is appropriate on some level, I don't know what the standard would be, for defense counsel to get it.

MR. STONE: And if a motion is required, that implies that there will be a response from the appropriate parties, which, and this brings up the same issue we had before, the appropriate parties are not only the prosecutor, they are the victim. The victim is in a better position to know whether those sealed records are relevant and something that they don't want the
world to know and why.

So, what happens is, the party who wants to unseal it files a motion. They serve it on the person whose records it is, even if they are not a victim, even if they are just a witness. If you want to unseal a record, you serve it on the person whose records it is and they and the state get a chance to respond and then the judges decide.

CHAIR HOLTZMAN: Let's just discuss the procedure secondarily as to whether who gets to respond, who gets service, and all of that stuff. Let's just go to the question first about whether we are going to have what kind of level of review is there going to be before the defense appellate counsel gets to see the sealed records.

Are we requiring an in camera review by the appellate judges, again, I don't know the number of judges or what, and a determination by them, him or her, one -- I don't know whether they can delegate it -- determination on the substance that these records are relevant and
appropriate and necessary for the proper defense of this case. That level of review or a lesser level of review, which would be to determine whether -- as the captain said, whether it is the right case, whether the issue is there, whether the sealed record is relevant even to the defense to make the preliminary determinations on that level. Is that clear?

So, maybe before we vote on this, we should get a better idea of what it would mean to have an appellate review of the records. Maybe Colonel Orr, you could explain.

COL. ORR: Well, there are two options. One would be if you have a motion come in, the judges would get together and actually rule on whether or not the trial court made the correct decision. That is one version.

CHAIR HOLTZMAN: So, they would have to read the sealed record, all three of them.

COL. ORR: Yes, to determine whether or not the right call was made before you decide to release it or not, or whether it is a
reasonable decision. And then you could just say, no, you can't have it. And then that pretty ends the issue for that particular court.

The other would be just basically is there a reasonable basis to raise this and then let appellate defense counsel articulate why they should have these.

MR. TAYLOR: So it is the latter of those two what you do now, what the --

COL. ORR: No, what the law clearly, 1103A says is they ultimately give them.

What we do now is you take it and say, is this person representing the client in this case. Now, is the records we are releasing, do they relate to an offense of which the accused was convicted? Because if you have multiple victims, you will have multiple records sometimes. And if you were convicted of the crime, there is no reason for you to see Victim A's records when that offense is no longer in play but they are still going to be in the record.
HON. JONES: But am I right, then, in that scenario, the court doesn't -- the appellate court doesn't go on to decide whether or not on the issue the defendant is going to win or lose.

COL. ORR: That's correct.

HON. JONES: All you decide there is if someone is going to argue this on behalf of the defendant, this issue is one that needs to be argued and he or she is the appropriate person.

COL. ORR: That's correct. That's all you decide.

CHAIR HOLTZMAN: But it is not even clear the court is making that decision. That is an administrative decision. They can just look. It doesn't have to be a judge who makes that decision.

COL. ORR: Well, in the Air Force, it gets to a judge.

CHAIR HOLTZMAN: Okay, it goes to a judge.

COL. ORR: Yes.

CHAIR HOLTZMAN: But not to three
judges on the court.

COL. ORR: Generally, no. Generally, no. It depends on what you are doing but, generally, no.

CHAIR HOLTZMAN: Because it is an administrative decision, as I understand it. Is this sealed record a sealed record related to a conviction in this case?

COL. ORR: Yes.

CHAIR HOLTZMAN: That is pretty much a ministerial simple decision. It is not a discretion -- I mean it doesn't involve a law degree, let's put it that way.

COL. ORR: Correct. That's right.

CHAIR HOLTZMAN: You know a clerk could make that decision. A computer could make that decision.

MR. STONE: In the Army, the clerk makes the decision.

CHAIR HOLTZMAN: Okay, right.

COL. ORR: No, we have an actual judge that actually sits down and makes this
comparison.

CHAIR HOLTZMAN: So, we are not talking about that here. I guess basically what we have been talking about here is that the appellate judges will have to sit down and review, the three of them, each of them --

COL. ORR: Yes, a panel. That's correct.

CHAIR HOLTZMAN: -- all of them would then have to review the entire sealed record. I guess they'd have to make the preliminary determination that it was relevant. But then they would have to make a determination on their own that these were relevant.

Defense counsel would not --

HON. JONES: They would have to read the entire trial record to determine that.

CHAIR HOLTZMAN: Right. And the defense appellate counsel, without having seen those records, wouldn't be able to give them any assistance in terms of why those records are relevant. They just have to do it on their own.
LT. COL. VERGONA: And typically ma'am, at the stage that you are at where you are asking for those sealed materials, at least for the Army, when the record goes to a panel, it is a three-judge panel, one of the members is assigned as the lead judge. He or she reads the record but, typically, they read the record once the defense and government have filed their briefs.

So, if you do an in camera review of the sealed materials, they are going to be reading it sort of with blinders on because they are only going to be looking at that sealed material without having the context of the full record. Because at that point they wouldn't be reading the whole record yet.

CHAIR HOLTZMAN: How could they decide if it is relevant without reading the whole record?

LT. COL. VERGONA: Exactly, ma'am.

MR. STONE: In federal courts, that is not the way the motion practice works. And I
imagine -- I don't know for sure that in the military it is going to be that way. But even if it is a three-judge panel, a motions panel is typically a lead motions judge who will often ask a second judge. So, they only need two to make a decision on a motion and it is only if those two decide that they bring in a third judge.

And I am sure that there is some kind of procedure to decide if they are going to allow an amicus brief to be filed and you don't necessarily have to bring in the third judge if you get two judges to agree. So, it isn't necessarily three. It depends on your motions rules in the particular appellate court.

HON. JONES: The only question for me here is do you want a judge, one, two, or three, to be making a decision either in a vacuum or after having had to read the entire record to figure out whether or not these records should be unsealed. Do you really want them to make a decision without giving the defendant an opportunity to argue? I think the answer is no.
VADM TRACEY: Can I repeat Mr. Taylor's question to Captain House? I am also hearing your formulation of anything other than the judge actually reviewing the record as what the current practice is in the Air Force. I'm still not understanding why you think it is different from the current practice in the Air Force.

CPT. HOUSE: I don't really know what the current Air Force practice is. In order for our Navy-Marine Corps appellate defense counsel to access a sealed record, they have to go the clerk at the Service court and say I am Attorney Smith. I am representing a sergeant or whatever. The 513 issue is the issue in this case. I would like to review the materials.

They have to file a motion before they can make any copies of those records. And they also have to file a motion with the court if they get copies, and the copies have to be destroyed.

CHAIR HOLTZMAN: The copies have to be what?
VADM TRACEY: Destroyed.

CHAIR HOLTZMAN: Oh, destroyed.

CPT. HOUSE: Yes, ma'am, so that they are not floating around or no one else has access to them. So, that is the current Navy-Marine Corps practice.

MR. STONE: And isn't he going to say that, make that proffer to the clerk in every case where there was a 513 hearing? Because he doesn't know, if the records were sealed, having not seen them, whether or not there is a 513 issue. So, all he is saying is there was a 513 ruling below. Therefore, I want to see the sealed records. Okay, right.

CPT. HOUSE: Of course. And then that defense counsel, in order to be able to articulate to the court whether or not there really is an issue regarding relevance, the only way to do that is for the defense counsel to see those records. Otherwise, there is no defense in 513. There is nothing.

MR. STONE: Well, there was whatever
happened below.

CPT. HOUSE: But if we shift that decision to a judge to decide whether or not those records were relevant or not, and then we lose, the defense loses, and we don't get the records, because under the CAAF, the CAAF does the same thing.

MR. STONE: Right.

CPT. HOUSE: We are up to the Supreme Court. That is where we have got to go because the defense has not been allowed to see the records at issue in the case.

MR. STONE: And that is the practice in the civil courts throughout the United States, which has been held constitutional.

CPT. HOUSE: You have to go all the way to the Supreme Court for records?

MR. STONE: No. That unless you make a proffer about why you want to invade someone's privilege, you don't get to invade their privilege. That is what it is.

HON. JONES: I don't think they were
talking about not making a proffer.

MR. STONE: No, no, no. But I mean you have to make a proffer beyond a substantial -- you have to make a substantial showing that there is reason to open up a privilege. Defense lawyers don't get to open up a privilege. That is a point of a privilege.

Look, I don't know how many murder cases where husband and wife privilege is raised but you don't get to find out what that other spouse would have said to argue later, there was justification for the murder -- you should have heard what they said to each other. I mean --

LT. COL. VERGONA: But at the trial level, if you can't make that justification, no one is going to see those records.

MR. STONE: Right.

LT. COL. VERGONA: This is only a review. It is really a review of whether the trial judge ruled correctly. Because the only reason those sealed records are in the record is because someone looked at them at the trial
level, that military judge.

It is going to go on appeal for the --
his point is for the defense to thoroughly review
the record and represent their client, they need
to be able to see those to determine whether the
trial judge erred.

And so now you are balancing the
policy decision -- you are balancing the rights
of the accused with the privacy rights of your
victim.

MR. STONE: Well, in all the other
jurisdictions of the United States, what gets
reviewed on appeal is the same proffer. Whatever
the defense counsel could have said at the trial
board, he can say again on appeal and, again,
whatever the trial judge reviewed in camera, the
judges on appeal can review in camera. They are
in the same shoes. Defense counsel is not in
better shoes on appeal than the trial counsel
was.

CHAIR HOLTZMAN: But that's not really
entirely the issue here. The issue here is
whether, in order to make sure there is a more
perfect sense of justice that there is, in this
limited situation, a review by the defense
appellate counsel to determine whether the trial
judge made an error. It is true that the defense
appellate counsel is standing in better -- is in
a better situation than the trial counsel was.
There is no question about that. But that is not
the beginning and ending of the argument.

The beginning and ending of the
argument is whether there is some real need for
this and whether this advances the cause of
justice.

Yes, you have to weigh two issues, two
values here. One side is the privacy right of
the victim. But the privacy right of the victim
is invaded in many instances in this process.
The trial judge will review it. The trial judge
will review the records. That is an invasion of
privacy. The trial judge will review it.

And so here, the question is whether
you are going to add, first of all, if you have
the defense appellate counsel reviewing it, you may avoid the need to have any judges or anybody else review it because the defense appellate counsel may say there is nothing here. And that ends the matter. Nobody else has to look at those records.

MR. STONE: That isn't correct. The trial judge does not automatically get to review --

CHAIR HOLTZMAN: I didn't say -- what?

MR. STONE: The trial judge does not automatically get to review it.

CHAIR HOLTZMAN: I didn't say the trial judge automatically --

MR. STONE: You just did.

CHAIR HOLTZMAN: No, I didn't.

MR. STONE: It may well be that the proffer is insufficient --

CHAIR HOLTZMAN: Well, I'm talking about the appellate --

MR. STONE: -- and the trial judge says I'm not looking at it either. I'll seal the
package but I need to look at it.

CHAIR HOLTZMAN: Mr. Stone, I am talking about the appellate level, being reviewed by the defense appellate counsel may obviate the need to have any of the appellate judges review those sealed records, three additional invasions of privacy because the defense appellate counsel may realize that there is nothing in these records, sealed records, that is relevant.

So, it is not necessarily an additional invasion. It could preclude invasion. But I am saying you have two factors to weigh here. You have the factor of the invasion of privacy but there has been an invasion of privacy already with regard to the victim because the trial counsel has reviewed the records.

MR. STONE: Not necessarily.

CHAIR HOLTZMAN: Because you have a sealed record. Those records have been brought to the court.

MR. STONE: And sealed. And they don't necessarily look at them.
In the case that I was telling you about, the judge recused herself because she had looked at the records.

CHAIR HOLTZMAN: Because she looked at them.

MR. STONE: And she said I don't need to be in this case anymore.

CHAIR HOLTZMAN: Okay but she looked at them.

MR. STONE: I shouldn't have looked at them, she said. There was no proffer that said these psychological records should have been looked at.

CHAIR HOLTZMAN: Whether she did or not -- let's talk.

MR. STONE: And the judge who decided the case didn't look at them.

CHAIR HOLTZMAN: As a practical matter, Mr. Stone, if a trial judge is going to call for the records to be delivered to his or her courtroom and we just changed the rules on that to make it not a standard operating
procedure -- it used to be the standard operating procedure. And this is what the RSP did. They stopped this as standard operating procedure, judges from calling in these records because once they are there, it is so easy to look at them. And that is what was happening.

So now, the judge doesn't automatically call for those records. So, the chances are, if the judge is making the effort to call for the records, he or she is going to look at them. I wouldn't say it would be 100 percent of the time. Maybe they drop dead before the records get to the court room. I don't know. So, it is not 100 percent of the time, granted, but most of the time they are going to look at those records.

So you do have, already, an invasion of privacy. We can't have perfect privacy, as much as I respect that and the need for that. The question is here we have already probably an invasion of privacy with regard to the courtroom. The court has already examined the records. You
have doctors and medical personnel who have
looked at the records. The question is, to what
extent is this really an issue for a justice for
the whole system, not just for the defendant but
for the whole system, if defense counsel gets to
see these records or is denied the opportunity to
see the records.

And I think Judge Jones talked about
the importance of being able to have a fair
trial. That is a value we can't ignore here.
How much weight we give to it is a separate
issue.

MR. STONE: I disagree with your
presumption. I don't think we changed the rule
about how the records get to the judge. All we
did was make sure that the investigators can't
pull the records without going to a judge. We
didn't say that the judge gets them and
automatically looks at them.

CHAIR HOLTZMAN: Well, I never said
that. You mischaracterized what I said.

MR. STONE: Okay then, maybe I am
mischaracterizing it but I don't think we changed anything about the judge's decision at the trial level, whether or not he is going to look at those records.

CHAIR HOLTZMAN: He or she.

MR. STONE: He or she.

CHAIR HOLTZMAN: Right. Well, we did change it --

MR. STONE: And I think that in every court in the United States, every single one that I know, except perhaps the military, a judge, when there is a challenge to privileged records, looks at all the records. They don't shy away from their job to look at the privileged records and then to say make your proffers.

LT. COL. VERGONA: Sir, the practice is not -- just because defense raises a motion and says I want to look at these records, they are not automatically brought over to the court and the trial judge reviews them. They absolutely are not. Your trial defense counsel must put on a showing of relevance for those and
it cannot be a fishing expedition because if that
trial judge says, tell me what is in it, and the
answer is I don't know until I see it, the answer
is no. They are not going to order those
records. Only after that --

CHAIR HOLTZMAN: Excuse me, wasn't that a change that was made as a result of the
Response Systems Panel?

LT. COL. VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: Thank you.

LT. COL. VERGONA: So, the trial judge
only orders the records after a hearing and after
the defense counsel has made a showing of
necessity. And it is not a low standard, at
least practically, it is not a low standard.
That is the only time those records are going to
come to that court.

If the judge says, defense, you have
not made your showing, those records are not
collected. So, there isn't anything the judge is
going to view or not view because he doesn't have
them.
Only when the defense has a showing will the judge order the records, the records come to the military judge. At that time, is when he or she does the in camera review. And then he or she is going to make the decision on whether to release anything or not.

So, many times after the in camera review, a military judge is going to say defense, you don't get it. I didn't see anything in there that is appropriate for release.

MR. STONE: And isn't that exactly the decision that we want to have reviewed? The records, based on the showing that was made below.

LT. COL. VERGONA: Yes, except that on appeal, keep in mind, one of the arguments defense is making is the military judge erred. So, the defense counsel is the one that is looking at the record as a whole. And there may have been other errors that the military judge made. And so cumulatively, the accused didn't have a fair trial with all of these errors that
the judge made.

The appellate defense counsel is in the best position to see, overall, the errors in that record. I mean they really are. For them to then say the military judge at the trial level erred when he denied release of those materials.

MS. FRIED: I just want to add, unlike the civilian courts, there is Article 66 rights. The appellate -- the Service courts had allowed them to do all this.

LT. COL. VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: Mr. Taylor, I'm sorry.

MR. TAYLOR: Yes, if I may. When we took our first vote on Option 1 to keep 1103A as is, I, for one, did not mean to imply that I necessarily opted it to the in camera review. Because Option 2, in our menu of options, was to modify 1103A to better provide procedures, perhaps uniform procedures, across the criminal courts of appeal, in how to deal with this. Because it appeared to me, from the testimony we
heard, that the Air Force has a very fine practice. And it sounds as if Captain House's description of the Navy practice is not a lot different from what you've described as the Air Force practice.

So, as it was, again, teed up by the staff, I thought that we could move in the direction of a best practices approach that would combine what we know from all the Services and how they do this, not going to the extent of having the in camera review, if that makes sense.

CHAIR HOLTZMAN: Okay. So, maybe it was my own fault in terms of how I teed this up. So, I apologize.

MR. TAYLOR: No problem. I just thought we could perhaps --

CHAIR HOLTZMAN: And to anybody else. Okay.

MR. TAYLOR: -- that there might be a greater sense of consensus among us if we thought about it in that light.

CHAIR HOLTZMAN: Okay. So, maybe I
should rephrase it and say -- so, should the first question be, do we want to have an in camera review of any request for the sealed records on appeal? Is that really the first question you think we should address?

MR. TAYLOR: Well, we would. What I was thinking was a little bit better system in implementing 1103A as we now have.

HON. JONES: And I confess. I thought what I was voting on was whether to change the practice of giving the records to appellate counsel -- defense appellate counsel. And I don't think that practice should be changed. I think they should get it.

Now, if we want to figure out a better way to decide how to get them, is that where we are at?

MR. TAYLOR: That is what I was suggesting, as a way that might incorporate the views of some of us. Obviously, not all of us.

CHAIR HOLTZMAN: Admiral Tracey -- maybe we need -- Mr. Stone, I think you knew what
you were doing. I don't mean to imply anybody else wasn't.

I want to apologize for phrasing the question in a possibly confusing and misleading way. So, I want to try to phrase this in a way that gets us to a vote that accurately reflects what the consensus or what the views are of the Members of the Panel. I really apologize for this.

MR. TAYLOR: No, no, I mean I think that maybe Option 2 on page 11 was what I was thinking about, which was to provide some more granularity to 1103A to make it a little clearer how this could be done in a way that reflects the best practices of what the Services are now doing.

CHAIR HOLTZMAN: Should we add to Option 2 without requiring in camera review?

MR. TAYLOR: That would be fine with me.

CHAIR HOLTZMAN: That clarifies --

MR. TAYLOR: I intended to vote for
CHAIR HOLTZMAN: Okay. Did you intend to vote for that, Admiral?

VADM TRACEY: That would be fine.

CHAIR HOLTZMAN: So, it would say Option 2: Modify RCM 1003A to better guide procedures for access to records without requiring in camera review -- prior in camera review by the court.

Is that okay? Anybody think this is misleading, inaccurate? Go ahead.

COL. ORR: My only concern you said what we do is an administrative review but it is done by a judge.

CHAIR HOLTZMAN: Right, I got it.

COL. ORR: So, I just don't want to make -- yes.

CHAIR HOLTZMAN: No, no, no, I meant administrative in characterizing the nature --

MR. TAYLOR: But that was my point. I mean I think having a judge do this is probably the right decision.
COL. ORR:  Right.

MR. TAYLOR:  But the Army does not.

COL. ORR:  Oh, okay.

MR. TAYLOR:  The Army leaves it up to the court.

CHAIR HOLTZMAN:  Okay.  Well, we can address how it is going to be done when we get to the best procedures.

All right.  So, I am going to state this again.  Anybody who has got any disagreement, confusion, please speak up.  And Panel, if you think this is -- expert panel, if any of you think this is confusing, please let me know.

So, this would then be Option 2.  The proposal is to modify RCM 1103A to better guide procedures for access to records to be -- it should be sealed records, without requiring prior in camera review by the appellate court.  An appellate?  By the appellate court.

Okay, speak now or forever -- okay.

In favor of this motion, everyone say aye.
HON. JONES: I don't know what the system is now but I think we have to make a distinction between the kind of review that I think the Colonel was talking about, which is, and it is done by a judge and maybe we want to put that in this process, as opposed to an in camera on the merits.

CHAIR HOLTZMAN: I know. That's what I said here.

HON. JONES: I'm sorry, I didn't --

CHAIR HOLTZMAN: Okay, modify RCM 1103A to better guide procedures for access to sealed records without requiring prior in camera review by the appellate court.

HON. JONES: Right.

CHAIR HOLTZMAN: Any in camera review.

HON. JONES: Now, what are the details on this?

CHAIR HOLTZMAN: Okay, well, wait a minute. You are not the only vote.

HON. JONES: Well, I think everyone else already voted.
CHAIR HOLTZMAN: Right, we have to get everyone's vote.

All in favor -- do I have to read the whole thing? All right, let me try it.

Modify RCM 1103A to better guide procedures for access to sealed records without requiring prior in camera review by the appellate court.

All in favor say aye.

All opposed.

MR. STONE: I'm opposed because before privileges are invaded by any judge, a judge has to review those records and I believe that is supported by the privilege and immunity clause of the U.S. Constitution.

CHAIR HOLTZMAN: Okay. Okay, thank you. We finally have some agreement, not unanimous agreement on this.

If we are going to look at the better procedures, the better guide procedures, what are the procedures we are going to suggest?

MR. TAYLOR: Well, as I said earlier,
I think having a judge make that decision --

CPT. HOUSE: If it helps, I don't think we are -- I can only speak for Navy and Marine Corps. We are not opposed to filing something with the court that says I am the attorney for Sergeant so-and-so, 513 is an issue in this case. I would like access to the records. We are not opposed to that.

The only opposition we would have is never get to see the records and some appellate judge gets to decide whether they are relevant or not, without us ever getting to see the records.

That is our opposition. The Air Force procedure, our procedure, whatever authority you would recommend we would go to to prove the bona fides, so to speak, of this is appellate defense counsel. If they actually have an issue in the case and they are the right appellate defense counsel, we are fine with that.

CHAIR HOLTZMAN: Can I make a suggestion about the better procedure because I feel that we don't have the Air Force procedure
in writing before us.

MS. GUPTA: We do. Tab 6 has all the CCA rules, including the motion.

CHAIR HOLTZMAN: Do we have the comments of the other Services on Air Force rules? So, maybe they have an objection to them. I think it would be a good idea for us to have a better sense about how other people feel. So, maybe the Navy and Marine Corps, they love them but maybe the Army doesn't love them.

LT. COL. VERGONA: The Army procedures are different, ma'am.

CHAIR HOLTZMAN: Right, I know that. And so maybe you would have objection to adopting the Air Force procedures. And so we just like to know that before we approve and the Coast Guard, too. Do you agree with that?

COL. ORR: Yes, I do.

CHAIR HOLTZMAN: Okay. I think I would feel better if we had your comments on that. So, we could easily take that up. We know what the issue is. We will see the Air Force
rules set out in front of us. We will have any
comments or objections or disagreements in front
of us and we can pretty easily deal with that.
Is that okay with you. I know you are not in
agreement with this procedure, Mr. Stone, but I
think it is at least fairer.

MS. FRIED: Just to be clear, the
position as far as the recommendation is to
modify and better guide, that still remains --

CHAIR HOLTZMAN: Right but we are
trying to figure out what the procedures are
going to be that we are going to approve. It
seems as though there is consensus to follow the
Air Force procedures but we haven't heard really
commentary from any of the other Services. They
may not like those procedures. They may have
disagreement with aspects of the procedures. So,
I think I would feel more comfortable proving
something if we knew completely what the
consequences were and we had the benefit of the
guidance from the other Service.

Of course, the Air Force is going to
love its own procedures, right?

COL. ORR: That's right. We have no objections to our own procedures.

CHAIR HOLTZMAN: Okay, great. All right. Thank you very much for your help.

And I just want to say, Captain, it was really a very wise decision to bring these experts here. Thank you for being here because you helped us with understanding these issues.

Okay, now we have I think the last -- is this the last issue we have to deal with?

CPT. TIDESWELL: Yes, ma'am, it is number four.


CPT. TIDESWELL: Yes, ma'am. So, the issue really is in which instances should the victims receive notice. Under Option 1, there is legislation pending right now in the Senate version of the FY17 National Defense Authorization Act in Section 547. And the
proposal is that a victim should receive notice of any appellate matter, regardless of what the issues are.

Option 2 --

CHAIR HOLTZMAN: Any appellate matter involving the case that they were in.

CPT. TIDESWELL: The case, yes, ma'am.

Option 2 would be, and this was one I believe that bore out in the testimony of the defense bar that we have heard, that was a victim should only receive notice of pleadings that reasonably implicate something that is of interest to the victim.

CHAIR HOLTZMAN: Can we have a discussion of this?

MR. TAYLOR: Well, if I may, it seems that Option 4 talks about implementing technology similar to PACER and that is, apparently, in the FY17 NDAA provision to require the creation of that kind of system.

So, it seems that there might be a really good long-term solution to this but when
the parenthetical says that implementation would
occur four years from enactment of the
legislation, I find it a little concerning that
there is not a more immediate policy to address
the issue.

So, it seems that there might be a
long-term solution out there. And one question
might be should we try to figure out something
that will bridge the gap.

CHAIR HOLTZMAN: Mr. Stone? Judge
Jones? Admiral Tracey?

MR. STONE: To comment on the
difference between the two options, I don't know
how anybody other than the special victims'
counsel can decide. Who is supposed to decide
whether a victim's interest is at issue? That is
why you give it to a special victims' counsel.
And certainly, once it is electronically
available onto PACER, that is not a big deal.
They look it up. They read it and they decide.

So, I think that, for me, Option 2 is
the only one that makes any sense. How we get
there from here in that gap, at least in the
military cases I have been involved in, even
before PACER is up, in every case I have been
involved in, the pleadings have been
electronically served on the other party over the
internet. Everybody had .mil addresses and we
were busy getting and receiving emails from
prosecutors and other people. And I think it
would be enough if we simply recommended that
they make their best efforts, whether it be by
paper or electronically to serve the special
victims' counsel if they were involved in a case
below. I don't think we have any reason to
believe now that there are going to be many cases
without special victims' counsel below. So, they
know who to serve, the victims' counsel below and
that will take care of it.

And if we say make their best efforts
if there is a circumstance where they can't do
it, at least because I don't know they were on a
ship or whatever happened, then it will be
understandable. There will be an out. We are
not trying to make it an inflexible thing. We are just trying to have them make their best effort until, I guess you could say, a more regularized system is put in place, which might be something else.

CHAIR HOLTZMAN: Okay, so but there are questions that are implicated by this. Well, first of all, I have a couple of questions.

One, Option 2 says pleadings that reasonably implicate the victim's interest. Is that the option that you are -- you said Option 2. Is that what you were --

MR. STONE: That's what I am saying. Nobody can know that but the special victims' counsel.

CHAIR HOLTZMAN: Well, that means -- so who is responsible for giving what notice?

I mean I think Option 2 -- I don't mean to put words in anyone's mouth here because I really messed up before but aren't we talking about probably 412 and 513?

MR. STONE: Maybe the victim was not
allowed to be present in the courtroom. I mean there is a whole litany of victims' rights. I don't know which they all are but I just think that if the defense counsel is filing a brief, whether they file it on the court or they file it on the court with an electronic copy to the last special victims' counsel or it is a hard copy if they are really doing it. But I tell you I haven't been involved in ones with the hard copy. If they make an extra copy and they send it, that is hardly a resource problem for people. We serve people all the time.

CHAIR HOLTZMAN: But as I remember the testimony about this, there are some issues here. One is it is not clear that the SVCs are representing a victim on appeal. So, the question is the lawyer.

Number two is -- let me see if I can remember some of the issues here. Number two is that some victims don't even have -- don't want to have representation on appeal. And number three is if we don't have an electronic system in
place, how burdensome is this going to be?

    My impression of this is going to be amazingly burdensome. I don't know exactly why but that was my impression about his. Obviously, the best answer is that we have this system and it is a PACER system and they can get whatever they want, anytime. But short of that, I don't know enough about the burdens here to understand what we would be doing if we mandated the Service.

    MR. STONE: I'm just trying to suggest something that we know is not a tremendous inconvenience until they move to the next step. If there is a special victims' counsel below, it will become their job to figure out, if they are not representing on appeal, where to forward it. If it is a victim who said they didn't want to be represented, they should know that, too. But they will know the victim and they will be able to take it from there and at least it will be an effort by the military to see that someone who has the victim's interest and not defense counsel
or the court or somebody else has the job because
they also have the victim advocates and stuff,
who have met with the victims who may not have
wanted counsel. They will know the next step to
see that a victim who says, I didn't want
counsel. I didn't want it but I wouldn't mind
just reading the brief. They will send them the
hard copy or they will say here is the electronic
copy. We will forward it to you if you have a
website.

I'm just saying the only burden I put
on the person filing the appeal in any of these
cases is to notify the last special victims'
counsel in the case. And I think that that is a
legitimate burden. I don't think it is terrible.
I think it is doable. It may not cover 100
percent of the cases. And you are right. One
percent of the cases may be so complicated that
they would be off the charts. Well, then we
won't be covering that one percent but we will
cover the 99 percent, or special victims' counsel
knows who is representing the victim, or if the
victim didn't want counsel. And it is a legitimate way to show that a legitimate effort is being made.

VADM TRACEY: So, in the event this victim is not being represented, who will determine that information is relevant to the victim?

MR. STONE: No, no, no, there is no screening. They send the brief. They get the brief.

LT. COL. WISSMAN: But there is also -- I mean clearly, we have victim witness forms, the 2704 forms, which comes up with the record of trial where the victim or the witness says, I want to know if the person is going to comment or if there is a hearing about that. So, there could be, as far as the procedure, if it decided to go that way, the modification on that form, do you want appellate proceedings and who do you want that to go to. And you have to decide, as a Service, if you don't have appellate victims' counsel, how that would work. But at least there
would be a procedure on a form that we already have that goes up with the record of trial. That could be --

LT. COL. VERGONA: And I believe the testimony that you heard, at least from the Army, that they do use these forms when it goes to the clerk of court and there is a person in the clerk of court who reviews those forms and, if the victim elects, then they go ahead and send those.

Also, I'm not sure how all the Services do it but at least the Army, it sounds like, our representation, special victims' counsel representation ends at action. So, there isn't necessarily a continuing relationship. Just like with the defense counsel, you finish your case. You don't necessarily represent them for everything and anything.

As they say in the military, we do have a centralized office, the Special Victims Policy that would be an option as well but I am just not sure how the Services, all the Services do it. So, some Services, once you form an
attorney-client relationship, it is possible that they have it continuously but, at least in the Army, that is not how it is.

CHAIR HOLTZMAN: Let me ask you another question to follow up on the point because I think Mr. Stone's point is that somebody should be getting this material and making sure that the victim, if she or he wants it gets it. Is that more or less it?

MR. STONE: That's it.

CHAIR HOLTZMAN: So, the question is, is there a better person? I mean is the victim advocate a better person to get it? I don't know. I mean that is --

HON. JONES: I like the idea of having it formal on a form. And before there was a special victims' counsel, there was a complete SARC and a whole mechanism for aiding victims and it should be part of that system. Then you don't need the defense lawyer or the prosecutor.

So, I think your idea of having yes, I want notification -- and I think a witness in a
case wants to know everything, not just their own issues. They are going to want to know who won, for instance. Was it affirmed or denied? So, I wouldn't worry about whether the issue was implicated. I would just ask him do you want to know what is happening in the appeal and if they say yes, then it is going to have to become a part of -- I keep just saying SARC but that would be --

LT. COL. WISSMAN: Ma'am, you probably remember from -- the Army has the appellate victim liaison that is working for the ACCA Court directly. And so that person is that liaison back and forth to the victim.

MR. TAYLOR: That's exactly what I was going to mention because when the Army was here talking about this, they said they had an appellate victim liaison within the clerk of court. And this is what the Army has used and somebody left as a form that I just happened to hold onto called Post-Trial Information for Victims and Witnesses of Crimes. The sample
letters of how something unfolds in a particular case that is held by the clerk of courts. I mean the Army practice, it may not be the best practice but it seems to be a practice that the Army has found to work.

LT. COL. VERGONA: Yes, sir.

CHAIR HOLTZMAN: But we don't know what happens with the other Services and what --

COL. ORR: Well, I can share something with the Air Force. In light of what we heard at the last meeting, what we have essentially done, and it is still conceptional because we are still working through it. But essentially what happens is at the end of the trial, at action, the SVC will hand a form that we have created similar to the 270 whatever that one is. And it says, essentially, do you want appellate SVC to represent you. And at that point -- or do you want to be notified any further. And the witness actually signs all of that and lets us know what they want. That form comes up here to Washington and they will assign a counsel here.
Now, our current practice now is that if there is an SVC or they are represented by appellate counsel, all the pleadings, once the appellate decides to file a plea, it goes to appellate government. And appellate government, then, at that point, there is a paralegal in there that actually forwards the pleadings to the counsel or to whoever they want it to go to.

So, they are now, we are in the process of making sure that they get the pleadings until the point they say they don't want to.

But essentially, we are like the other Services. Once the action is done, generally, the representation ends and then it is passed off to a different shop up here in Washington.

CHAIR HOLTZMAN: Well, how should we leave it? That the recommendation is that the various branches formalize -- maybe that is a better way to do it is formalize proceedings either similar to what the Army has or whatever proceedings there may be that will allow full
notification of the victim/witness if they want it.

MR. STONE: Yes, give notice. We will leave it open for them to figure out what works for them.

CHAIR HOLTZMAN: Right.

LT. COL. WISSMAN: If I could, for us to be clear, a copy of the pleadings and the briefs as well.

CHAIR HOLTZMAN: Yes, right. It gives them the option of what they want. Yes, sorry.

MS. GUPTA: I just want to specify trial, some of the proposals we have heard about are only for only sexual assault victims. So, do you want your notice recommendation to apply to all victims?

CHAIR HOLTZMAN: We don't have that authority. We can just talk about sexual assault victims. That's it. Whatever we want.

So, we have addressed -- I think that is the last issue. Does any expert have any other comment about that issue number 4, which is
basically we leave it up to you to figure out how to make sure that the victims get proper notification, to get the opportunity to respond as to whether or not they want to be notified, and then once they say they do, they get the materials they want?

MS. FRIED: To clarify then, Ms. Holtzman, is the proposal to formalize procedures to provide notice and pleadings to victims if the victim so elects, something like that?

CHAIR HOLTZMAN: Correct.

Okay, I just want to say despite all my -- I have been thinking back and forth on this. So, I am just going to change my vote on Issue 1 from a no to a yes. And that is it.

Okay, so we are finished with this portion and we will take a ten-minute break and then we are on to planning. And we are early.

Okay, thank you very much. Thanks to the Members of the Panel and, of course, thanks especially to the expert panel for your good counsel and advice in helping us think this
through.

MR. STONE: Is there any public comment? Nobody wanted to comment?

No public comment today?

CHAIR HOLTZMAN: We have no public comment. It is a planning session.

MR. STONE: Okay.

(Whereupon, the above-entitled matter went off the record at 2:08 p.m. and resumed at 2:28 p.m.)

CHAIR HOLTZMAN: Thank you very much, everybody. We are going to get -- we are still ahead of time.

So, let me welcome you, Members of the Panel and the audience back to our second part of our work today, which is a planning session. And before I ask Captain -- Ms. Fried, may we proceed?

MS. FRIED: Oh, yes, we haven't closed yet.

CHAIR HOLTZMAN: Before I ask Captain Tideswell to lead our planning discussion, I
thought it would be important to highlight what the Panel has accomplished thus far, the status of the JPP Subcommittee site visits and the new Sexual Assault Advisory Committee authorized by Congress.

Since the Judicial Proceedings Panel was established on June 24, 2014, we have held 24 public meetings, received testimony from over 200 individuals, received responses to 158 requests for information submitted to the Department of Defense and the Services, received and reviewed thousands of pages of material, published five reports, and made a total of 38 recommendations to Congress and the Secretary of Defense related to victims' privacy and access to information, the Special Victims' Counsel program, victims' restitution and compensation, Article 120 of the Uniform Code of Military Justice, retaliation against those who report sexual assault, and court-martial data trends.

I am also pleased to report that the JPP's efforts have led to positive action by
Congress and the Department of Defense. The 2016 NDAA enacted four of the recommendations from our initial report. These recommendations were to: 1) establish guiding principles, standards, and measures for the Special Victims' Counsel Program; 2) standardize the requirements and time frame for SVC training; 3) maximize the opportunity for victims to have in-person contact with SVCs; and 4) develop options for streamlining the process for implementing changes to the UCMJ.

Further, in June 2015, the president signed an executive order which followed a recommendation of the JPP to eliminate the quote, constitutionally required, closed quotes, exception in Military Rule of Evidence 412 in Article 32 hearings.

Most recently, the Senate-passed version of the 2017 NDAA incorporates a number of additional JPP recommendations. These recommendations include amendments to Article 120 of the UCMJ to 1) revise the definition of
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consent; 2) define the term of incapable of consenting; 3) remove the element of causing bodily harm; 4) amend the definitions of sexual act and sexual contact; and 5) adopt a new theory of liability for coercive sexual acts or contacts in which a perpetrator has used position, rank, or authority to obtain compliance by another person.

The pending 2017 NDAA legislation also incorporates four JPP recommendations regarding retaliation against those who report sexual assault offenses. These recommendations include establishing metrics to evaluate efforts of the Armed Forces to prevent a response to retaliation, requiring retaliation complaints to be tracked and included in the annual DoD SAPRO Sexual Assault Reports, ensuring specialized training and command personnel assigned to investigate retaliation complaints and establishing guidelines on the release of retaliation complaint disposition information to complainants.
Finally, the proposed FY2017 NDAA also incorporates both of the recommendations made by the JPP in its report on data trends. The recommendations offer DoD to create a document-based case adjudication data system and to include data on intimate partner and child sexual assaults in the DoD SAPRO Annual Sexual Report to Congress.

Coupled with legislative action, the Department of Defense is independently implementing other JPP recommendations. These include requiring uniform guidance for release of mental health records by military medical facilities, developing guidance to ensure victims have appropriate access to docketing information in case filings, requiring all complaints of retaliation related to sexual assault be investigated by the DoD Inspector General and establishing uniform practices and procedures concerning SVC participation in military justice proceedings.

In addition, the JPP Subcommittee
continues to be very active. This summer, eight members visited military installations in Virginia, North Carolina, Colorado, California, Maryland, Korea, and Japan. The purpose of these visits was to hear from investigators and military justice practitioners and victim advocates in the field about the effect of recent changes to Uniform Code of Military Justice and the sexual assault-related policy.

As two of the JPP Members designated to serve on the JPP Subcommittee, Judge Jones and I personally attended several of the site visits. We also met with fellow subcommittee Members on October 14, 2016 to discuss observations made during these visits and to identify key issues the subcommittee recommends for further analysis.

Two of the issues identified, defense resources and sexual assault investigations, will be briefed to the committee during our public meeting on December 9th.

The last matter to highlight is the upcoming Defense Advisory Committee on the
Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces. This advisory committee was authorized by Congress in the 2015 NDAA and was to be established following the completion of the JPP's term in September 2017. The start date for the new committee was accelerated by the 2016 NDAA, which requires that it start this year. As far as I know, membership of the DACIPAD has yet to be announced.

Before Captain Tideswell proceeds with the planning session, I would like everyone to know I am very pleased by our progress. Thank you to my fellow Members, the current and former Members, and JPP staff, our Service representatives and all of those who contributed to this effort over the last two years.

Thank you again, very much, Members of the Panel.

Captain Tideswell, please proceed.

CPT. TIDESWELL: Yes, ma'am. And if I could just draw the committee's attention to the read-ahead materials, specifically Tabs 11
and 12. I think the goal of this session, ma'am, is to sort of set the way ahead for the Panel for the remainder of the time that it is empaneled through September of 2017.

The staff prepared two documents. The one behind Tab 12 literally outlines by FY NDAA and the sections, by year what exactly it is the JPP was tasked with. You will notice that there are several columns in that document. First, we identify the law that has sort of given the tasking, a brief description of the tasking, what the tasking was and the action taken to date.

You will notice, as you make your way through that document that some of the issues are highlighted in gray and some of them are highlighted in yellow. And we can get to those in a minute because I think it might be easier to review those on what is contained at Tab 11.

But this is sort of the long form that contains all the eaches of everything. But if you look at Tab 11, this is more of a snapshot that what the staff is left by tasking for the
JPP to do.

The items that appear in yellow are issues that we would recommend that the JPP needs to take action on. And so for example, the first issue listed is review and assess use of MRE 412.

Another remaining item --

CHAIR HOLTZMAN: At courts-martial.

CPT. TIDESWELL: At courts-martial, yes, ma'am.

Another tasking that remains is from the FY2013 NDAA, which is to assess the trends and training and experience of trial and defense counsel. You will note that on the bullets that are listed as number two and number three here, the number two being the assessment of trends and training, there actually has been action taken by the JPP. There have been requests for information on that issue. There was a public meeting held on the 13th of May and the subcommittee also gathered information as they made their way through the various sites, collecting data and getting a feel for what the
reactions are in the field. And so, that might be a matter the committee may want to consider as ready for a report to be done by the staff.

Number three is sort of similarly situated to number two in that the JPP has done a lot on that matter, except there has not been a report. So number three is monitoring trends and special victims' capabilities are now referred to as SVIP capabilities. The JPP, thus far, has in fact sent out requests for information on that issue. You all have received testimony in April on the matter and the JPP subcommittee also gathered sort of in their interview questions at the site visits information on this matter.

So, the staff would recommend that this might be a matter that is now ripe for you all to consider us having us write a report on.

The fourth issue that remains is monitoring the withholding authority for the initial disposition policy, where now the O-6 has to make that decision as opposed to somebody of a lesser rank. That comes out of the NDAA in FY13.
This seems to be a smaller item. There was information gathered on this during the subcommittee site visits this summer. So, we do have some information to work on. The staff would recommend that this should be addressed in a report but probably because it is a smaller issue not in a stand-alone. So, you may want to consider embedding that in either the SVIP or the data report that comes out usually in the February/March time frame.

So, ma'am, if you look further down, there is a couple of tasks that are listed that are in gray. We would argue they are sort of in the gray zone. But those are the JPP tasks that remain but have been affected by intervening actions. So, as a Panel, one could argue that either it has been overcome by events, or this is a matter that some other change is going to be effectuated and maybe you don't assess and leave it, perhaps, for the next Panel that is coming.

And I could run through those, if you
would like. The first is the review and assessment of MRE 412, but that is at the Article 32. And we all know that there has been an executive order that has changed and eliminated the constitutionally required reception under that rule. And this was based, actually, on a recommendation that you all had made. So, one could argue that that has sort of been overcome by events. If the Panel was so inclined and said well, we still would like to get a feel for what might be going on in that area, you could easily make that part of a hearing that you do with MRE 412, evidence at courts-martial and sort of just do both of those at the same time.

The second item listed, assess use of depositions, including whether a military judge should serve as a deposition officer. There was a change that was made in the FY15 NDAA, which now requires that a party requesting a deposition actually demonstrate exceptional circumstances and that it is in the interest of justice to take the deposition. So, they have, sort of, raised
the bar in that.

We do know that the Military Justice Act that is currently pending in the FY17 NDAA does have language that talks about depositions and in there is recommending that judge advocates be the deposition officers whenever practicable.

Just as a side note, we do, on the December 9th schedule, have scheduled Judge Effron and Mr. Dwight Sullivan, who is the military justice expert from DoD, they are scheduled to come in on your agenda to give a briefing on what is in the Military Justice Act.

We are not sure when the NDAA is going to be passed. We will all keep our fingers crossed for, hopefully, early December so when they come in on the 9th they will be able to share what actually does exist but nobody is sure about that yet.

The third issue is studying the plea bargaining process. That is another matter that is contained in the Military Justice Act and they are proposing a new Article 53 within the rule.
And it basically changes the way negotiations are conducted, the military judges' determination on whether or not to accept the plea or not, and the operation of the plea agreement as far as the sentence limitations.

That sort of goes hand in hand with what is also pending in the Military Justice Act, which is the fourth bullet. It appears that there is a recommendation being made in the Military Justice Act to sort of replace the broad sentencing authorities that currently exist with sentencing parameters, or guidelines, criteria. And that would sort of change on some level the way sentence is approached in the military. Right now, we do not have sentencing criteria or sentencing guidelines.

And probably for the Panel, one thing that should be highlighted is that would, also, then in a sense, sunset sort of the mandatory punitive discharge that now comes with convictions under certain parts of Article 120 where, if you are found guilty of rape or sodomy,
you are facing mandatory dishonorable discharge
or a mandatory dismissal, if you are an officer.

The fifth bullet that is listed there
is the review and assessment of MRE 513 evidence
during Article 32 hearings. There was a DoD
policy memo that directed the JSC to recommend
uniform guidance on that matter specifically for
the release of mental health records. And I
believe that is based on a recommendation that
you all made that it be standardized and looked
into. And so it is my understanding that that is
pending right now. We did not have a firm answer
on that from Colonel Pigott today.

The last issue that is listed in gray
is number six, to review and assess establishment
of privilege of victim communications with the
DoD Self-Help Line in helping personnel. The
staff would argue that this has, in fact, been
finished with the issuance of EO 13696 that was
published in June of 2015, where it did, in fact,
amend MRE 513 to establish privilege for
confidential communications with the DoD Help
Line staff.

So, ma'am, I believe some of these issues that the Panel, if they so identified as either being overcome by events or something that might be better served by the successor panel, I think that is something that we would recommend could be easily put into an Executive Summary perhaps at the end of the Panel to sort of sweep up and make sure we address everything that we have been tasked with doing.

CHAIR HOLTZMAN: Okay, so if I understand this -- let me make sure I understand it. So, I don't know if I could explain it, given my past very bad history of this session today.

But what I am hearing from you is that we took -- the yellow bars are the ones that have really not been addressed. We can't even make any pretend argument that somehow they have been addressed in some way.

CPT. TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: We haven't addressed
them at all.

But so the review and assessment of
the use of MRE 412 has to be addressed.

CPT. TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: But the training and
experience of trial and defense counsel, that
could be done because enough substantial work has
been done so that the staff is ready to write a
report if we instructed it.

CPT. TIDESWELL: Yes, ma'am, we are.

CHAIR HOLTZMAN: Number three,
monitoring trends and special victims'
capabilities, the staff could -- the same with
that. The staff could write a report on that,
too. You have done -- the Panel has done enough
work on that for a report to be written and we
could fulfill our responsibility on that.

And the same with number four, that
enough work has been done so that maybe not a
stand-alone report but enough could be written so
that it could be part of another report.

CPT. TIDESWELL: Yes, ma'am.
CHAIR HOLTZMAN: So, the key unaddressed tasks, the only one we haven't really addressed is MRE 412 in courts-martial. But there is time, as you say, to address this because we have -- I mean we don't really have until the end of September because if we do a little bit of a backwards calendar, I mean we have to finish our work in enough time so that the staff has a report and we have to approve it. So, I am thinking probably the end of June or the end of July at the latest is the deadline.

But particularly also because we could throw in some MRE 412 at Article 32 hearings, which is the first item in the gray area, I would strongly recommend that we address 412.

We are going to have other things to do because we have to -- we will have reports from the -- these reports under 2 and 3 and 4 that we will have to review and approve and we will have the reports from the Subcommittee that we are going to be briefed on in December. But unless anybody really objects, I would suggest
that we try to set up a schedule for hearings in January, if not before. I don't know whether we could do it before, but hearings as soon as possible on the MRE 412.

MS. FRIED: And so I just want to point out to the extent we are going to rely on the JPP Subcommittee-gathered information, that needs to briefed to the Panel in public before we can incorporate it in the report. So, that is true for 2 and 3.

Number 4, though, it says that the Subcommittee gathered information but it is not clear that the Panel considered that information in a public setting either. So, I think, actually, it is 1 and 4, right?

CHAIR HOLTZMAN: Yes, 4 will also have to get the information from the Subcommittee.

So, Item 1, we haven't done, aside from the 412 at Article 32. No, I think Item 1 we can just do 412. And 2 and 3, the staff can just -- well, I guess to the extent there is Subcommittee information there, we may have to be

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briefed on it first.

    MS. FRIED: Correct.

CHAIR HOLTZMAN: But basically, these are reports that have to be written. Some briefing of us, possibly, and reports that have to be written and then approved.

    Maybe we can approve the reports and get the briefing at the same time?

    MS. FRIED: I think they can start writing the report.

    CHAIR HOLTZMAN: Yes, they can start writing.

    MS. FRIED: But with respect to what the subcommittee presented, I would probably hold off on that until you all had taken a position on what the subcommittee presented and they can just add or not add that to the report.

    CHAIR HOLTZMAN: I guess we will figure out how to exactly proceed on that in consultation with you. But basically, that is how I would suggest we deal with the yellows and the first item of gray.
Okay, what about the balance? Do we have time to address the balance of the gray area at all?

HON. JONES: Can I ask a question first?

CHAIR HOLTZMAN: Go ahead, please.

HON. JONES: I don't remember our statutory tasking but what is it that we are assessing about Rule 412 evidence? It comes in or it doesn't come in. Are we looking for trends?

CPT. TIDESWELL: Yes, ma'am.

HON. JONES: I just don't remember what the point is.

CPT. TIDESWELL: The language is, I'm paraphrasing, but it is review and assess instances in which evidence of prior sexual conduct is introduced by defense counsel and its impact.

CHAIR HOLTZMAN: And its impact, yes. So, basically how it is being used now and then -- and its problems, any problems that we see
with it.

MR. STONE: On that and some of these others here, I read those to suggest that over a year ago we had reports on how they were putting in a data system and the various -- and they were putting in things for the first time and trying to do it in a uniform way. And I presumed that meant we were going to try and get an update to see how many -- now that they have better numbers, how many sexual assault cases does a 412 motion get made in? And how many of those does it get granted and how many of those is it denied? And how many of those have been on appeal? I don't think we know yet how many of those appeals have gone one way or the other. But if we do, I thought that was the whole point of us getting that data thing in to try and see if we could report on it a little better -- basis of a little better data than a lot of the impressions we had at the first couple meetings, which were by knowledgeable people but we didn't have data. And I thought some of that was also
true for three and four, that by monitoring the trends, we were going to see if there is something in that data we are collecting that lets us know now we have data that says all SVC counsel have gotten training or the percentage has gone way up or they get it within the first two months and they used to get it within the first eight months if they were lucky.

I mean I thought we were going to use the data that everybody was spending money to figure out how to collect to see if we could say something a little better there.

CPT. TIDESWELL: Yes, sir, it is my understanding that our data project does not encompass a look into MRE 412. I think part of the problem is the documents are sealed in some instances is part of the issue, but that is not data we are collecting now.

MR. STONE: Well, what is sealed is the substance of it, not whether a docket sheet says made a Rule 412 motion, granted/denied.

CPT. TIDESWELL: Yes, I agree.
MR. STONE: We don't have that.

CHAIR HOLTZMAN: What would that tell us, Mr. Stone?

MR. STONE: Well, they are asking for trends. It would just tell us that yes, this is important because it comes up in 80 percent of the cases or it is only coming up in 5 percent of the cases. I mean I think that is kind of a relevant --

HON. JONES: Well, you know it is interesting. I mean part of the reason I asked my question is because I am not sure how helpful this going to be if we do research this. I think it is a given that trying to introduce 412 evidence is always important, whether it is five percent or 80 percent. And then after that, I think all we are going to see is how the trial court may have decided it and then if it went on appeal, how the appellate court would decide it.

MR. STONE: Right.

HON. JONES: But I'm not sure where we go from there because I don't think we are going
to be deciding, well, we think that CAAF was wrong on that or the other appellate court, if it only got to that level, was right on this.

I am just trying to figure out what is to be gained from a look at this.

MR. STONE: Well, it impacts a lot of the stuff we discussed this morning if it turns out 412 motions are almost never granted or almost always granted. That makes some difference on how you structure the rest of it. That is why I would like to see it.

In other words, does it look like defense counsels feel they have to make these motions, even when it looks like, looking across the system, there isn't that much substance to them, they just feel obligated to make it on behalf of their client and they are mostly denied or are they making the motions and, in 90 percent of the time, they grant it, so it is an important topic.

CPT. TIDESWELL: So, sir, to your point, although we are not collecting the data
now, that does not prevent the committee. We could always do a request for information from the Services and try to collect the data that way, if you all were so inclined.

CHAIR HOLTZMAN: Right, the quantitative stuff may be interesting but I think it would also be useful to hear from trial counsel, special victims' counsel, defense counsel, about how this actually works in practice. To what extent are these 412 -- I mean to what extent are the 412 motions -- I mean maybe defense counsel feels that the judges are being unfair or the standard is wrong in terms of the interpretation. We don't know that. I mean maybe we can tell from the statistics.

Maybe trial counsel will say the judges have the standard and the review is wrong or there was some impropriety or something needs to be changed. I mean we have no sense of how it is working. And we know that in terms of 412 at Article 32 hearings, it is not happening because nobody is testifying there. So, that doesn't
even become an issue.

So the question is, what happens now that 412 is coming up for the first time at trial? What does this mean? What is the impact on the system? And maybe special victims' counsel has some thoughts about it.

So, I mean with all due respect, Barb, it is possible that you are right. It is probably likely that you are right. I don't know any time that you are not right but maybe, maybe, slight possibility that there could be something else here.

HON. JONES: Well, I mean look, we might hear the judges are overwhelmingly going one way or the other.

CHAIR HOLTZMAN: A rubber stamp or whatever. I don't know.

But I think that since this is a mandate we have been given and haven't really looked at it at all, it is probably worth --

HON. JONES: So, are we -- well, I mean a hearing is certainly along the lines of
what the kinds of questions you would like to ask
-- how is it actually working sounds fine.

CHAIR HOLTZMAN: Maybe it is not a
whole day of hearings but maybe that is at least
one subject we could have and we could certainly
try, as Mr. Stone suggested, try to get some of
the data, if there is any that we can get easily.

CPT. TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: Is there any further
objections to it?

Okay. All right. Now, I guess the
other question has to do with the Items 2, 3, 4,
5 and 6 in the gray area. Whether you feel --
whether we have done enough -- I don't know what
in Item 2 RSP 2014 Report -- are you saying that
the RSP made that recommendation and the question
is --

CPT. TIDESWELL: Yes, ma'am, they
recommended that you all take a look.

CHAIR HOLTZMAN: Oh, that we take a
look --

CPT. TIDESWELL: Yes, ma'am.
CHAIR HOLTZMAN: -- at how -- what is happening with depositions.

CPT. TIDESWELL: Yes, ma'am. I think they were worried that, with the change in the Article 32 investigation, that it would then shift to depositions.

CHAIR HOLTZMAN: Does anybody know what has happened with the depositions? Is that something that --

MS. CARSON: What has happened in the intervening is the FY15 NDAA has made it much more -- a much higher standard to get a deposition. So, they have taken into account the issue. So, it appears -- we haven't heard testimony directly on it but from what we have heard, depositions aren't happening because you have to meet this new higher standard to get one.

CHAIR HOLTZMAN: Is it worthwhile making a request for information about this?

MR. TAYLOR: Is that even information that the Services are collecting?

CPT. TIDESWELL: I don't know. We
would have to find out.

CHAIR HOLTZMAN: Oh, okay.

MR. TAYLOR: I think it would be too granular for them to --

CHAIR HOLTZMAN: So, if we are not going to approach this issue, what is our answer, that because of the changes in 2015 and 2016, it's premature? I mean how do we explain our failure to address this? Do we say because of these changes, NDAA changes, statutory changes in 2015 and 2016 that it doesn't make -- it was premature for us to study?

CPT. TIDESWELL: It is premature and not right to make an assessment.

CHAIR HOLTZMAN: Okay. And then maybe that is for the other committee. Any disagreement with that? Okay, fine.

All right, so now we are up to study plea bargaining process. Are we actually required to study the plea bargaining process? Is that one of our tasks or was that just a recommendation from the RSP?
CPT. TIDSWELL: It was recommended by the RSP.

CHAIR HOLTZMAN: But we are not required to. I mean nothing in our tasking from our --

CPT. TIDSWELL: Not through NDAA.

CHAIR HOLTZMAN: That is a very big --

HON. JONES: It's big and obviously someone else has studied it and probably know more about it -- certainly know more about it than we do at this point.

MR. TAYLOR: I just don't think it is central to the function of our committee to do that.

HON. JONES: That's an even better point.

MR. TAYLOR: It is certainly a collateral issue but it hasn't been the focus of our attention.

MR. STONE: I kind of think we could listen to see what Judge Effron thinks on the issues that they have proposed something in the
Military Justice Act of 2016 and whether or not it is neutral, positive or negative on the roles of the SVC. And if it is accounted for the SVC, it may be that he has done as much as we would cover, as long as they have taken it into account. If it's either ignored the special victims' counsel on all those issues there in the middle, then it is possible we would want to be able to have a written comment in our last report that basically says that the Military Justice Act of 2016 doesn't seem to take into account when they are doing this new plea bargaining stuff or this new sentencing stuff or that SVC should be factored into the process.

I'm guessing he has taken it into account but I have no idea. I would want to hear from him.

CHAIR HOLTZMAN: Okay, so right now, the view is that because new changes were made in the 2016 Military Justice Act, that -- unless it doesn't take into account the point that you are making, that there is really nothing for us -- I
mean it is way too early for us to undertake it.
And it is such a big subject we couldn't
undertake it and finish it in time. But we
would, when Mr. Effron comes, we could ask him.
Staff, just make sure we ask him about SVC.

Okay, number 4, Assessment of
Mandatory Minimum Sentencing, which was a tasking
of the FY2014 NDAA. Well, the question is -- I
mean that is also another very big subject.

I guess if the Military Justice Act is
adopted by the Conference Committee, in the
Conference Report, then what is there for us to
look at?

CPT. TIDESWELL: There isn't, ma'am.
In fact, it would sunset out the requirement that
you get the dishonorable discharge or the
dismissal if there is a conviction under --

CHAIR HOLTZMAN: Yes, but it would
also -- how could we -- what would there be for
us to look at because it is new? This Act would
just take effect now.

CPT. TIDESWELL: Yes, ma'am. It would
change the landscape.

CHAIR HOLTZMAN: It would change the whole landscape. And there is not enough time for us to really look at this. No way. Am I right?

CPT. TIDESWELL: I believe you are correct.

MS. FRIED: I think, though, what this is looking at is --

CHAIR HOLTZMAN: Ms. Fried, tell me.

MS. FRIED: I'm sorry. The mandatory minimum sentencing that is currently in place right now, is that happening? Are people getting those discharges for the cases that have been adjudicated since that time? But there probably isn't enough to really make any assessment on it anyway because by the time they get through the process, you can really see the action.

So, I think it is a little bit different than what the Military Justice Act -- the Military Justice Act of 2016 would amend that but I think looking at what the requirement was, is for us to assess or the Panel to assess how
that was being implemented up until the change.
But I think there is not enough information,
perhaps.

MR. STONE: Well, we could get one
person to testify on that. It's not a terrible
idea.

CHAIR HOLTZMAN: But why do we want to
know about how the law worked, a law that is
being replaced?

MR. STONE: Because it may not be
replaced, I think is the--

CHAIR HOLTZMAN: Oh, no, but we will
know by the end of December whether they pass the
Conference Report. And if it is in those two--

MR. STONE: Okay, so we can table this
until then.

CHAIR HOLTZMAN: Yes, because
otherwise, it seems to me that, if this has all
been undone by a new statutory framework, what's
the point of looking at what happened in the
past?

MR. TAYLOR: I agree. It's the so-
CHAIR HOLTZMAN: Yes, I mean, and it is going to be -- we won't have enough time to evaluate the new law. And the Conference Reports, it is in both -- since the Military Justice Act is in both -- it might be slightly different in both House and Senate versions or is it exactly --

CPT. TIDESWELL: I believe it is different.

CHAIR HOLTZMAN: Okay, so they will probably try to resolve those issues but I can't imagine that that is not going to be adopted. They are going to adopt the Conference Report, right? They never have not adopted the Conference Report.

So, I think this is probably going to be our responsibility is going to be superseded by the new law. But we can see. You can let us know --

CPT. TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: -- whether we need to
add that. And then we have the MRE 513 evidence during Article 32 hearings and courts-martial. Well, there is no MRE 513 evidence during Article 32 hearings.

Is there time to do this, the use of MRE 513 evidence during courts-martial?

CPT. TIDESWELL: There is but right now, per a DoD policy memo, they have got the JSC looking into it and standardizing the approach to the release.

So, just so you know, there is movement afoot by another body, which is Colonel Pigott's group acting on a JPP recommendation.

CHAIR HOLTZMAN: But that is the uniform guidance. Well, aside from the uniform guidance issue, what else would we look at with regard to the use of MRE 513 evidence?

Is there anything else for us to look at?

CPT. TIDESWELL: I don't believe so, again, except for the data that Mr. Stone talked about.
MR. STONE: Or if we wait to see if
the JSC publishes their Federal Register comment
and if it is similar to or inconsistent with the
road we have been going down -- I mean they may
be trying to make it like JPP Recommendation 11
and we may decide their version of it misses the
mark or hits the mark. So, again, that is
another thing we can keep our eye on, since
apparently you should see something in the
Federal Register soon from them. I don't know if
it will be on this issue but hopefully we will
see some stuff in the Federal Register.

CHAIR HOLTZMAN: Item 6 -- well, I
guess I don't know. I mean I am just going back
to 5. Is there any issue about once you release
the records the whole question of relevance? I
mean has that been looked at? Is that something
to look at? I am just grasping at straws here in
terms of -- they may set standards for the
release but then -- I don't know. I need to
think about this one.

CPT. TIDESWELL: Chair Holtzman, if
you don't mind, let me just read the tasking. That might help us.

CHAIR HOLTZMAN: Okay.

CPT. TIDESWELL: "Conduct a review and assessment regarding the impact of the use of any mental health records of the victim of an offense under the UCMJ by the accused during the preliminary hearing conducted under Article 32 and during court-martial proceedings, as compared to the use of similar records in civilian criminal legal proceedings."

HON. JONES: That sounds like the original tasking of comparing the entire civil system with the military justice system that we got in the RSP.

CPT. TIDESWELL: Yes, ma'am.

HON. JONES: We are never going to have enough data or even be able to figure out what the data means from the civilian system. So, we couldn't do the comparison.

And I mean if that is the point, I don't think we can do it.
CPT. TIDESWELL: Right.

CHAIR HOLTZMAN: Right. We discovered that during the RSP Panel, Admiral Tracey and Mr. Stone. And Mr. Taylor, just to bring you up to date, we figured out that there was no way to compare those two systems, and there was one whole subcommittee that did nothing but try to figure that out because that was the tasking in the RSP, the tasking of the RSP was to compare the military justice system with the criminal justice system and there was no way to do that comparison. So, I don't think that has changed.

But I guess the other question is, I mean maybe it is worthwhile thinking through whether there is anything, any residue that we could look at or that we should look at with our 513, forgetting the civilian system.

HON. JONES: I mean, I guess it would be the same thing we were thinking about doing with 412, look and see what is happening or ask people how it is going. It would be the same --

CHAIR HOLTZMAN: Yes, right, the same
kind of inquiry.

HON. JONES: I mean, if it is one panel with both --

CHAIR HOLTZMAN: Yes, right. How is it going? What are the problems with its use? I mean that might be useful and if we have one -- depending on how many people we have, we could have a whole day of hearings or two sets of hearings. I think that is a good idea.

At least we can say we have looked at it. Here are some problems that nobody has paid attention to or this is fine and everybody is happy.

Okay, great. And 6, review and assess establishment of privilege of victims' communications. That is already -- that has been set up. It just got set up.

So, do we have to --

CPT. TIDESWELL: I think the executive -- I mean if someone would just acknowledge that it has been done.

CHAIR HOLTZMAN: Right, that's it.
VADM TRACEY: Could I go back to Item 4? Is it conceivable that under the Article 56 amendment you could be on the sexual predator register and not be discharged from active duty?

CPT. TIDESWELL: Could they change it?

Potentially, yes.

MS. CARSON: I think the Services -- well, I can't speak to the Services but I believe they have policies now. I think it is about being in the Service at all.

MR. STONE: It is the state registry. These are state registries.

MS. FRIED: And I believe it is based on conviction not the position, like the actual adjudication. So, if the offense that is a qualifying offense, that would trigger the registration, not the sentence, necessarily.

VADM TRACEY: I'm still saying just harmonic dissonance of having someone who is on the registry and might not be discharged from active duty.

CPT. TIDESWELL: Well, at that point,
I guess the administrative separation process would kick in. I think there are other ways of discharging an individual.

CHAIR HOLTZMAN: Okay, so as I am hearing this, we have two --

MR. STONE: Before you end it, I read in from this list and also stuff that I heard at the last meeting another question which I don't see exactly set out here and it comes from the number two in yellow, overview of judge advocate training programs and number four in yellow, monitor withholding to initial disposition policy, and also, number two in the gray, including whether military judges should serve as deposition officers. And what we heard at the last meeting that there is at least some sentiment that the military judges who are being appointed aren't getting enough training or experience for the sexual assault cases. And that is why they are saying some of the officers getting them their withholding or changing the nature of who gets them it has to be they want it
to be a different convening authority, et cetera.

And I wonder whether there isn't a question there that could be probed whether they would like to see that in these kinds of cases. Like for example, maybe also in capital cases you have to have a military judge who has at least two years of training on the job. Maybe there is some thought that in sexual assault cases, given the nature of the seriousness that there ought, that it should only be a judge who has undergone training courses and had 20 cases that they have presided over, that it went to trial, not just pleas, or two years on the job or something.

I feel like that training thing doesn't just go to the prosecutors and the defense counsel and the SVC. I feel like, from the comments we heard last time that said, well, some of these problems aren't even today. Some of these problems are, some of these military judges don't have enough experience. That is why we have got to get the review because they are making mistakes.
I mean maybe that is a suggestion that we ought to take seriously that these kinds of cases we would like to see judges who have been around more than a year.

CHAIR HOLTZMAN: I think that is a good point. The only problem I have is we have certain taskings. I want to make sure we finish our taskings and let the staff set out a schedule for those taskings plus the Subcommittee reports. And if we have time left over --

MR. STONE: You don't think that is part of number 2, at least number 2, and maybe what is behind 4 and the gray 2?

CHAIR HOLTZMAN: Well, I don't recall that we ever were -- I don't think we were ever charged or tasked with looking at judges in any of the tasks. I could be wrong about that but maybe --

CPT. TIDESWELL: No, the language is specific to trial and defense counsel.

MR. STONE: See, I don't think it came up until our witnesses started to say well you
know, and it was including some of the judges themselves. We have so many judges and they rotate in and they rotate out and they are having trouble administering some of these things. I mean they said that to us and we know that there is this rotation policy that you have got to get rotated to get promoted. And so I just wonder whether that is within the scope of the overview of the training, that we would want to look at it enough to be able to put a couple of sentences in about what some testimony shows.

CPT. TIDESWELL: I mean there is catch-all to the committee's tasking. And that is, other things as deemed appropriate. It is sort of the same path with the victims -- just priority-wise.

CHAIR HOLTZMAN: But what I am saying is I think we should have a schedule made up. We have the Subcommittee reports. We have all the stuff. We have to hear from the Subcommittee and then decide. We have these two issues, 412 and 513, that we are going to have to meetings on.
Let's make a schedule with that.

And if we have time left over, we can look at these other issues. This might be one. Maybe someone has got something else.

MR. STONE: Right, because these might be --

CHAIR HOLTZMAN: Right. Let me put it this way. I don't think it is part of our existing tasking and I am just really concerned that we meet our tasking requirements first. But if we have time left over --

MR. STONE: And while we are looking at drafts of long reports on some of these other things, we can hear testimony. Because I don't think it takes a lot for us to make a recommendation at the end that the testimony suggests that this is a category of cases that should be treated more carefully with judges who have had more time.

I mean I can see sexual assault defendants and victims being upset if they get someone who was just appointed as a judge who
they think is making crazy rulings and neither one is comfortable with what happens. It either leads to more appeals or more reversals.

CHAIR HOLTZMAN: Well, if we have the time.

MR. STONE: These are all the consequences involved.

CHAIR HOLTZMAN: Right, it is a question of our time.

MR. STONE: Yes.

CHAIR HOLTZMAN: I want to see that schedule first and then let's see what time we have that is left over and what other issues are outstanding, including this one.

And when we get together the next time in December, we will decide whether we went to add it, whether we can add it.

MS. FRIED: And then to Admiral Tracey's point, it may be that Judge Effron and Mr. Sullivan can speak to the issue if they get retained, but not discharged. What does that do? I can't imagine that he would consider that but
they may be able to speak to that. And if not, maybe in that same meeting you can have someone speak to that, if that is something the Panel wants to consider.

CHAIR HOLTZMAN: That's a good idea, too.

MS. FRIED: But that shouldn't take that long, I don't think.

MS. PETERS: Ma'am, if I may, a point of research the staff may be able to provide after the meeting. This is Meghan Peters for the record.

So, one of the recent NDAAAs, I think the 2015 NDAA required that for somebody who was not discharged at court-martial, at some point along the way they said if they are not discharged they have to be processed for administrative separation.

MS. FRIED: Processed is not the same as being discharged, though.

MS. PETERS: Right, it doesn't guarantee the discharge but it is probably the
end goal of the process.

MS. FRIED: Right.

CHAIR HOLTZMAN: So, if there's nothing else, we are ready to hear from you, Ms. Fried. Oh, I'm sorry.

VADM TRACEY: With respect to Mr. Stone's point, does anything preclude us in our reporting from suggesting that a number of panels have, in fact, suggested that military judges have less experience than may be necessary for these kinds of trials and the standing committee that is being stood up might want to take a look at that, if we don't have time to look at that.

CHAIR HOLTZMAN: I'm not 100 percent sure that that is what the testimony was.

CPT. TIDESWELL: Judge Baker did mention and he pushed fairly hard for tenured positions.

CHAIR HOLTZMAN: That is a different point, though, tenure.

CPT. TIDESWELL: Yes, ma'am, but I think the point was the experience level was
lacking and I wasn't sure --

VADM TRACEY: Yes, but experience level has been mentioned by several different panels.

CHAIR HOLTZMAN: Right, but experience is not the same thing as training.

MR. STONE: Well, I'm more interested in experience, really. I just thought that the tasking about training might be stretched to cover it.

But I am looking at experience level because that is what would happen in a capital case. You wouldn't take a new judge, even if he was trained, and ask him to sit on a capital case.

CHAIR HOLTZMAN: Or she. Maybe. Sometimes it happens.

Personally, just having two or three judges mention that, I think I would personally rather have a more systematic addressing of that issue before we made a recommendation. That's all.

I'm not opposed to looking at it at
all. I think it is a very important point.

I remember when I was district attorney, we had a very serious issue of judges' training with regard to issues of sexual assault and domestic violence and all the rest. So there is no question that that is an issue. I'm not minimizing it. I'm just trying to figure out how we have time to address it and address it in a responsible way.

MR. STONE: Well, that's what I'm saying, in those last meetings when reports are being written on the other stuff, we may be able to cover this slightly different topic.

CHAIR HOLTZMAN: It's possible. I'm not opposed to that. Anybody else opposed to that?

Great. Ms. Fried, we are up to you.

MS. FRIED: Thank you. The meeting is closed. And Happy Thanksgiving, everyone.

CHAIR HOLTZMAN: Happy Thanksgiving, everyone. Thank you very much.

(Whereupon, the above-entitled matter went off the record at 3:17 p.m.)
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C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: Judicial Proceedings Panel

Before: US DOD

Date: 11-18-16

Place: Arlington, VA

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

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