The Panel met in the Grand Ballroom, Holiday Inn Arlington at Ballston, 4610 North Fairfax Drive, Arlington, Virginia, at 9:00 a.m., Hon. Barbara Jones presiding.

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

WITNESSES:
Hon. Andrew Effron - Director, Military Justice Review Group, Department of Defense
Ms. Lisa Friel - JPP Subcommittee Member
Ms. Laurie Kepros - JPP Subcommittee Member
Dean Lisa Schenck, COL(R) - JPP Subcommittee Member
BG(R) James Schwenk - JPP Subcommittee Member
Mr. Dwight Sullivan - Associate Deputy General Counsel for Military Justice, Department of Defense
Ms. Jill Wine-Banks - JPP Subcommittee Member
STAFF

Captain Tammy P. Tideswell, U.S. Navy - Staff

Director

Ms. Meghan Peters - Attorney Advisor

Ms. Terri Saunders - Attorney Advisor

OTHER PARTICIPANTS:

Ms. Maria Fried, Designated Federal Official (DFO)

*Present via telephone
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(9:19 a.m.)

MS. FRIED: Ms. Jones, we're ready.

CHAIR JONES: Thank you, Ms. Fried.

The meeting's open. Good morning to everyone.

I'm Barbara Jones, a member of the JPP and I've been asked to, by Chair Holtzman, to provide today's opening comments, as she is here with us but only by telephone.

So, I'd like to welcome the participants and everyone in attendance today to the 25th meeting of the Judicial Proceedings Panel. Four of the panel members, as you can see, are here and as I indicated, Liz Holtzman is participating on the telephone. Today's meeting is being transcribed in full, 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 Acts for fiscal years 2014
and '15. Our mandate is to conduct an
independent review and assessment of judicial
proceedings conducted under the Uniform Code of
Military Justice involving adult sexual assault
and related offenses since the most recent
amendment to Article 120 of the UCMJ in 2012.

Today's meeting will include a
presentation from JPP Subcommittee members on the
Subcommittee report to the Judicial Proceedings
Panel on Military Defense Counsel Resources and
Experience. Following that presentation, the JPP
will conduct deliberations on the recommendations
of the Subcommittee from that report.

In the memorandum dated May 20, 2016,
just to give you some background, the JPP
directed the Subcommittee to conduct site visits
at various military installations, to obtain base
level perspectives on topics relating to JPP
tasks, including the special victims counsel
program, special victim investigation,
prosecution capability, attorney training and
experience, victim's rights with regard to
commanders, including expedited transfer and involvement in courts-martial proceedings, and recent legislative changes to judicial proceedings including revisions to Article 32 hearings.

The Subcommittee visited bases throughout the United States and Asia, speaking to over 280 individuals involved in the sexual assault military justice process, and we very much look forward to hearing the observations of the Subcommittee from their site visits. We will then continue our deliberations as the Panel in victim’s appellate rights.

In the afternoon, we’ll receive a presentation on the Military Justice Act of 2016 from the Honorable Andrew Effron, who is already here in our audience, welcome, and Mr. Dwight Sullivan. Mr. Sullivan, are you here yet? Thank you. I just wanted to welcome him, who is the associate military counsel at the Department of Justice.

Each public meeting of the Judicial
Proceedings Panel includes time to receive input from the public. We received no requests for public comment at today's meeting. All written materials received and reviewed by the panel members are available on the JPP's website at jpp.whs.mil, M-I-L. Thank you very much for joining us today.

We're ready to begin the meeting. Our first presenter is Ms. Laurie Kepros, who is a JPP Subcommittee member and also the Director of Sexual Litigation for the Colorado Office of the State Public Defender.

I should just note that also at this front table is Brigadier General Retired James Schwenk, Ms. Lisa Friel and Dean Lisa Schenck, and many of you probably already know their backgrounds. But I will ask them to tell us again how accomplished they are before they speak. Okay. Ms. Kepros, we'd like you to begin. Thanks.

Site Visit Presentation on Defense Resources

MS. KEPROS: Thank you, thank you.
Judge Jones and panelists, as was indicated, we had a great opportunity to meet with numerous military justice personnel across countries around the world, at diverse installations, in all the Services.

We had the benefit of speaking with trial counsel, prosecutors. We had the opportunities to speak with defense counsel, judges. We spoke with victim advocates. We spoke with everyone that we could think of that was touching the legal system as it reflects on these cases, because our overriding concern was to find out what was happening on the ground, and what were the policies, particularly those things that have been amended over the last several years. What were the effects of those impracticalities? Were things working as they were intended, and were they ultimately bringing benefit to the administration of justice in the military?

CHAIR JONES: So Ms. Kepros, I apologize. I have to interrupt you because I
forget my other role here today, which is that as the chair of the Subcommittee, I want to advise the JPP that this is our report to the panel on military installation site visits, and it's being presented to you for your deliberations, and let me just give you a little more background on that.

It was in May of this year, 2016, that the panel requested that Subcommittee members visit these military installations to hear these base level perspectives on the tasks that the panel charged them with. At least two Subcommittee members attended each of the site visits, and as you recall, Ms. Holtzman and I were both appointed as members of the JPP Subcommittee, and so we participated in some of those visits.

From June through September, members of the Subcommittee visited military installations throughout the United States and Asia, as I previously said, and again spoke to over 280 individuals representing 25 military
installations. Obviously, it was all about the military justice process and sexual assault in the military.

I think we’ve already covered the range of people that we spoke to, prosecutors, defense counsel, investigators, special victims counsel, paralegals, commanders, victim advocates and all sorts of other personnel frankly who touch upon the system.

The Subcommittee members asked the participants questions about special victim’s counsel program, victim’s rights, the new Article 32 preliminary hearing process, its effect, attorney training and experience, sexual assault investigations as well as a number of other topics.

We spoke to the participants, and this is an important note, in non-attributional setting, in order to hear candid views on the topics that were raised. This was something that the response panel had previously done, and from their experience we found that it was an
There were several topics discussed on the site visits for which the Subcommittee determined that we needed additional research before we could report back to the panel, and that's why today, the Subcommittee will be presenting just one report, certainly not all the reports that will be forthcoming, and that one report will be on military defense counsel resources and experience.

As I think you just figured out, we also anticipate future reports or a report certainly covering all the other issues that were raised on the site visits, or at least those that we feel we have something important to say about. Possibly the Article 32 process, prosecution standards in examining the conviction and acquittal rates for sexual assault courts-martial. Those are all among the topics that we're still considering and working on.

So as we go forward, the Subcommittee will keep the panel apprised of our progress.
And now after that very impolite interruption, would you go ahead, Ms. Kepros? Thanks.

MS. KEPROS: My pleasure, Judge. In addressing today the issue of defense counsel resources, I have to start by saying our method is quite strong. The current resourcing of defense counsel puts justice at risk.

This is a serious issue that goes to the legitimacy and fairness of the military justice system, and is of course of tremendous importance with the consequential effects of sexual assaults on victims, on those who are accused of such offenses in their military careers and obviously in their lives on the planet.

We spoke about this issue not only with defense counsel, and I think it's important to understand. We also spoke about it with all those other entities that were described, and we heard not just from defense counsel but also from prosecutors, from investigators about the relative under-resourcing of defense counsel when...
it comes to helping defend against these charges.

We learned that defense counsel reported being under-resourced in attorney staffing, in paralegal staffing, in access to defense investigators and experts. At one large military installation that has ten defense counsel, they had one paralegal and zero defense investigators available to them.

The military criminal investigative organizations that do the initial case investigation that leads to the prosecution, the preferment of charges, does not do investigation at the request of defense counsel, so that is not a resource for them.

Moreover, that entity would not operate within the professional privileges of the attorney-client privilege of the work product privilege that are available to, for example, civilian defense counsel when they retain private investigators or public defenders who are working with in-house investigators to conduct investigation for the defense.
We also learned from the military investigators that current practices require them to adopt, using your terminology, non-confrontational approaches in interviewing victims, and some of how that works was described as extremely as not investigating the victim, or in one case we were told we investigate what happened, not what didn't happen.

That means if an investigation is being conducted with no one investigating the possibility that the crime did not occur, it is incumbent for defense counsel to find out if that is generally the case. They are particularly challenged in doing that without internal defense investigator resources.

Currently, attorneys, defense attorneys are in a difficult position because they cannot interview witnesses without risking the possibility that they could inject themselves as a witness in the case if there were discrepancies in statements at trial and things like that.
So it's an ethical issue for them to do it themselves, in addition to obviously the resource issue of the person has to do the job of being a lawyer and all of the other demands of litigation, and advising and representing their clients.

We heard that to make a request through the military for the appointment of the defense investigator, the defense needs to reveal case strategy, possible avenues of inquiry to the government, the same entity that has decided to prosecute the accused in the first place, creating I would suggest at least an appearance of impropriety.

There have been obviously significant changes to the Article 32 process in recent years. Most notably, for the impact on the defense investigation, has been the fact that few witnesses testify at these hearings anymore. Victims are no longer required to testify at these hearings, and this hearing had been the principle discovery vehicle for defense counsel.
in the history of the military.

As the recent changes have transformed the military's more investigative model to something that looks more and more like the civilian adversary system, it is absolutely necessary that adequate tools be provided to both sides in an adversary process, so that the relevant facts can be discovered and presented as appropriate.

Additionally when it comes to Article 32, the scope of what's relevant at the hearing has been dramatically narrowed, so that it is now a probable cause inquiry and does not allow a more searching inquiry into issues that could be relevant at trial.

That has been described to us, again by various personnel in different roles, as a principally paper process at this time, where documents are tendered. They're reviewed by the preliminary hearing officer and that becomes the basis for the decision at most, although not all Article 32 proceedings.
At this time the Navy is the only service that employs defense investigators. This was a relatively recent development and it has been -- I would look at it almost as sort of a pilot over the last few years, to see how it worked. It has only added eight people worldwide to this kind of defense investigative role.

However, they have proven to be very useful to defense counsel in the Navy. They have found them to be a great resource, but they have also identified that additional staff to conduct these kind of functions would be very helpful. The other services do not have any independent budget that would allow them this sort of person or this kind of staff.

They have to go to the convening authority or at a later stage in the process, once there is one, the military judge. That obviously could also delay the ability to even make a request for a defense investigator.

That being said, even when those requests are made, they are routinely denied.
That was uniformly agreed upon by both prosecutors and defense counsel that we talked to, that they are just generally not permitted, and this has caused, in practice, defense counsel to rely heavily on junior paralegals that have been assigned to their offices.

The paralegals have not been trained as investigators. The paralegals are unable to put the same time into the paralegal job duties for which they were hired because they are busy trying to locate and interview and follow up with witnesses.

In some instances defense counsel have also asked of their service member clients that the client pay to hire an investigator on the case because of the inadequacy of the military's resources.

There is obviously a constitutional ramification to this situation. To have effective assistance of defense counsel, the accused needs to have lawyers that are investigating the facts in their case, that are
presenting the relevant evidence in their
proceedings, whether it's at the trial or
pretrial litigation.

And so it's not just a matter of
legitimacy and fairness, although I think it is
those things as well, but also a matter of
constitutional rights. This concern was
previously reported in hearings before the
Response Systems Panel and in other presentations
before the JPP, so it's not completely new.

But I thought it was very powerful,
the observation of a former president of the
National Association of Criminal Defense Lawyers
who addressed the RSP a few years ago, when she
said I don't know a lawyer in the country that
does sex offense representation without an
investigator, except in the military.

Really, there is no such thing. There
was testimony from the Army Chief of Trial
Defense Services, who noted that in doing an
informal survey, defense investigators have been
approved in one out of 12 sexual assault cases,
and obviously that also implicates due process rights in addition to Sixth Amendment rights.

We understand that the JPP has received and will continue to receive additional information about what have been described as high acquittal rates in sexual assault cases in the military in recent years.

But we wanted to address that in the sense that that fact, whether there's a conviction or an acquittal in a given case does not speak to whether the process was fair, and does not undermine our concern that it needs to be, and that adequate resources be provided to the defense.

One other consequence of that is that it has led cases not to make it to the appellate review stage, perhaps causing this issue to go undetected, and of course it does not speak to the fact that there may still be wrongful convictions occurring as a result of under-investigated and under-defended cases.

There has been identified examples of
lack of parity and resources for trial counsel and defense counsel, including the availability of highly qualified experts, which have been identified as a useful, if temporary resource for less experienced lawyers. Additionally, the introduction of the special victims counsel and victim legal counsel programs into the services has added to the areas of work that need to be addressed by defense counsel.

The litigation is more complicated obviously by the inclusion of a third lawyer, but also issues like accessing the complainant for an interview are by design more complicated when those counsel are involved in the process, and will require the additional work of an investigator to necessarily complete all the proper communication to make sure that any requests are done in an appropriate way.

I think it's also worth remembering some of the prior testimony that we've heard from law professors at the JAG school and these kind of people in these kind of training positions
about the inherent complexities of Article 120 proceedings and all the legal changes that have been made over the last several years and evidently will continue to be made given the make-up of the 2017 National Defense Act.

But with all of these additional responsibilities, technicalities that the defense attorneys need to be sensitive to, leaving them as the sometimes sole investigator on a case in addition to everything else is really problematic. As a result, with respect to defense investigators, we do have two recommendations that we've proposed to the JPP.

Recommendation No. 1 is that in order to make sure of the fair administration of justice, all of the military services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to an investigator as needed.

Our second recommendation is that the military services immediately review service
defense organization staffing, including defense
counsel, paralegals, highly qualified experts and
administrative support personnel, and augment
current levels in order to alleviate the reported
understaffing.

The Secretary of Defense should direct
an audit by an independent outside entity of
defense staffing across all of the military
services, to determine the optimum level of
staffing for the service defense organizations in
the long term.

The second topic that I'm going to
address today concerns defense access to experts.
Like the investigators, defense counsels do not
currently have access to their own funding
source for defense experts, and to get experts
funded they must make that request from the
convening authority.

These requests are also frequently
denied or in some cases a substitute is proposed
by the government that is actually inadequate for
the purpose for which the expert is needed. One
example of that was a case that we heard about, where the defense needed an expert in child suggestibility, and was instead offered an expert who was a general child psychologist, who did not have the necessary expertise for the issues in the case.

Even when experts are approved, it is often occurring on the eve of trial, and at that point in the case the defense counsel does not get the benefit in developing their case strategy with the insights and the expertise that the expert can provide. So it's just sort of a Hail Mary at the end, instead of somebody who's really helping them put together the most thoughtful and coherent case.

Additionally, to get the expert approved in the first place, defense counsel is required to reveal their strategy for the case, and show their cards and lay it all on the table so that they cannot conduct the kind of confidential inquiry that civilian defense counsel rely upon to effectively represent their
clients.

In contrast, observations of both trial counsel and defense counsel at the installation level is that prosecutors are not being denied experts in the same way, that they often can obtain expert assistance at the early stage in the case, and then have the benefit of that expert through their preparation and the development of their strategy.

In prior testimony, the RSP has heard about models such as public defender agencies that have their own budget for experts, and there has been information about how that can be a workable model, and that certainly has informed the recommendations that we are going to provide today.

I think it's also important to recognize that civilian defense counsel routinely benefit from consulting experts. That is, people they never put on the stand as a witness, but rather someone they can consult to find out is this an issue, is this something we should be
concerned about, and to do it in such a way that
if the answer is no and if the information might
even inculpate the accused, it need not be
explored under the full surveillance of the
government that is seeking to prosecute the
accused.

It allows defense counsel to get
better quality information and to make a more
candid and thoughtful assessment of the evidence
in their case, and provide appropriate advice to
their client about likely outcomes at trial and
things like that.

The United States Supreme Court has of
course recognized the constitutional right to
expert assistance in Ake v. Oklahoma. It has
been a right that's been recognized in the
context of trial experts as well as sentencing
experts, which we know is another significant
phase in military trials.

To make the request for an expert in
the military system, defense counsel is also
required to identify what value they would get
from a proposed expert, and while I think on its face that seems like a fairly reasonable thing to ask of someone, it denies the defense counsel the opportunity to first learn what the expert can do for them.

It is particularly problematic in a system that is inevitably made up of primarily young lawyers who do not have the knowledge and experience to necessarily identify all the potential benefits in the experts' field of knowledge.

So, they could be denied for not knowing and then once they know, we have heard they were sometimes told you already know this topic, so you don't need an expert to assist you, then causing the difficulty of what the lawyer's supposed to do to present evidence on that topic if there is no expert in the room who is sufficiently knowledgeable.

As a result, our third recommendation is that the Secretary of Defense direct the military services to vest defense expert funding
and approval authority within the defense,
service defense organizations.

The last issue really dovetails with

what I've already said about the experience of
defense counsel. There is -- there are a couple
of levels of disparity that we had brought to our
attention.

One is that the experience levels that
are required across services are inconsistent,
and also we learned that even where there are
metrics identified for the qualifications of
defense counsel, they're not always met in
practice. So they become aspirational instead of
what is necessarily happening in the field.

Of particular concern, we learned that
in both the Army and the Marine Corps, first tour
judge advocates who had no experience in military
justice were assigned to defense counsel billets.
Because of the current situation where more than
half their case loads are sexual assault cases,
it is unlikely that they will have an opportunity
to handle numerous less serious cases and develop
some experience as a trial lawyer before they have to handle one of these cases.

We did hear several reports of lawyers in their, you know, first couple, three trials, second or in one case even first chairing an Article 120 sexual assault trial.

Within the area of sexual assault litigation, obviously there are particularly complex legal issues, rules of evidence that are specific to things like rape shields and privilege, in addition to the necessity of trial skills in cases that are more likely to go to trial than some other types of charges, requiring some level of litigation skill in trial.

As I mentioned, there has been value identified to us in the highly qualified experts when those are utilized. They provide some continuity from year to year, and when we learned about defense counsel in the Marine Corps having 18 month tours, that was essential. I mean there are cases that can't even be resolved in the length of the tour, because of how complicated
the case is.

Then when the lawyers change, and I'm referring to defense counsel, trial counsel and the VLC in the Marine Corps, that can further slow things down obviously. But even those HQEs are not permanent positions. They are time limited and they do come to an end. So the need to have some sort of institutional continuity was definitely identified for us.

There was testimony in May before the JPP that in the Army, 20 percent of the attorneys assigned to a defense counsel billet have no prior experience, and obviously we are talking about a type of case where there is going to be extensive motions practice.

I've already discussed the investigation demands that may come to the fore, and we are living in a time when the potential for technical evidence is probably higher than it has been in the past.

In most cases, the parties have cell phones, computers. There may be DNA, and there's
a whole other universe of potential facts in investigations that may be relevant to developing the case, developing the motions practice and developing the trial defense. That doesn't even speak to the level of sophistication necessary to present effective mitigation when talking about sentencing someone for a sex crime.

To be effective at trial, defense attorneys also need to be able to put together a coherent and persuasive trial strategy, which is, I would suggest, an art and something that can improve greatly with experience.

As a result, our fourth recommendation is that the military services only permit a defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in a sexual assault case. The military services should develop a formal process using both objective and subjective criteria to determine when a defense counsel is qualified to serve as the lead defense counsel in a sexual assault case.
In addition, the military services should set the minimum tour length for defense counsel at two years or more, except when a lesser tour length is approved by the service judge advocate general or staff judge advocate to the Commandant of the Marine Corps. I know my colleagues are happy to take your questions.

CHAIR JONES: Well before I ask the panel to ask questions, I would like to let each of you introduce yourselves, so that everyone will understand the tremendous amount of background on this topic and experience with it. So I should say Ms. Jill Wine-Banks is here with us now, and perhaps you could just start and tell us your past experience.

MS. WINE-BANKS: Certainly, thank you. I am Jill Wine-Banks and I really appreciate the opportunity the JPP has provided to us to investigate this very important issue, and to allow us to go on the site visits, which I think really helped us to get a different perspective than we were getting from testimony. So thank
you for that.

I have served as general counsel of the Army. So I have that background. I was a prosecutor before that, a defense lawyer after that, and also have served in corporations as an executive in international business development.

CHAIR JONES: Thank you. Laurie, can you tell us a little bit more about your background?

MS. KEPROS: Okay. As you mentioned Judge, I'm the Director of Sexual Litigation for the Colorado Office of the State Public Defender. I trained and advise over 800 lawyers and other staff in the Colorado Public Defender's Office statewide in their representation of individuals who have been accused or convicted of sex crimes.

I was a trial lawyer in the Public Defenders Office for more than ten years, including a period of time where I handled exclusively sexual assault cases. I have advised on I think probably over 5,000 sexual assault cases in the civilian context.
CHAIR JONES: Thanks. General Schwenk.

BG SCHWENK: Yes, thank you. I was commissioned in the Marine Corps as an infantry officer and having failed miserably at that, I went to law school and became a judge advocate. As a judge advocate, I tried a couple of hundred courts-martial, and as a trial counsel or a defense counsel when Clayton Lonetree decided to become a spy for the KGB, I was put in charge of that process.

Eventually I retired and took a job in the DoD General Counsel's Office, because unlike the other people on the panel, I couldn't get a real job in the civilian world, and in the DoD General Counsel's Office my primary duty was not military justice. But I was the backup on military justice and whenever there was a gap in that billet or whatever, then I would fill in.

So I was the one person in the office who was absolutely delighted when Dwight Sullivan showed up, because that ended my one year of gap
duty in military justice.

CHAIR JONES: Thanks. Lisa Friel.

MS. FRIEL: My name is Lisa Friel. I went to the Manhattan District Attorney’s Office right out of law school back in 1983 for what I thought was going to be a three year commitment, but I made it to Robert Morgenthau at the time and I walked out of there 28 years later. So I have a long prosecutorial background.

Of the 28 years I was there, I spent 25 of them in the Sex Crimes Prosecution Unit, 11 years as the deputy chief for the unit and ten years, my last ten years there as the chief of the unit and Manhattan being a very big place, there were a lot of sexual assault cases and investigations I handled in that time period.

I left in the fall of 2011. I went to a security and a consulting firm, and I opened a division for them doing sexual misconduct consulting and investigation in the private sector. So my clients were schools of all levels, private businesses as well as sports.
teams and leagues. I got hired as a consultant
to the National Football League in the fall of
2014 after one of their players, Ray Rice, had
had a pretty infamous domestic violence incident.

I worked as an outside consultant for
them about seven months and they offered me a
full-time job, and I am now there as their
special counsel of investigations. They have a
workplace conduct policy, called the Personal
Conduct Policy, that dictates the behavior of all
our employees at the NFL, players, coaches and
people like me who work at the league office, and
basically tells us we have to behave 24-7 and not
just when we're at work.

I oversee the investigations of people
who are alleged not to have behaved in a way that
upholds the standards of the National Football
League.

CHAIR JONES: Thanks, Lisa. Dean
Schenck.

DEAN SCHENCK: Yes. I'm Associate
Dean Lisa Schenck and --
CHAIR JONES: Could you speak up just a little bit?

DEAN SCHENCK: Sure.

CHAIR JONES: Thanks.

DEAN SCHENCK: I was in the Army for 25 years. I was a signal officer first and then I was in the Legal Education Program and went to law school. I served in the Army JAG Corps in many positions. I was a prosecutor and a special assistant U.S. attorney.

I taught Constitutional and Military Law at West Point, and I was a chief of military justice. I was on the Criminal Appellate bench before -- on the Court of Criminal Appeals. Spent almost six years as the senior judge on that court.

I was appointed as an appellate judge for the Military Commission as an additional judge, and I decided to retire. For one year I was a senior advisor to the Defense Task Force on Sexual Assault in the military Services.

Then I went to George Washington
University Law School. I'm the associate dean for Academic Affairs there. I've been there since 2009. I teach military justice. I co-authored a book on military justice, and I was also -- I'm the co-director of the National Security Law Program. I thank you for including me in this, and I've really enjoyed working with my colleagues. They're extremely motivated and really, really experts in this field.

I also would like to thank the panel for looking at these issues. I think it's extremely important that we have experts such as my colleagues looking at the military justice system. It's a very specialized system, and it needs experts on both sides, people who have worked with General Schwenk and Jill in the area of military justice, as well as who are experts in the civilian sector. I really thank the panel.

CHAIR JONES: Thank you. I want to just say in particular thanks to you Laurie for a terrific report, and there's nothing better than
a report that's clear and complete and persuasive, I think. But that's in my capacity as your colleague on the Subcommittee. All right.

MS. KEPROS: The staff should get credit for that.

CHAIR JONES: True enough.

Mr. Taylor.

MR. TAYLOR: Yes. Let me add my thanks to each of you for your efforts here, as well as Professor Schinasi, who could not be here today. I think also the presentation that you provided this morning was superb. I really appreciate that. I just have three or four questions, and I'd like to direct them to the panel in general. So if anyone would feel free to respond, please do so.

When you were conducting your field visits, did you have an opportunity to talk to people higher in the trial defense service chains, that is to say regional defense counsel, and do you have a sense of whether there has been
the proper requests for resources made known to their higher-ups and had pushback, or do you get the sense that the whole defense community is pushing for this, but somehow their voices aren't heard? What do you think is happening there in terms of what you have described as the real need, which I agree with?

By the way, I started my career as a young JAG officer, and I would say that all the complaints that you've surfaced here I could have surfaced many, many years ago, because I had the same experiences and the same sense that I never got as many resources as the prosecution, and certainly didn't get what I needed.

So I would just be curious to know to what extent do you think people have given voice to this as high as they can, give that voice in their respective chains and with what if any results?

BG SCHWENK: I'll take a shot at some of that, Mr. Taylor. The first thing I'll say is I think part of it is for the very reason you
gave, looking at your background. This is not a
new phenomenon in the military justice process
and probably in the civilian criminal process
either.

And so as the more senior people grew
up to making their complaints when they were more
junior, they grew to accept the system. That's
the way the system is. We're always short. We
never have enough resources to really adequately,
if you're looking at a world class military
justice process, which is what we like to
advertise we have in the Department of Defense.

There are never enough resources and
you become used to it. Then the new lawyers.
Then you get to a supervisory position and the
young lawyers come and when you visit them they
say "Man, I'm working seven days a week. I have
one paralegal for ten lawyers. I've got to do my
own investigations. I've made these requests and
those requests," and you say as a supervisor I'll
take that up with my boss and see what I can do
for you, and of course you know the well is dry,
you know.

We have -- we're going to have a Military Justice Review Group, no disrespect to Judge Effron. We're going to have a Military Justice Review Group. Where is that staff going to come from? It's going to come from some of the people who are residing in the military services, who were supposed to be in billets out in the field and they're not. They're in D.C. working for the Military Justice Review Group.

What about advisory, federal advisory committees, not to name any in particular. Where do the staffs for that come from? Sometimes we staff them with military people and they come from the services. The whole criminal process for detainees, you know. That was originally staffed with all military people pulled right out of the services.

So that whole ethos of do more with less, you know, that you never have all that you need, it makes it, I think for most supervisors, a leadership thing, of trying to do the best you
can to help your people and going to your bosses
and saying boy, we're really short on this, and
have them say to you man, you're absolutely
right.

I couldn't agree with you more, but
look, there's nothing in this pocket and there's
nothing in that pocket, and I've got Joe over
here yelling and screaming there's not enough in
Operational Law and Fred over there, there's not
enough in legal assistance for our young enlisted
guys and their wives and families that need help.
I'm out of Schlitz.

So I think it's not -- I definitely
believe it is not a callous disregard for the
needs of the defense or for military justice at
large. I think it's an over time, unfortunate in
my opinion, but a system where people just grow
in the system to accept the limitations on
staffing.

One big thing that happened was when
the Air Force had their unfortunate problem in
Texas and what was one of the solutions? Throw
people at it, and they were able to get well real
fast with extra bodies.

I think you probably remember the time
the Air Force JAG decided to change their
staffing model and somehow convinced the manpower
people in the Air Force to let them do it, and
they ended up getting their big plus up in Air
Force judge advocates because they were able to
prove they needed them.

None of that trickled to the other
services, which is why our recommendation is for
an outside agency to do it across the services,
so that they can actually try to figure out how
do you evaluate how many defense counsel you
really need and how many paralegals and what have
you. So, I don't know if that helps but --

MR. TAYLOR: Yeah, thank you. Would
someone else like to comment on it?

MS. WINE-BANKS: Yeah. Tom, I'd like
to answer it in a slightly different way, which
is we did talk to people at all levels, from the
new ones to senior people, regional counsel,
commanders, and there is no one who differed with this opinion. Everyone was aware of it.

I think General Schwenk is quite correct. People are just okay, this is the system. We accept it, and it would take an outside intervention like this one to possibly bring it to the attention that this is a serious due process issue, that it also is affecting I believe the overall impression of military justice.

The high acquittal rate means people start to lose faith in the military justice system. There are a lot of explanations for why the high acquittal rate. Part of it is what we've identified as a lack of resources. There are other reasons as well, but it does affect a general opinion.

So it's an important issue to solve, and I don't -- I'm not aware of, no one ever said to us I've been asking and asking and asking and I didn't get a response.

I think it really was more there's no
point in asking. In the same way that they've used the system, they go to the commanding officer to ask for an expert. They go to the judge to ask, and it's denied. So at some point they say why am I even bothering. I'm making a record but it's not going to go to appeal. So what good does it do? So I think that's more the explanation, that people have just not tried.

MS. FRIEL: And I'd like to add, if I may, just to put it in a civilian perspective, having dealt in the prosecution world of sexual assault for almost three decades, that I don't know of any defense attorney or defense organization in my experience that does not have investigators, whether it was the Legal Aid Society in New York, public defenders or individual defense attorneys who hired them themselves.

I was surprised to hear, I didn't know much about the criminal -- the military justice system. I've learned a lot in the last two years. But I was surprised to hear that they
don't have this resource, because it is just such a fundamental resource that I took for granted as a prosecutor that the other side had.

The other thing I'd like to put in perspective, Tom, as you point out, this is not a new problem and you'll hear in subsequent reports from us that there are issues with the investigative resources for the prosecution as well. So the resource issue, especially with investigators, is not a new problem.

But what I do think we have to think about is how we are handling in the justice system, civilian and military and even our schools, if you think about colleges and universities, how we are handling sexual assault is dramatically different in the last couple of years than we did when you started your career a few years before that.

You know, we have gone to great efforts in the civilian and military world to increase reporting, recognizing this is such a severely under-reported problem and those efforts
have borne fruit, and we are seeing higher reporting rates again, military and civilian. So now we have a lot more of these cases in our systems, and they require a lot more resources and a lot more expert resources. I tell everybody we can joke all we want about all the Law and Order shows, but there was a reason there's a Law and Order SVU show, and it's because you do need special training and experience to handle a sexual assault case, whether you're a prosecutor, whether you're a defense attorney, whether you're an investigator. So the world has really changed, and that's I think why we have these panels and we have the Subcommittee looking at it. We're going to need to make a change to keep up with the way the world wants to handle sexual assault going forward.

DEAN SCHENCK: I'd like to also make a comment.

CHAIR JONES: Liz.

CHAIR HOLTZMAN: As a member of the
panel that was also put on the Subcommittee, and
this is to respond and kind of add a little
footnote to what Ms. Friel just said, which is
that it may be that this is an age-old problem of
lack of resources for defense counsel. But the
terrain has changed, and in the past perhaps they
could make do with a very different kind of
Article 32 procedure, which was a kind of
discovery procedure, a discovery tool.

It was very, very valuable and of
course that is gone now, and there's nothing to
replace it. So the need for some of these
investigative tools and resources has become much
more acute, because the system has changed. I'd
just add that footnote. Thank you.

DEAN SCHENCK: This is Lisa Schenck,
Congresswoman Holtzman. I'd like to also add
that in these cases, there's about 50 percent or
more that are sexual assault cases out there in
the field that they're trying easily, and with
the new system, the modified 32 where it's just a
probable cause hearing, with the special victim
counsels only for sexual assault cases, defense

counsel are fighting with one hand behind their
backs.

It's just impossible for them to do
their jobs and it's not fair to the accused in
these cases, and like I said, there are a
majority of these cases. So that's why the call
for resources has been magnified, by us making
sexual assault cases. It's been magnified
because of that special victim counsel. So
special victim counsel can decide whether or not
the defense counsel can even talk to the accused.

Also, I want to point out the kinds of
sexual assault cases that are being tried in the
military services are about 50 percent sexual
abusive contact cases, which are generally
alcohol, involving alcohol, and many people in
the units. So defense counsel has to rely on the
criminal investigation, the MCIOs, to give them
information about what happened in the incident.

They have to wait, and they have to
wait to talk to the victim, and maybe not even
get to talk to the victim if the special victim
counsel says you cannot. They have to allow for
the file to come to them, as opposed to be
proactive with an investigator of their own and
speak to people in the units, because these are
he said/she said cases or involving many people,
eyewitnesses in the units where the defense
investigator could help draw the facts out from
both sides.

    In the old days, the Article 32
hearings were used for just those sort of cases.
The commanders referred the cases, appointed 32
officers and said let it go. Let the 32 officer
make a determination about what happened. The 32
officer called the victim. The 32 officer called
the people in the units. The 32 officer heard
testimony from everybody, the investigators.
They sorted it out.

    That's not happening anymore. It's a
probable cause hearing. The victims don't have
to testify. They don't testify. It's a paper
case. So and that's what we heard from the
field. The 32s are giving them nothing. The
defense counsel have no opportunity to interview
the victim.

Yes, there are acquittals. There are
acquittals because the cases are going forward
because victims want to go forward with the case,
and they're not testifying until -- they're not
telling their story even to the prosecutor in
some cases until they get on the stand. When you
get on the stand and you have them cross-examined
by the prosecutor or talk to practice
prosecution, practice direct, practice cross-
examination, you're going to get acquittals.
That's what's happening.

You know, it looks funny because
you're getting acquittals and you're asking for
defense resources. But that's because of what's
happening before they get into that courtroom.

MR. TAYLOR: Well, I'm glad you made
that point, because I think that is a strong
counterfactual that needs to be understood. So
thank you very much for doing that, and the segue
that you set up, I think, for my next question, my only question in this round I suppose, when we were in Charlottesville in May at the Army's Legal Center and School, we had the services come in and tell us about their training programs.

And as Ms. Kepros pointed out, we understood the differences between what the Marine Corps and the Army in particular do and assignment of counsel from the other services.

It seemed that the argument that the Army and the Marine Corps were proffering was essentially that because they didn't have experience, they would provide intense training and the intense training would somehow compensate for the lack of experience.

And my question to you as a panel of experienced litigators is how valid is that as a way of thinking about the problem?

MS. FRIEL:  It's not.  I often say expertise is training and experience.  It's both. You have to have both.  You would never in a civilian, at least not in a big office like my
old office, let anyone near a felony sex crime
who hadn't tried a number of cases. They'd
probably have to be at the DA's office for five
years to do that, because there are just skills
that you learn doing it that you can't learn in a
courtroom.

MS. WINE-BANKS: I agree completely
with Ms. Friel. The training that everybody
commented on they said was excellent, but it
cannot substitute for actually knowing. I can
still remember the first time I ever went to
court, and getting there and suddenly realizing
do I actually say "may it please the Court"?
That's what I was taught in trial practice class,
but is that what I really do, and just having no
idea the first time I second chaired a case.

After my boss did the cross-
examination of the defendant, I went how did he
know where to get those questions from? I was
fully prepared on the case, but you just don't
know until you've sat through a number of trials
as second chair and then had an experienced
lawyer with you while you did some stuff.

Experience cannot be substituted.

(Dial tone.)

(Technical difficulties.)

CHAIR JONES: Mr. Stone? Can we fix this first?

CPT TIDESWELL: Why don't we take a moment to --

(Pause.)

CHAIR JONES: Why don't we take a couple of minute break and get Ms. Holtzman back on the phone? Thanks.

(Whereupon, the above-entitled matter went off the record at 10:06 a.m. and resumed at 10:10 a.m.)

CHAIR JONES: Thank you, Liz. I'm sorry we lost you there.

CHAIR HOLTZMAN: It's all right, thanks.

MR. STONE: Thank you. I'm not sure if Ms. Kepros you are the chair of the panel, or if one of you down there was the person who was
designated to speak for the Subcommittee. So when I ask a question, please consider this directed to all of you, because I see that I don't think anybody went to all six site visits, is that correct? And panel members only went to three of them, is that right? A single panel member was at three of them?

CHAIR JONES: Are you talking about the panel members or are you talking about the whole Subcommittee?

MR. STONE: I'm talking about our -- no, I'm not talking about the Subcommittee. I was looking at the attendance sheet that was handed to us as page 15, and it indicates that only one panel member went to three of the six visits, and I was just trying to check if that's accurate.

MS. KEPROS: I think that most were attended by Ms. Wine-Banks. I attended six installations in three different trips.

CHAIR JONES: No. I think you're talking about Ms. Holtzman and myself, is that
right?

MS. KEPROS: Right. Oh yeah, yeah, yeah.

MR. STONE: I'm actually looking right, at all the attendance.

CHAIR JONES: Right, oh okay.

MR. STONE: Some of these trips only show two people. But yes, I'm also asking if you and Ms. Holtzman went to -- together went to a visit or it just -- it looks like you each went to separate ones?

CHAIR JONES: That's right. We did not do a joint visit.

MR. STONE: Okay, and I guess I'll start maybe in reverse order, if I may, with the recommendations that I saw were made. The last recommendation is the one that speaks about only allowing defense counsel in sexual assault cases who have a lot of experience, and the last two comments I just heard from this group before me were from people who were saying if I got it correctly, that even prosecutors shouldn't be
One of the comments was in the New York DA's office, no one without four or five years of experience would have been trying one of these cases, because these are complex cases. Is that right?

MS. FRIEL: That's correct.

MR. STONE: All right. So I guess my question is you have correctly articulated what we heard last May, that a lot of defense counsel don't have that kind of experience. Did you also ask and line up to speak with prosecutors at these installations, to find out whether they had that kind of experience?

MS. KEPROS: Do you want me to --

CHAIR JONES: Go ahead, Laurie.

MS. KEPROS: We did.

MR. STONE: And what was the result of that?

MS. KEPROS: Most of the prosecutors were starting in military justice in a
prosecution billet. That was a first assignment. That was a common pathway across the services. However, there was a lot more available in terms of senior trial counsel. That was apparently a more desirable career path, and so we saw a little bit more institutional memory, longevity within the prosecution community and some of those kind of dynamics were different. The training resources were different. I think I mentioned or it's in the report --

MR. STONE: I guess that was not my question.

MS. KEPROS: Okay.

MR. STONE: My question was did you find that the prosecution counsel in these cases had significantly more trial experience than the defense counsel?

MS. KEPROS: Those who were trying the cases did, yes.

MR. STONE: And do you have numbers? Did you back that up with numbers at those places?
MS. KEPROS: We were collecting qualitative information. I know there was some quantitative information that various, you know, parts of this Committee are looking at. I don't have those numbers.

MR. STONE: Because we have previously heard that many front line prosecutors also don't have -- certainly they don't have four to five years of experience before they handle sexual assault cases in the military, and they don't have much more experience than defense counsel, which is due in part simply to the rotational policies of the military services.

MS. KEPROS: Yeah.

MR. STONE: Does anybody on the panel disagree with that?

DEAN SCHENCK: No, but I do want to point out that --

MR. STONE: Can you turn your mic so we can hear?

DEAN SCHENCK: Yes. I do want to point out that the Navy has a different set up
now, where it's almost an apprenticeship type
series, where they serve in six month sections of
their career, and before they are even certified,
I believe, they have to serve the six months for
prosecution, six months for defense, six months
doing installation law, you know.

And so there's four of those things,
and then at the end of two years, then they can
go out and I'm not sure if they go to defense or
to the prosecution, but they have that. You
know, they have to do every kind of law that's
practiced in the Navy. So the Navy's got a
little bit different tone on things.

With the testimony I heard and from my
experience and knowledge of the Army JAG Corps,
the prosecutors are more experienced that are
trying the sexual assault cases and they usually
do a co-chair, you know, an assistant trial
counsel to train folks on the folks we heard, as
far as defense --

A couple of installations I went to
had all the services testify, talk to us, and
they indicated that they were put in those
defense billets with limited experience, whereas
the prosecutors didn't complain about their
experience as being problematic with their
trials. Their complaints were more of
investigation, the special victim counsel,
unavailability of the victim to talk to them.

MR. STONE: And that's just
summarizing the testimony that we previously
heard?

DEAN SCHENCK: No, no. The
discussions we had with the folks in the field,
when they spoke to us when we went out for the
site visits.

MR. STONE: Okay. I didn't see any of
that in her report.

CHAIR JONES: Just so we're clear, I
think that the Subcommittee is really only
talking about, you know, what they learned during
their site visits.

MR. STONE: Which look to me --

CHAIR JONES: Unless they labeled it
differently.

MR. STONE: Which look to me from the
tenor of this report like they did not go into
whether prosecution counsel had the requisite
experience in the same number or similar number
of cases and more importantly, and this is what
came up at the last hearing that we had here,
whether the trial judges had the requisite
experience, because they are also rotated and
they also typically don't have four to five years
of sexual assault case experience, which frankly
adversely affects all the parties.

I wondered whether the panel, when it
was out there, made an attempt to talk to
military judges who handle these kinds of cases,
because I don't see it in the report.

MS. KEPROS: If I could address that,
Mr. Stone, your observation is correct. This
report does not address any of that. We talked
about a lot of other topics on the site visits.
This report is very narrow. It is only on the
issue of defense counsel resources.
We are going to be preparing additional reports on other aspects of our site visit investigation. This is narrow. This is not addressing the broader issues that you've identified, and that we certainly did collect some information on those topics. So you're right. We don't get into that here. I did want to note one thing I did hear about in terms of prosecution experience in sex assault cases on the site visits.

There are service branches that have a function and forgive me if I get the terminology wrong, but it's essentially a special victim prosecutor, and I do not believe we heard about any equivalent expertise on the defense side in any of the branches, aside from the Navy's military criminal justice track, which was just alluded to by Dean Schwenk.

MR. STONE: We've heard testimony before this panel that the special victims counsel, which is not the special victims prosecutors, are also brand new and don't have
sufficient experience to be able to handle those positions. Did you interview any of those special victims counsel and receive information about their lack of experience?

MS. KEPROS: We did, and that is one of the topics for our future reporting.

MR. STONE: So really, what I guess I'm getting to is I don't see anything that explains whether this problem of lack of experience, due in my view to the rotational policies of the military, which it has other reasons for, doesn't affect all the participants in these proceedings. It may be an adverse effect, but it seems to me that it affects all the participants. Do you agree with that?

MS. KEPROS: My personal opinion, because we've not deliberated on this as a Subcommittee, is it does affect all of them. However, my concern about defense counsel is they appear to be more dramatically affected, and they are the parties who are affected to whom there is a constitutional right that is guaranteed.
And when they cannot fulfill that constitutional right, the actual legitimacy of the conviction is jeopardized so --

MR. STONE: Did you collect any statistics that compare the lack of experience and the effect on all these different parties on the proceedings?

MS. KEPROS: I collected qualitative information. I do not have any statistics.

MR. STONE: I assume, maybe I'm wrong, but I assume that the panel is familiar with the transcripts of -- the Subcommittee is familiar with the panel's various hearings, because a lot of this data is repetitive of what we heard, and indeed you're quoting back to us stuff we heard last May. So I wanted to know if the panel that went out on each of these visits was familiar with all of our prior hearings?

MS. FRIEL: We were. We've been provided with background and I know from our discussions that we've all reviewed it and read it. It helped us form our questions, to go out
in the field and see if the testimony that you
got, for instance, out in the field if we were
hearing the same thing.

In a number of areas, we did hear the
same thing out in the field. In other areas
there was a discrepancy and as Laurie mentioned,
we will have other reports on different areas
that we specifically looked into and have
recommendations based on it, and in some you'll
see we learned, as I say, something consistent
with what you heard in testimony, and in other
places we heard inconsistent with how it is in
practice.

MR. STONE: Well, can you tell me what
other --

CHAIR HOLTZMAN: This is Elizabeth
Holtzman. I was a member of the Subcommittee,
and I traveled both to several bases in the
United States as well as several abroad, and I
heard the testimony before the JPP panel.

Just because we heard testimony from
people doesn't mean that what we heard was
representative. That was one of the reasons that I wanted to be on the Subcommittee and felt that our exploration and investigation was important.

I don't think the Subcommittee report, or even Ms. Kepros' very fine presentation in any way captures almost a tone of desperation that we heard, that I heard at these various installations, which was not just reflected by or expressed by defense counsel, but by prosecutors, investigators and others who are part of the system.

The concern was that the inadequacy of the resources, whether you looked at it in terms of investigative help or staffing or training or experience, the inadequacy of resources is affecting the very quality of justice. That was what I took away from this. Now can you quantify that? Maybe, maybe not. I can't quantify it for you.

But that was to me really disturbing, because it wasn't one person who said it, it wasn't one side that said it. It was a virtually
unanimous expression of concern by people who are part of the system, and they wanted to be proud of that system and they wanted it to work as a system of justice and they were not seeing that. That's what I took away.

So I just wanted to give you a sense of somebody who heard the JPP testimony, and had, if you will, a substantial reinforcement and expansion and deepening of it as a result of the work on the Subcommittee.

MR. STONE: That actually raises my next question, which is the recommendations of the Response System Panel, which I understand from your resume, Ms. Kepros, you were an expert on and I presume you know something about, made this one of their -- several of their recommendations related to the lack of resources that the Defense Council in the military were getting.

I don't understand why we should be simply restating at this late date the same recommendations that were made and which the
Department of Defense has been endeavoring to respond to.

Is there something here that you think is different than the Response Systems Panel said, and if so, I'd like to hear that, and I'd also like to hear what it was that the Subcommittee heard that I've just heard responded to me that some things were different than we heard here? That's what I'd like to hear, what the Subcommittee found.

CHAIR JONES: Can I respond, jump in as a member of the Subcommittee and just respond to the first question? It's true that many of the recommendations of the Response Panel have been adopted in some form or other and are now legislation and rule.

But I'm unaware of any actual movement in terms of trying to fulfill the recommendation of the Response Panel with respect to enhancing defense resources. So I don't -- I don't think procedurally there's really any issue with us doing another look at it and raising it again,
and it was something that the Subcommittee was
tasked to do by the JPP.

Now I've forgotten your second
question. I'm sorry, Mr. Stone, but --

MR. STONE: Well I guess -- I guess
what that raises in my mind is before we would
adopt any recommendations that repeat the
Response System Panel's recommendation about
additional resources that are needed for the
defense counsel in the system, shouldn't the
public hearing give the Department of Defense or
General Counsel's Office or the Joint Services
Panel or whomever agrees that they have some
responsibility to review those recommendations, a
chance to come up here and tell us what their
progress is?

CHAIR JONES: I think that's -- I
think that's a good idea, and that we should
discuss that as a matter of our deliberations, as
opposed to presenting it to the Subcommittee.
Does that make sense?

MR. STONE: Well I guess -- okay. So
then I can assume one, the Subcommittee didn't go
into talking to high level officials at these six
bases or on these six visits, and find out
whether or not the Response System Panel's
recommendation has been somewhat implemented, not
implemented, controversial, discussed. They
didn't go into the RSP's progress on these
recommendations. Is that right?

CHAIR JONES: No. What the
Subcommittee did, at least my own experience and
I was unfortunately only able to go on one of
these site visits, was we found out from people
who were there speaking to us, prosecutors,
defense lawyers, everyone in the system what they
had and what they didn't have now, regardless of
what recommendations may have been made.

We didn't really analyze or ask the
question well gee, after that recommendation,
didn't you get any more resources? So we don't
know that answer. But we know they don't have
the resources.

MR. STONE: So this, to the extent
that this was covered by the RSP, this is an
update of that recommendation, bringing it
forward to a more recent point in time?

    MS. FRIEL: I would say that's
accurate. I think the point is here we are in
December of 2016, and we have learned there is
still a need for additional defense resources in
the area that we've described.

    MR. STONE: Okay, and I guess you
haven't presented the report yet, but I'll ask
you about the Subcommittee visits. Did you also
look into, at that time, the current status of
that trial judge experience, the prosecutor's
need for experience and the special victims
counsel's lack of resources and need for
experience, which the special victim counsels
explicitly made a point in testimony before us?

    MS. KEPROS: Do you want me to address
it?

    CHAIR JONES: Yes, go ahead Laurie.

    MS. KEPROS: Okay. We did not collect
judicial information like that. We did interview
concerning trial counsel and special victim
counsel about resources, and as I mentioned, I
anticipate we're going to be covering that in
future reports.

MR. STONE: Well, and so I come back
to what I started. It seems to me that if you
have a recommendation on additional experience
that you require in your Recommendation No. 4, it
seems to me it ought to await including whether
or not that should cover prosecutors, special
victims counsel and the trial judges before this
panel talks about who at military first level
courts-martial should get more resources.

CHAIR JONES: So that's an issue for
the JPP to decide, that perhaps the tasking
wasn't broad enough, okay.

MS. WINE-BANKS: But we will be
covering trial counsel in future reports. It's
just that this report was focused only on the
defense side. So that we could get some
information to you, we decided to present it
piecemeal. Possibly it would have been better to
wait many months until we could finish all of our reports.

I'm not sure. Has our -- have the detailed minutes of our site visits been made available to the JPP?

CPT TIDESWELL: No ma'am, they have not.

MS. WINE-BANKS: Okay, because we do have detailed minutes of who we met with and what we were told without attribution to any particular person, that could be made available. At every site visit there were notes taken and captured the findings that we were relying on. We used the ones from, you know, we pulled out the ones that related to this topic to do this report.

In future reports, we would pull out the information from those detailed reports to cover the others, and make recommendations regarding trial counsel, regarding special victim legal counsel who --

By the way again, we haven't discussed
this, but from my perspective, the ones that I heard from all sounded like they had much more experience than the others.

There was also an issue raised that the defense now felt quite outmanned because there was one of them and there were at least two against them, usually three because there was usually two prosecutors plus the victims counsel and the victims advocate, adding a fourth not legal component, but a fourth thing.

So that's just an observation that's not part of our deliberations yet.

MR. STONE: Let's follow that line for a second. We heard in testimony before this panel that the trial counsel at these military first level trials, both the prosecution and the defense, have regional bodies, regional counsel to whom they call.

When I specifically asked how they handle difficult questions, because neither side necessarily had an experienced person at that proceeding, they said oh, well we have people.
We grab ahold of them on the phone. We run
issues by them and they help us about the issues
so we know what we're doing.

That's available. You didn't find
that that's not available to defense counsel in
these cases, did you?

MS. WINE-BANKS: No sir, we did not.

MR. STONE: So then why is it that
your report says that they wouldn't have the
ability, with the expertise that they can get
from their regional counsel who are experienced,
to know even what to do or what questions to ask,
which we just heard is part of your report?

MS. WINE-BANKS: I think what we found
was that they were available often too late.
They would come in to assist at the last minute,
much like the experts who came too late, if they
were even the particular specialty that was
needed, and that it was not a question of they
aren't available.

They are. There just aren't enough of
them and the main work is being done before the
experts get involved. I don't know if the other
panel had other memories of their testimony.

MR. STONE: Well I don't -- does
anybody else want to comment on that?

BG SCHWENK: Well I think one of the
-- one of my thoughts on that is when we talk
about the availability of regional defense
counsel or whoever they are, they are available.
But they're not available when you're in the
courtroom. They're not available when the
members of the jury are sitting there looking at
the cross-examination or the direct or whatever,
and that's where the experience comes in.

As Lisa was talking about, that's
where the experience, and when you don't have it,
you don't have it. And you're learning it, but
your client, the accused, suffers in the meantime
while you're on a learning curve. So they are
available and they are very helpful when you can
call them ahead of time and identify an issue and
talk it out with them and get some guidance or
they can visit you.
But the problem of knowing the right question to ask or whatever comes from experience and, you know, we're all a victim of it takes a while to develop experience.

MR. STONE: So you're suggesting that no defense counsel should have less than several years of experience because they won't know what questions to ask ahead of time?

BG SCHWENK: Oh that oversimplifies, I think, the report that you heard from Laurie and that's written for you to read. But I do think that when we look at what they should be able to do, our recommendation is no lead defense counsel in a sexual assault case should be someone without experience.

So if you're going to have a sexual assault case, you should ensure the lead defense counsel has sufficient experience to be able to handle the case.

MR. STONE: And since that expert's not available on the phone to the prosecution either, you agree that that ought to be true of
the prosecutor in the case too, don't you?

BG SCHWENK: I'm not going to talk about the prosecution side of it because we haven't deliberated. So you know, I can tell you that experience says not everybody in a military court-martial can all be equally experienced, because somebody has to get experience somehow. So we do it by second seating. That's where our recommendation on the defense side is.

The lead counsel has experience. That allows the new counsel to sit and learn and develop it, so they can become lead when the objective and subjective criteria are established. Sounds reasonable that the government would have something on the trial counsel side also, but we haven't deliberated so --

MR. STONE: I guess --

BG SCHWENK: I don't want to jump ahead of the FACA rules and say anything.

CHAIR JONES: So Mister --

MR. STONE: I guess what doesn't sound
reasonable to me is that if the statistics are --

CHAIR JONES:  Mr. Stone, I really --
do you have a question for them?

MR. STONE:  Yes, I do.

CHAIR JONES:  Okay.

MR. STONE:  If the statistics are that
the vast majority of these cases result in
acquittals, as you've noted, and the defense
counsel doesn't have the opportunity to have an
expert at their side, nor does the prosecution,
that doesn't suggest like they're doing a bad
job.

Are you implying that the military is
indicting cases improperly? Because if they're
not, then defense counsel, by looking at the
results, suggest they're able to do and are doing
a pretty good job.

BG SCHWENK:  I think that's an
oversimplification of how you evaluate a court-
martial or a criminal case in general. There are
a lot of reasons that can result in an acquittal.

One can be a very difficult case to prosecute,
and if you take a very difficult case to
prosecute and you have your ace prosecutor with
all the experience in the world, who does a bang-
up superb job, the end result could be not
guilty, because it was a hard case to begin with.

MR. STONE: Let me ask you another
question because you've been in the military.
The military system is different than every
civilian system because in effect there is a de
novo raising of issues on appeal. The record
that's made at the trial court and the evidence
offered to the defense counsel at the trial court
is not closed with the end of that proceeding.

As we've heard before, 513 issues are
very common in sexual assault cases, which are
the access to privileged psychological records of
the victim and sexual assault cases, as you
pointed out, are now very high, in very high
numbers in the military system, maybe a majority
of cases.

But when the case gets to appeal, an
experienced defense appellate counsel gets to
review not only the record below but also new material and make any arguments that counsel wants to.

CHAIR JONES: All right. Mr. Stone --

MR. STONE: Why doesn't that correct the problem? Did you inquire about that concern in your Subcommittee deliberations?

CHAIR JONES: Thank you. Thank you for your question. I think it's something that we can discuss in deliberations. I think it goes beyond a question appropriate for the panel.

Okay.

MR. STONE: Well, if you're going to cut me off, I do have something else I want to know for the record and I'm going to ask whoever was in charge of the Subcommittee to put it on the record. At our May meeting in Charlottesville, a meeting was held by this panel that was not public to decide on whether or not there would be these Subcommittee visits.

I was told there would be a public vote on that, there never was. At that meeting,
I only agreed to the visits on the condition that if two panel members were not going on a particular visit, I wanted to be invited because I wanted, just like this panel has said, and just like the chair of our panel told us on the phone, I wanted to be there in person to see what these people had to say.

Because as you said, it might be entirely different from the testimony we got here. I was told don't worry, that certain panel members were going, had every intention of going and therefore I could not go because you couldn't have three panel members go on a Subcommittee visit because that would constitute a quorum.

I want to state for the record the attendance shows that two panel members from this JPP didn't go on any of those visits. I was never invited to go on them, despite saying that I wished to go. I was the only panel member who said they wished to go on any of the visits, and we've also never heard a report, a financial accounting of how many tens of thousands of
dollars was spent on this report, which I was, I believe, improperly not invited to attend. Thank you.

CHAIR JONES: Well, I can only say that I attended two administrative meetings. They were not public, you're correct Mr. Stone, where the panel discussed whether or not these site visits were something that we should do, whether the expenditures to go and make these site visits were going to result in worthwhile information that we couldn't get with just having hearings with people.

We had had this experience with the RSP and we found that being able to talk to installation level people who are not speaking for attribution was very, very important in order to understand things in context and get additional information.

We also, as I said, we had two meetings. At the second meeting, my recollection is there was -- I don't think everybody said on here no, but there was an understanding that you
did not agree to the panel meetings. But and I
can be corrected. I think the other members of
the panel did agree that we should go forward on
it.

I don't recall there was ever a public
announcement of that, but we did do them at two
administrative meetings. With respect to the
rule about panel members, if more than two panel
members attend -- in other words, if three panel
members attend a meeting, then under my
understanding of the FACA rules it becomes a
deliberation of the panel and therefore if we did
that, we would not have been able to have these
site visit meetings where we could talk to people
and do it without attribution.

It is a fact that neither Ms. Holtzman
nor I ever attended together one of these site
visits, and I recall in our conversations that I
told you, Mr. Stone, that I would be happy if you
wanted to attend one with me. There would only
be two of us, that way we could do it.

I apologize if -- and I don't know.
You were never contacted or given a schedule or if you never called to ask specifically once we agreed to do site visits, to go. That's all I can say for the record.

MR. STONE: Well, my only response is that part of my concern, which the Ethics Council to this panel agreed with when I was told that the deliberations and open vote on whether there would be Subcommittee visits as opposed to panel visits, which is what I wanted, that the vote on that would be public.

That did not happen despite that opinion from the Ethics Council, and I frankly think that what happened here is a violation of the Open Meetings law. Thank you.

CHAIR JONES: Okay. Well, I don't have any familiarity with that opinion. All right. Admiral, did you have some questions for the panel?

VADM TRACEY: I apologize.

(Simultaneous speaking.)

CHAIR JONES: Or the Subcommittee.
VADM TRACEY: --Schwenk. I don't know how to pronounce your last name.

BG SCHWENK: We try to confuse everybody. Lisa and I have done a great job.

She is a Schenck and I am a Schwenk, and I don't know why that is, but that's the way it is.

(Simultaneous speaking.)

DEAN SCHENCK: -- because I married him and I took his name.

VADM TRACEY: The Navy process that you described, is that a new process or --

DEAN SCHENCK: I think it is. I actually -- I don't know why they do it, but I believe it's in the last few years, maybe two or three years.

VADM TRACEY: Okay.

MS. WINE-BANKS: Could I just add that they also have then developed a military justice track, a litigation track and that has been highly regarded by many of the services, who may be or may not be considering whether that would be an appropriate track to develop for
themselves.

VADM TRACEY: That's also recent, right?

MS. WINE-BANKS: Yes.

VADM TRACEY: Did you get to talk to convening authorities? I don't know if I heard that in what you had to say.

MS. WINE-BANKS: Yes, we did.

VADM TRACEY: Is there -- can you characterize what their perceptions are of the issues that you raise around the inherent risk to fairness in the resourcing of the defense side?

MS. KEPROS: I can tell you I think I only met with maybe two or three convening authorities, so I don't think we had as representative a perspective. And I don't specifically remember discussing the defense resource topic in that meeting.

Frankly, the broader topic that I reflect on is we were talking about preferral of charges, that process, and how those convening authorities were resolving decisions about
whether to go forward, what was significant to
t heir decision, the role of the victim's wishes
in the formulation of that decision.

VADM TRACEY: Anyone else have any
recollection of --

MS. WINE-BANKS: No, that was my
recollection. Many of the convening authorities
also were just indoctrinating us in the base that
we were on and the mission of that particular
facility, rather than being as much in our list
of questions or topics that we wanted to cover.

VADM TRACEY: Just confirm for me, if
you would, that except for the Navy's eight
defense investigators, my understanding would be
that even at the regional defense counsel level,
there are not investigative resources available
to assist at the defense counsel level?

MS. WINE-BANKS: Yes ma'am.

VADM TRACEY: Okay. Last question.
Ironically, NPR ran a piece on public defender
resource shortages this week. Is there a best
practice in the public defender world around
developing the right kind of experience for
counsel?

MS. KEPROS: I love your question.

BG SCHWENK: Well, then I want to
answer it.

MS. KEPROS: Right, so take it away.

I can't be trusted. We actually discussed that a
lot in our deliberations in arriving at the
recommendations, and specifically the
recommendation to have an outside entity take a
look at staffing needs.

We are under-informed but very
sensitive to the diversity of needs across
services, the differences in not just size but
the geography and, you know, how they function
within their justice systems.

But what we have seen nationally is
various jurisdictions with public defender
offices, and to be clear those are organized in
really diverse ways, right? They might be at the
municipal level, they might be at the federal
level, they might be at the state level and it's
all over the map as you go across the country.

There has been increased attention to auditing those kind of diverse issues and figuring out that the needs in a jurisdiction that is rural, that has small caseloads are going to be different from the needs in a jurisdiction that is urban and has large caseloads.

For example, in the urban jurisdiction the attorneys can generate experience a lot more quickly, and they might have easier access to experts and other kinds of help. In the rural jurisdictions, the caseload size might not be a problem, but they can't get help and they don't have people to turn to to learn what they need to be effective in their work.

So there have been attempts to put metrics to these kind of questions. They involve processes such as surveying private defense attorneys in given communities, finding out what do they charge somebody to work on a case.

What are their expectations for what it really takes to do a responsible job
representing a client in this kind of case? What are their expectations for experts? What are their expectations for hours that they could bill a private client?

Obviously, public defenders are not in necessarily the same situation, but it starts providing some metrics. They are also collecting data from various public defender agencies to look at how much time do the attorneys actually spend. There have been published reports with the sponsorship of, I believe, the American Bar Association out of the state of Missouri.

And as you might be aware, I didn't hear the NPR story but I know there has been press looking at lawsuits in jurisdictions where public defenders are saying we are not sufficiently resourced to provide adequate representation, and I suspect in the course of the civil lawsuits, these kinds of figures are also coming up.

CHAIR JONES: Liz, unless you have some questions, I think we've concluded that
part. Any questions?

FEMALE PARTICIPANT: Did we lose her?

CHAIR JONES: We may have lost her.

All right. I want to thank you all very much, and especially again express the appreciation to the panel for giving a very clear presentation and also for all the work you've done on this report as well as all of the other site visits that you've conducted. So thank you.

BG SCHWENK: Thank you.

CHAIR JONES: All right.

BG SCHWENK: Let's take a break.

CHAIR JONES: Let's take a ten minute break, a real break this time and we'll come back and begin our next session.

(Whereupon, the above-entitled matter went off the record at 10:48 a.m. and resumed at 11:03 a.m.)

CHAIR JONES: Okay, we are going to begin now and for this portion, we are going to at least begin our deliberations on the Subcommittee Report that we just heard. I think
some of the Subcommittee Members are still here.

They are not allowed to deliberate. If they are
here and there is a question, we may ask them but
this is a Panel deliberation.

Liz, are you there?

CHAIR HOLTZMAN: Yes, ma'am, thank you.

CHAIR JONES: Okay, thanks.

All right, we should take it

recommendation by recommendation, I guess would
be the most orderly way to do it. And unless
there are some preliminary comments, I think if
we just start with their recommendation that, in
order to insure the fair administration of
justice, all of the military Services provide
independent and deployable defense investigators
under their control in sufficient numbers so that
every defense counsel has access to an
investigator, as needed.

And so I would like to hear any

comments with respect to that recommendation.

Yes, Admiral.
VADM TRACEY: While I was compelled by the argument that the Article 32 changes makes this an even more important issue, perhaps, than it was under the previous model Article 32 hearing, sort of grounding a recommendation around this quite clearly in the fact that in addition to what has been the historic under resourcing, there is this additional change that has occurred, making this an even more -- having a bigger impact on the defense counsel than perhaps was true in the old model of Article 32 hearings.

CHAIR JONES: Yes, and the Article 32 piece of this was something that, obviously, we learned a lot about because it has, you know the change occurred in the last year and a half and so there was a lot of commentary about that, as the Subcommittee described and it has made it even more difficult.

Although, I think, frankly, the RSP concluded three years ago that they were already in pretty bad shape. But I completely agree that
their needs have only gotten greater because they have access to even less information.

VADM TRACEY: With reference to this Panel's responsibility to evaluate the effects of those changes, here you have at least anecdotal evidence suggesting that this particular change is having a profound impact on something that was already an issue.

CHAIR JONES: Right. I agree with that.

MR. TAYLOR: I think, to some extent, what has been identified here is as much a cultural issue as the way people have been thinking about this problem in an historical context for a very long time, as I reflected on my own experience. So, certainly hearing someone say that this is so important that it puts justice at risk raises the stakes, it seems to me, for taking some action that is clear.

I certainly appreciate what Mr. Stone had to say about the fact that this is a kind of recommendation that has been made in the past but
it seems to me that it is pretty clear that not
enough attention yet has been paid to the issue
and certainly not enough resources developed and
devoted to the issue. So, I am in support of
this.

CHAIR JONES: Mr. Stone?

MR. STONE: Yes, I would like to start
by continuing on the last line that we just
heard. I agree that everybody who needs
investigators at the first level court-martial
hearing ought to have some access, reasonable
access to an investigator but we have not heard
from DoD what they are doing. And if it turns
out that they are in the process of hiring more
investigators or they have already expanded the
number of investigators and the fact is they are
in training right now, then the fact that this
Subcommittee has found that they may not be on
the ground yet is not a reason for us to make a
recommendation. I think the recommendation is
premature before we have heard from DoD. And it
is also premature because we just heard they
really didn't quiz the convening officers on the
basis they went to as to whether this is
something different than what we heard from
everybody earlier in the year.

So, I think that before we have heard
from DoD on this particular need, it is premature
because they do have an RSP out there that states
this. So, the second feeling I have is we don't
need to repeat something, if it turns out it is
in the process of being fixed.

And the other comment I have is that
I would change the language because we
specifically heard testimony that the SVCs don't
have investigators that they need. So, if this
is a recommendation, the recommendation should be
that the military Services provide independent
and deployable investigators for defense counsel,
prosecution counsel, and Special victims' counsel
in sufficient numbers so that every counsel has
access to an investigator as needed. That we
have to be even handed across the board.

And so without an update from the DoD
and without being even handed to talk about all
of the participants, I don't find this
recommendation, in its current form, acceptable
and I will not vote for it.

CHAIR JONES: Well, I see no problem
at all not getting an update from DoD. I haven't
seen any evidence that more investigators are
being hired and are being given to the defense
counsel throughout the military. I don't think
that is happening but I see no reason not to make
sure that we are not recommending something that
is already in process.

So, I think the Staff can put their
heads together and figure out how we get that
update. And we can be absolutely sure we are not
recommending something that is already in
process.

My own reaction to expanding this to
give independent investigators, I guess we can
always say if needed, to special victims' counsel
and the prosecutors, I put them in two different
buckets. I think that I haven't heard that the
prosecutors claim they need it because they
already have their special victim capability but,
again, we can double-check and make sure that
they are not expressing a need for more
investigators.

With respect to special victims'
counsel, I think we are overcrowding the field.
The Government has investigators, I believe, and
they need them. And certainly the defense needs
investigators and they don't have them. It is
not clear to me well, one, what an investigator
for a special victims' counsel would do,
independent of what the Government or the defense
would do. But I am open-minded on the subject.
I just think it is a lot of investigators running
around in one case.

MR. STONE: Well, I think this goes
back to the difference between special victims'
counsel and the prosecutors and the fact that the
prosecutor does not have an attorney-client
relationship with the victim and the special
victims' counsel does. The special victims'
1 counsel may want to go out and question, and this
2 is just a hypothetical, a woman who says she was
3 assaulted by talking to three or four of her
4 prior boyfriends or whatever and does not
5 necessarily have to or want to have that
6 information conveyed to the prosecution
7 investigator, who, by virtue of it being in the
8 prosecution's hands, has to turn it over to
9 defense counsel. That is up to the victim to
10 decide with the victim's counsel.

11 And that is the whole issue of whether
12 or not the victims have slightly different
13 concerns than the prosecutors and their
14 investigators who are bound under Brady to turn
15 material over to the defense counsel and why they
16 need special investigators. And I heard a ton of
17 testimony about that when I went to the training
18 session in Charlottesville with special victims'
19 counsel, how they have no investigators. And so
20 when a victim tells them something at the first
21 level, they can't follow it up before they decide
22 how that information, if it is relevant, should
be turned over to the prosecution about say the
woman's prior sexual history or lack thereof or
whatever and whether that is going to be turned
over.

CHAIR HOLTZMAN: This is Liz Holtzman.
First, I didn't get a chance to thank the Panel,
maybe because I was serving on it. I do want to
say that the Members of the Subcommittee really
did an amazing job and spent an enormous amount
of time and traveled around the country. They
are extremely qualified and thoughtful people and
experienced, and expert.

And so I want to say thank you to each
and every Member of that Subcommittee, present
company, myself excluded, and including the
Chair, Chair Barbara Jones.

CHAIR JONES: You can exclude me, too.

CHAIR HOLTZMAN: I also want to say
that it is -- talking about premature, we have
not had the benefit of the deliberations of the
Subcommittee on the issue or their fact-finding
with respect to the issue of Special victims'
counsel and with respect to trial counsel. So, this report, as the Subcommittee made very clear, is limited in its scope. If you want to object to the report on the grounds that it should have addressed all those other things, there is no reason -- you can have an objection on any grounds, I guess. But I would completely object to any inclusion of any material that does not have the benefit of the Subcommittee's reflection and deliberation.

And so, I would oppose expanding this and any such material. And I just wanted to express my support. I share Admiral Tracey's view particularly that the grounds have shifted and that the needs have become much more exigent and urgent because of the change in Article 32.

And I wonder whether -- and maybe Maria can help us figure out how we approach this problem. Maybe can we vote in favor, pending a Defense Department report, as to whether they are doing something on this issue or should we just postpone the vote until we hear a report from the
Defense Department.

Maria, do you have a suggestion about that?

MS. FRIED: I think it probably -- my suggestion would be to defer, pending more information from the Defense Department, if the panel agrees that they need more information.

CHAIR HOLTZMAN: That we should defer?

I'm sorry, because I am on a speaker phone I couldn't hear you. Defer?

MS. FRIED: Yes, I think if the panel believes that they need more information from DoD, my recommendation would be to defer this recommendation, pending further information from the Department of Defense.

CHAIR JONES: I mean my thought was simply that we could ask the question whether or not there were any plans or if, indeed, any of the Services had already begun to provide investigators to defense sides in each of the Services.

I don't know that we need any
information beyond that. And I understand Mr. Stone's concern that maybe they are already doing this. As I said, I see no evidence of it. We haven't heard any evidence of it either from the Subcommittee or I think from anyone we have heard testify here.

But I am not opposed, as sort of, you know if it is a one-question request to each of the Services. It should be a simple answer, I think.

I don't know. You know more than I do about these things, Mr. Taylor.

MR. TAYLOR: No, but just as a point of clarification, did the RSP recommendations also extend to Issues 2, 3, and 4, in terms of equality or parity between prosecution and defense? That is to say, the funding not only of office personnel but also the witness expert funding and staffing and experience. Did the RSP recommendation cover that as well?

CHAIR JONES: I only remember that we recommended more funding for the defense.
CHAIR HOLTZMAN: It was in the report, Mr. Taylor, because the report does reference the RSP's recommendations in this area. So, it should be -- if the RSP did it, it would be in the report.

MS. FRIED: Page 3.

CHAIR JONES: Oh, defense investigators. Well, yes, it does include the RSP's recommendation, which was Recommendation 81, the Secretary of Defense direct the Services to provide independent, deployable defense investigators in order to increase the efficiency and effectiveness of the defense mission and the fair administration of justice. So, yes, we certainly did make that recommendation.

CHAIR HOLTZMAN: But they made the other ones, too, further that --

CHAIR JONES: They may have but I would have to go take a look and I didn't.

VADM TRACEY: There is also from RSP Recommendation 82 speaks to the Military Defense Counsel Organization is adequately resourced in
funding, resources, and personnel including
defense supervisor personnel with training and
experience. I don't see --

CHAIR JONES: Comparable to their
prosecution counterparts, right.

MR. TAYLOR: That was my recollection,
although we did not get this report until late
last night and I didn't have a chance to study
it. But I thought that the same issue that Mr.
Stone raised also would apply to something other
than the defense investigators.

VADM TRACEY: Witness and expert
funding is Issue 3.

CHAIR JONES: Right, to the extent
that we are recommending, that the Subcommittee
is recommending that the Secretary do certain
things and provide resources, whether it is for
investigators or personnel with more experience,
they would all, I guess, Mr. Stone, correct, fall
under that same question that you have. Aren't
they already doing this? That is how I
understand your question.
MR. STONE: Well, that is one part of it. And the other part is, legally, can what is being recommended be done? In other words, it says here Recommendation 3 says recommends the Secretary of Defense direct the military Services to vest defense expert funding and approval authority. I don't know if they can do that legally.

I mean I would want to hear from them that it is even -- that vesting of monetary power can be done. It may be that it has to be changed to be something that can be done. I don't know. We haven't heard from the Secretary of Defense on any of these.

CHAIR JONES: Right. I mean, obviously, right now the budget for all of these types of things is with the convening authority. And I don't know whether it can legally be done but I guess all things can be changed legally, at some point.

But that is another question that you would like answered and I think that is a valid
point. It may very well help us to figure out if
this is the right way to make this recommendation
or whether it needs more information in it.

Any other comments on the substance?
We have heard opinions about more defense
investigators. And we have your suggestions, Mr.
Stone, and we are going to find out the answers
with respect to all of these where we are talking
about recommending more resources and find out
whether, in fact, there are plans to do it
already.

And in the instance of separate
funding for defense organizations, see whether or
not that can even be done under current policy
and law.

MR. STONE: That is in Recommendation
3.

CHAIR JONES: Yes, 3.

MR. STONE: Did you want to talk about
Recommendation 2 next?

CHAIR JONES: I do, substantively.

The Subcommittee recommends that the military
Services immediately review Service defense organizations' staffing defense counsel, paralegals, highly qualified experts, and administrative support personnel, and augment current levels in order to alleviate the reported understaffing.

The Secretary of Defense should direct an audit by an independent, outside entity of defense staffing across all of the military services to determine the optimum level of staffing for the Service defense organizations in the long-term.

That is the second recommendation and it is born of the site visits, as well as other information that was received, that their defense are understaffed. They are not just more inexperienced than most of the prosecution counsel, they are also understaffed.

Mr. Stone, I'm sorry.

MR. STONE: Okay, as to Recommendation 2, the first part, the first sentence of it, once again, ignores the fact that we haven't asked the
Department of Defense, the Secretary of Defense, if they are, in fact, currently reviewing Service defense organization staffing. My guess is that, as a regular part of what they do, they are doing that and/or if they have plans to do it in a more focused manner in the future. That is my complaint about the first sentence.

CHAIR JONES: Well, I think everyone agrees that we are going to do that with respect to the expenditure requested in all of these.

MR. STONE: Okay. Moving to the second sentence of that recommendation, I strongly object to the word outside that is on the second line, where it says Secretary of Defense should direct an audit by an independent outside entity of defense staffing, to determine the optimum level of staffing. And I also would object for it to say for the Service defense organizations. Again, it should say for prosecution, defense, and special victims' counsel organizations in the long-term.

The reason I object to the word
outside is, frankly, we have heard no evidence, and there is none here that people who are familiar with the military system can't do that kind of an audit, especially if they are independent, like an IG. And no Service would appoint an IG who has not been enmeshed in the current military Services. I, for one, have heard repeatedly from this panel, civilian sexual assault representatives tell us how their numbers don't correlate with the military numbers. Their trial procedures don't correlate with the military trial procedures. And they made the case, and we have seen it in our statistics, that the two systems are not interchangeable. Therefore, I don't think we need a non-military, non-Department of Defense expert. It is clearly sufficient if it is an independent entity, just like an IG who does a review. And I am not even certain that they have to be independent because I have not heard any panel member say that they have heard people within the Defense Department say we have more than enough defense
investigators. So, it is not like anybody is covering anything up or there is any reason that we need somebody who has less expertise than the people we have been bringing before the panel.

So, I object to the second sentence to the use of the word outside and, again, the limitation on optimum levels of staffing that they are examining just for defense organizations.

CHAIR JONES: Any other comments?

MR. TAYLOR: I just have a question to follow-up on that. And someone can tell me if this is not an appropriate question. But since we still have Subcommittee Members here, just as a point of information, when you wrote independent outside entity, what were you thinking? Because what I was thinking when I read this was not that it would be some organization that had no chops, if you will, for defense manpower but some defense manpower organization, as opposed to an organization that would have no understanding of the military. But
perhaps someone can enlighten us on that, if you
are able.

CHAIR JONES: General Schwenk.

BG SCHWENK: I believe that what we
thought is that there are outside -- we were told
that there are outside organizations that are
private auditing agencies that go around to
public defenders offices and whatever offices
similar to that, to help them with assessing
staffing needs and requirements.

And we thought if we could get one of
those, if the Department got one of those outside
organizations with expertise and brought them in,
they could do a cross-Service scrub and share
their results with the Services and let them take
it and proceed from there.

MS. FRIEL: Yes, Ms. Kepros was aware
of at least one that she mentioned to us by name
that had done such an audit in I think it was
three different states. So, they had a real
background in looking at defense organization
staffing needs. And we thought that that would
be a great thing for the military to do across
all its Services, use that expertise.

CHAIR JONES: Admiral Tracey. I'll
just put you on the spot.

VADM TRACEY: Yes, could we
accommodate Mr. Stone's concern by trusting the
Secretary of Defense to know whether the audit
needs to be done by an independent internal
organization or if he needs to go outside the
Department to get the sort of insight that he
wants? And modify that sentence, perhaps, to the
Secretary of Defense should direct an independent
audit of defense staffing across all the military
Services.

CHAIR JONES: I like that. Yes, go
ahead, Liz.

CHAIR HOLTZMAN: My concern about that
is that the example that Mr. Stone offered of the
IG, I think it is inappropriate because the IG
doesn't do consulting work. The IG finds fraud.
The IG finds inappropriate money spent. This is
not an IG issue.
I don't know exactly what agency you would -- I mean I am not that familiar with the Defense Department but is there an agency that is independent that could do this? I mean if there is, that is a different story.

But I do think that my own view is that assuming that the answer comes back to the Defense Department has no plans particularly to augment or deal with the issue of defense resources, then it does raise the question about the need for an outside audit because the Defense Department has had this issue before it for several years and hasn't taken any action.

Assuming that is the case, if that is the case, then I would feel no problem about having a non-governmental, non-Defense Department agency take a look at this just so that we could have a very thorough report. And I certainly trust the Secretary of Defense to find an appropriate entity to do the analysis. I have no problem with that but I do think it should be an entity that is outside the Defense Department.
with no stake in the outcome.

CHAIR JONES: Well, and it may not be the entity that was just described by some of the Subcommittee Members. It could be an entity that knows the military quite well for having done a lot of consulting with it. So, there wouldn't be an entity that had no relevant background.

I'm sorry, I interrupted you, Liz.

What did you say?

CHAIR HOLTZMAN: I said like RAND Corporation or something like that.

CHAIR JONES: Right.

MR. STONE: I would just like to state I think everybody is aware that recently in the newspaper they have had articles about how the Department of Defense has, according to at least one report, way many more auditors on its staff than spending millions of dollars than other people think are necessary. So, it is clear to me they have plenty of auditors and I strongly oppose an auditing group composed of people who are not working in the military and how audit
non-military systems that are very different.

CHAIR JONES: All right, do we have --

Liz, you feel strongly about an outside entity.

CHAIR HOLTZMAN: I do.

CHAIR JONES: Can I hear from Mr. Taylor, Admiral Tracey?

MR. TAYLOR: Well, I know that Admiral Tracey, at one time, was the senior informed person in the personnel business. And I, again, think that there are individual organizations within the Department that I have thought, in the past, had a duty to simply call balls and strikes, based on their understanding of what the mission requirements were and, therefore, would be in a position to do an independent assessment.

But without, I guess, putting you on the spot too much, Admiral Tracey, do you have a sense about that one way or the other?

VADM TRACEY: In my experience, which is now dated, but in my experience, we typically buy that service from someone like the RAND Corporation or Center for Naval Analysis. And we
tie a DoD person to that study to help them
navigate what might question they have.

CHAIR JONES: So, does the phrase or
definition independent outside entity, is that an
accurate description of what you just said?

VADM TRACEY: Yes, it would be. And
I don’t have any objection to this. I think what
the Subcommittee was trying to vector to was to
capitalize on the experience of some of these
organizations who have actually been looking at
whether, even in the private sector, the defense
resources are adequate for the defense demands.

CHAIR JONES: Right.

VADM TRACEY: And there is some
benefit to vectoring DoD to look at whether they
actually want to apply just a manpower study to
this or do they want a manpower study that has a
lens specific to this topic?

And this, no matter how we say this,
this particular formulation of the recommendation
by itself will not point them to the fact that it
was the opinion of the Subcommittee that there
are some people who are specializing in this
right now who might be helpful informants to the
Department.

CHAIR JONES: Right.

MR. STONE: But we didn't hear any
testimony about that, though, from the
Subcommittee when they gave their presentation.
And eliminating the word outside does not mean
that, if the Secretary of Defense finds he does
not have internal resources, that he can't then
contract with somebody like the RAND Corporation.
It just doesn't mandate that it is outside, which
frankly I take to be a slap in the face of the
Secretary of Defense.

VADM TRACEY: My recommendation is
two-fold. One, the edit that I suggested
earlier, which is direct an independent audit of
defense staffing across all military Services.
And can we add some statement in the
recommendation, I know it is in the body of the
report but sometimes executives don't read the
body of the report, so getting into the
recommendation a statement to the effect that
there are agencies, organizations, entities that
have been conducting similar kinds of assessments
of public defender resources in various
jurisdictions that might be useful, something to
that effect.

CHAIR JONES: Well, I would definitely
agree with that. I think that is very helpful.

MR. STONE: Again, the first part of
it makes me suggest that we can't vote on it
today.

CHAIR JONES: Okay.

MR. STONE: The other thing that I
think needs to be pointed out, and maybe the
Secretary of Defense would put out is that to the
extent somebody identifies that, they have to
realize, based on this pink sheet, page three
that is in the work product, that that would
suggest that it is possible someone is going to
be looked at for violating Article 46 of the
UCMJ, which declares that trial counsel, defense
counsel, and the court-martial shall have equal opportunity to obtain witnesses and other
evidence in accordance with such regulations as the President may prescribe.

And before I am going to set somebody out to write a report that could result in accusations of violation of the UCMJ, I want to hear what DoD has to say first.

CHAIR JONES: Well, why don't --

CHAIR HOLTZMAN: I don't understand your point, Mr. Stone. The DoD to say what?

CHAIR JONES: Well, I mean I think if we are all in agreement that there should be an audit, leave aside the word outside, I don't think we don't want to do it because we are afraid of what we might find.

So, I think we should go ahead and if the Staff, based on our conversation, our deliberations, would add some of the language and the concepts that Admiral Tracey just gave us and also her other edit, and then we can continue the deliberation on this. Because we will have to
continue anyway with respect to at least two
questions that we have reserved to find out from
the military, the DoD.

MR. STONE: But before we drop that
recommendation --

CHAIR JONES: Sure.

MR. STONE: -- I would also like an
alternate recommendation written that recommends
that the audit cover not only the defense access
to these things but also special victims' counsel
and the prosecution. As long as we are going to
do an audit, I would like people to audit what
all the parties at that hearing have.

CHAIR HOLTZMAN: I object to that
recommendation because while it may make sense on
the surface, I think it should come -- our
recommendation should be based on what we have
heard from the Subcommittee and they should
deliberate on this. And this report is simply
recommending defense resources.

It does not mean that other parts of
the military justice system are fully resourced
or not but it doesn't address those. So, I would
wait until we have a response from them on the
subject.

CHAIR JONES: I agree with that. I
wouldn't add special victims' counsel or the
prosecution with respect to -- for the same
reasons with respect to either Issue 1 or Issue
2.

CHAIR HOLTZMAN: And I agree with what
Admiral Tracey has said. I think she formulated
it very well and I have no objection to that.

CHAIR JONES: All right. I think we
understand your objections, Mr. Stone, on 2.
Were there any other objections to 2 or can we
move to 3?

All right 3 is witness and expert
funding and approval. The Subcommittee
recommends that the Secretary of Defense direct
the military Services to vest defense expert
funding and approval authority in the Service
defense organizations.

I think you raised the valid point,
Mr. Stone, and we sort of already discussed this, but if anyone has anything additional to say I would like to hear it, that it would be a good idea to figure out if there needs to be more said here with respect to whether this can simply be done. And I think that was one of your comments on that. Anything else from anyone?

MR. STONE: Well, I would just make a comment again that if it is expert funding and approval authority, that as we heard early on, and again I heard at the training in Charlottesville, special victims' counsel organization is much like the defense counsel organization in that they are an independent entity at the military trial. And just like the defense counsel has client confidences that he doesn't have to share with anyone, the special victims' counsel is in the same way. And again, it is a different line of authority.

So, I think that if we are going to vest authority for expert funding and approval and take it away from the chain of command for
the defense counsel, the same thing has to extend
to special victims' counsel to keep them on even
footing, if they need it, when they need it.

CHAIR JONES: All right, well, I have
expressed my opinion. I think these -- and has
Ms. Holtzman, that these recommendations should
be limited to what the Subcommittee looked at,
which relates to defense resources.

Mr. Taylor?

MR. TAYLOR: I agree with that.

CHAIR JONES: Admiral Tracey?

VADM TRACEY: I agree.

CHAIR JONES: Okay. So then, number
4, the Subcommittee recommends that the military
Services only permit a defense counsel with prior
military justice or civilian criminal litigation
experience to serve as lead defense counsel in a
sexual assault case. The military Services
should develop a formal process, using objective
and subjective criteria to determine when a
defense counsel is qualified to serve as a lead
defense counsel in a sexual assault case.
In addition, the military Services should set the minimum tour length for defense counsel at two years or more, except when a lesser tour length is approved by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps.

Everybody want time to think about that or do you want some comments? Go ahead.

MR. STONE: I will start by saying that is almost verbatim RSP Recommendation 86, which we all have on page four of the current materials, the Staff work product. It is almost verbatim.

And again, I don't see why we should be repeating an RSP recommendation verbatim without getting an update. It doesn't make any sense to me.

CHAIR JONES: Okay. I agree that we will ask for an update on all four of these, since each of them refers to prior recommendations for resources.

MR. STONE: Okay and then the second
point I want to make here is the same one that I have made before, which is that I think there has to be a minimum tour length of experience of two years or more for all the trial counsel in the case. And that includes the prosecutor, which maybe will be easy for them, I don't know. But I think it has to include the SVC, too, because I have heard anecdotal evidence at the training I went to in Charlottesville of brand new lawyers being thrown into the trial of sexual assault case as SVC who have not even yet had training because the training cycle hasn't caught up with them and saying how, frankly, in retrospect, they knew they weren't doing -- providing adequate representation because they had never been in that situation before.

So, I think it has to extend -- it is a good recommendation. It needs to be extended across the board. If half of the cases are not sexual assault cases, then let them get their two years of experience rotating, as we heard the Navy does, in other types of cases or sitting
second chair.

CPT TIDESWELL: Judge Jones, it might be helpful to draw the Panel's attention to the bottom of page four.

CHAIR JONES: Okay.

CPT TIDESWELL: Which outlines a portion of the FY17 National Defense Authorization Act that we know has passed the House and Senate at this point. And it talks about creating an effective program for the prosecution and defense to sort of establish skill designators, sort of monitor the experience levels to set up pilot programs.

So, that might be beneficial to review as part of your deliberations.

MR. STONE: Thank you for calling the Panel's attention to that. That is another reason, I think, why this recommendation, at this point, may be premature and ought to wait and see if that provision of the NDAA actually gets passed, in which case it seems to me that the recommendation would be substantially changed.
It might have to do with something in this
program, looking at those programs before we tell
them they don't know -- they are not doing it.

CPT TIDESWELL: Yes, sir. We believe
this will be the language. Right now, it is just
pending the President's signature. But based on
the voting, it is veto-proof at this point. So,
I think it is safe to assume --

CHAIR JONES: You are saying this is
--

CPT TIDESWELL: Almost done, yes,
ma'am.

CHAIR JONES: It is almost done?

CPT TIDESWELL: Yes, ma'am.

CHAIR JONES: All right.

CHAIR HOLTZMAN: But I want to just
understand. The NDAA calls for the creation of a
pilot program. Am I correct?

CPT TIDESWELL: Yes, ma'am, it does.

CHAIR HOLTZMAN: So, it is not calling
for an across the board change in this regard.

It is calling for what I would call a baby step
in what is the right direction. The Subcommittee
calls it --

CPT TIDESWELL: Well --

CHAIR HOLTZMAN: Let me just finish my
question. The Subcommittee is calling for
something more comprehensive. Is that correct?

VADM TRACEY: Doesn’t paragraph (a) in
that box suggest that so is the NDAA? The
secretary concerned shall carry out a program to
ensure trial and defense counsel detailed to
prosecute or defend a court-martial have
sufficient experience and knowledge to
effectively prosecute or defend a case, and 2) a
deliberate professional development process is in
place to ensure effective prosecution and defense
in all courts-martial.

There is a paragraph (c) that is about
the pilot program but I think paragraph (a) is
actually directing the comprehensive solution.

CHAIR JONES: Right. And I suppose it
is never a bad idea to have a pilot program to
figure out how to reach your goals.
Well, I don't know if there is anything that was intended by any of the other Subcommittee Members that goes beyond what I didn't appreciate was two steps away from being law.

VADM TRACEY: So is there, potentially, a message from the Subcommittee and the Panel that you believe this should be acted on expeditiously?

CHAIR JONES: Right.

VADM TRACEY: Again, and the role of evaluating what the impact is of changes that have been made.

CHAIR HOLTZMAN: What is the difference between the Subcommittee's recommendations and NDAA? Is the Subcommittee's more specific like only for three years or is that more experience? I'm sorry, I don't have the document in front of me.

VADM TRACEY: It has got here that the NDAA does not specify a tour length.

CHAIR HOLTZMAN: The NDAA does what?
VADM TRACEY: Does not specify a tour length.

MR. STONE: Except that it does say that there is going to be a report after four years on each of these programs. So, that implies that they had better get started quickly if they are going to be able to put them in place, evaluate them, and write a report.

I might also add that portion (b) of the proposed legislation says that the Secretary shall establish and use a system of military justice experience designators or skill identifiers for purposes of identifying judge advocates with skill and experience, et cetera, et cetera. And that very much is the same thing as the recommendation that says military Services should develop -- in Recommendation 4, military Services should develop a formal process using objective and subjective criteria to determine when a defense counsel is qualified.

So, it seems to me they are looking at that as well, not just a program to give them
more experience but also to identify in each
service when they can identify somebody who has
met that level of experience.

Chair Jones: The recommendation is,
I would say, just more specific and basically
very blunt when it says that only a defense
counsel with prior military justice or civilian
criminal litigation experience should be
permitted to serve as the lead defense counsel.
That sort of is a black and white recommendation.

And I am not surprised that the
wording of the legislation proposed in the NDAA
grants considerably more sort of discretion to
the military to figure out when somebody is
experienced enough to try that case.

So, this is almost a -- I don't know
whether that will be the outcome of their pilot
project or were there deliberations on this.

VADM Tracey: So, there would
certainly be room, if the Panel thought those
were important metrics to apply, that they could
suggest that. In execution of the NDAA, those
are things that we would recommend.

MR. STONE: I point out that the Recommendation 4 that the Subcommittee gave us which, again, repeats what the RSP recommendation was, does say in the last sentence, except when a lesser tour length is approved by the Service Judge Advocate General, or Staff Judge Advocate to the Commandant of the Marine Corps. So, that recommendation also recognizes that there will be exceptional circumstances.

And so I see no reason not to let the NDAA and the Secretary of Defense figure out what happens if this passes and then report to us on what they have in mind before we start telling them what they are not doing.

CHAIR JONES: Yes, I think --

CHAIR HOLTZMAN: Well, excuse me, I think they know what they are not doing. The Congress know what they are not doing because it is up to the Secretary of Defense to address this problem. So, I think the fact of the matter is that Congress recognizes that there is a serious
problem here.

So, the Subcommittee is not doing something that was pie in the sky in a sense or unwanted. The only question is given the recommendation and that it is more descriptive than the NDAA, does the JPP want to go forward or does the JPP want to somehow acknowledge that there is a problem that the Subcommittee -- I mean I think there are several options. But one would be if we don't accept the recommendation of the Subcommittee, we could still acknowledge that the Subcommittee identified the serious problem, one that the Congress also identified, and that the recommendation of the Subcommittee is something that Defense Department might want to consider as a response to the prescription of the NDAA.

CHAIR JONES: I think it would be worth working with that. I agree with Mr. Stone that almost everything past the first sentence I would like to compare with what is in this so that we can accurately describe what additional
consideration we would like them to give.

So, I would ask the Staff to work on
that as well.

All right, I think we have deliberated
as far as we can deliberate on the Subcommittee's
recommendations. I see that you remained and I
appreciate your continued presence here. Thank
you very much.

All right, is it lunch? What would I
do without you, Mr. Taylor? All right, we will
adjourn for lunch now.

(Whereupon, the above-entitled matter
went off the record at 11:50 a.m. and resumed at
12:44 p.m.)

CHAIR JONES: All right. It's 12:45
or thereabouts, and the Panel has decided to move
to the presentation on the proposed Military
Justice Act of 2016, since we are fortunate to
have Judge Effron here and Mr. Sullivan. And we
are going to put over to our next meeting our
deliberations on victims' appellate rights.

So let me begin by again welcoming
both of you to the Panel, and we are actually
thrilled to be able to hear you come in and be
able to talk to us about some things. I remember
your first appearance -- and you were great -- to
one of the subcommittees, but things were still
in the mix. They hadn't been decided. So I
think you can shed a lot of light on the work now
that you've done, and we're anxious to hear it.

HON. EFFRON: Thank you, Judge Jones,
and members of the Panel. And Dwight Sullivan
will begin with a brief summary of how we got to
where we are now, and then I will talk about
specific provisions of the legislation.

CHAIR JONES: Great. Thank you.

MR. SULLIVAN: Good afternoon. It's
good to see you again, Judge Jones, and members
of the Panel.

So the Military Justice Act of 2016
traces its origin to a request from General
Martin Dempsey when he was Chairman of the Joint
Chiefs of Staff, asked the Secretary of Defense
to order a comprehensive, systemic review of the
UCMJ, expressing concern that because of the way
the military justice system had been modified in
piecemeal fashion, it may no longer -- the gears
may no longer mesh.

And so we asked for a comprehensive
review, and the Secretary of Defense agreed,
which led to the formation of the Military
Justice Review Group.

Now, I note that just a few miles from
here we have had the baseball national meetings
this week. And of course each team goes there
with their wish list. And we have a wish list
for who we wanted for the Military Justice Review
Group, and there was one name that was at the top
of our wish list, and that was the Honorable
Andrew S. Effron. And we were luckier than many
of the teams at the national -- at the baseball
winter meetings because we signed the person at
the top of our list. We were just thrilled that
Judge Effron was willing to come and lead the
project. There would have been no one that could
have done this and led this project as well as he.

But, of course, it wasn't all Judge Effron. Each of the services provided representatives to the Military Justice Review Group. And as the Military Justice Review Group conducted its study, it circulated proposals within the Department of Defense, and so we had a rolling coordination process even while the study was ongoing.

And then in March of 2015 the Military Justice Review Group produced a 1,300-page comprehensive report that analyzed literally every single article of the Uniform Code of Military Justice, looked at proposed improvements to those articles, and then suggested legislation to make those improvements happen. And that was a wonderful product.

Once that was produced, then it was circulated within the Department of Defense for formal coordination. There were some revisions made as a result of that process, and then the
Department of Defense forwarded it to the Office of Management and Budget. At that point, it was coordinated throughout the entire executive branch.

Additional revisions were made as a result of that coordination process, and then on December 26th of 2015, the Department of Defense and the administration -- so that it is an administration bill -- to Congress on December 26, 2015.

So at that point, both the House and Senate Armed Services Committee took the Military Justice Act of 2016, the legislative portion of this report, and inserted it into the National Defense Authorization Act for fiscal year 2017. And so on May 18th, the full House of Representatives adopted the National -- their version of the NDAA, which included their revised version of the Military Justice Act of 2016.

On June 14th, the Senate passed their version of the NDAA. And not only were there other differences with the NDAA, but there were
differences in the two houses' adoption of this proposal.

On July 7th, the House then once again passed their version of the Military Justice Act, which once again was different than the Senate version, and requested a Conference Committee. At that point, the Conference Committee -- the resulting conference report occurred.

And then on December 2nd, the House passed the conference version. Just yesterday the Senate passed the conference version. So now both houses have passed an identical version of the Military Justice Act of 2016 that is largely the same as the version that was proposed here, but with some important departures, and Mr. Effron will talk about those departures.

Now, in addition to including the Military Justice Act of 2016, the NDAA also includes a separate subtitle, Subtitle 5(e), that includes some other military justice reform measures. There are nine measures in Subtitle 5(e). And it may be important to go
through those, but they aren't as important as the Military Justice act provisions that Mr. Effron will discuss.

So let me just quickly mention those nine. If anyone wants to discuss them further, I will be more than happy to engage with that, but just -- just to get them out there.

So there are some reforms regarding the Court of Appeals for the Armed Forces. Those are largely personnel and technical reforms. There is a provision to enhance the professional development of Judge Advocates who both prosecute and defend court-martial cases. There is a provision dealing with SAPRO reports and the inclusion of allegations of retaliation that result from the reporting of a sexual assault.

There is another provision in the bill which deals with the SAPRO report. It extends the life of the reporting requirement from 2017 to 2021, and then also links up that report with an enhanced family advocacy program report that is required by a different portion of the bill.
The bill also calls for SAPRO to develop retaliation metrics, and also identify best practices and disseminate those to the services. It provides for training for those who investigate retaliation, including training in the nature and effects of sexual assault trauma.

There is another provision that deals with the notification of the results of retaliation investigation. It provides for the person that made the report to be notified of the results, including whether the report was substantiated or not.

There is a broadening of the definition of sexual harassment. It takes away the concept of work environment and applies it to the environment writ large. And then, finally, there is a hazing prevention and data collection provision. So those are the non-Military Justice Act of 2016 provisions that are still related to the military justice system.

And with that, I will turn it over to our number one draft pick, Mr. Effron.
HON. EFFRON: Dwight, you are too kind. This project would not have made it through the legislative process if I hadn't had a partner with his knowledge and experience, not only of military justice but of governmental processes in general. And also the partnerships of the Judge Advocates General and the people that they sent to work on the Military Justice Review Group. It was a real pleasure to work with them.

We also benefitted tremendously from the work done by the RSP and the JPP. We benefitted from your recommendations. We benefitted from the studies and analysis that you all prepared throughout our work. So thank you very much for that, and I know that the Department, and the nation as a whole, is very grateful for the work that you have done and that you are doing.

With respect to the Military Justice Act of 2016, I am going to give a brief overview and then talk about several specific items that
your staff has suggested that I discuss.

Taken together, the legislation which has now been passed by both houses, awaiting the President's consideration and hopefully signature, will increase transparency in the military justice system, will strengthen the structure of the military justice system, enhance fairness and efficiency in pretrial and trial process, streamline post-trial, modernize the military appellate practice, improve the clarity and utility of the punitive articles, and provide for an independent, ongoing review of the military justice system.

Some people have asked me, "What have you fixed?" I say, "We haven't fixed anything." We have given the judges and the counsel and the managers of the military justice system the tools to improve and enhance the quality of military justice, so we can give the men and women of the armed forces a system that is worthy of their service and sacrifices. That was our goal, and that is what I believe Congress has done in this
area.

Now, we're going to talk about today seven different areas -- transparency, the preliminary hearing, disposition guidance, sentencing, pretrial agreements, the appellate process, and depositions. I'd be glad to talk about any other aspects of the legislation or military justice that you'd like us to address.

And it will take me probably 10 minutes, 15 minutes to go through those, but please feel free to interrupt with questions at any time as we go through.

Now, with respect to transparency, the legislation requires the Secretary of Defense to enhance public access to court-martial and appellate documents by establishing uniform procedures that reflect the best practices of the federal and state courts. I know some of your reports have referred to PACER, and we will be looking at PACER as we implement. But not just PACER. PACER has been around for a while. There are some criticisms of PACER. We are going to
look at state systems as well as that is developed.

It requires the Secretary of Defense to prescribe uniform procedures for case management, data collection, and accessibility of court-martial information to enhance the efficiency of the military justice system and to facilitate the evaluation. I listened to your deliberations this morning. Hopefully, when that system gets into place, the data will be there to make much better decisions about the management of the military justice system into the evaluation and management into the future.

Now, it is never going to be perfect because the problems that you have -- you collect data on the problems you know today. You look at a dynamic society, legal systems are dynamic, so that system will have to evolve over time. But hopefully that will give us a better set of data than we have right now.

Another thing that -- for transparency is it mandates that all updates to the military
justice system will be done -- will be promptly
placed on the internet. So that we won't be
wondering what's in the manual for courts-martial
and have to look at three or four different
documents and executive orders to do it.

We will have one place promptly where
people can look and see, these are the rules,
these are the statutes that govern the military
justice system.

We are going to provide for public
access to the disposition guidance that is put
out by the Secretary of Defense. Like the U.S.
Attorney's Manual is made public now, so there
will be a sense of what are the basic criteria
that are being used in deciding whether to go
forward with the case or not. That will be new.

I'll turn next to the preliminary
hearing, Article 32, which you have been
discussing. Now, as was mentioned frequently
this morning, the traditional Article 32
investigation consisted of a relatively open-ended inquiry into the facts and circumstance of
alleged offenses, with broad opportunity for the
government and defense to present and examine
witnesses and documentary evidence.

Over the past three years, Congress
has transformed that traditional Article 32
proceeding into something that somewhat
resembles, but does not emulate, a civilian-type
preliminary hearing. Current law provides that a
victim may not be required to testify at an
Article 32 proceeding.

Now, the Military Justice Review Group
recommended a number of modest enhancements in
light of those congressional changes. First, we
required a more comprehensive preliminary report.
That is, the preliminary report is not simply to
say up or down, go to a court-martial or not, but
to give the Staff Judge Advocate and the
Convening Authority information that they can use
in making that decision.

So the recommendation is in many
respects the least important part of the process,
because the preliminary hearing officer is not a
decision-maker. The preliminary hearing officer
is putting together information. So that's part
one.

Secondly, it provides an opportunity
for all parties -- government and defense -- and
also for victims to submit additional information
at the conclusion of the hearing regarding the
appropriate disposition of charges. So after the
hearing takes place, there is an additional
opportunity for documentary information and
written submissions to come to the Staff Judge
Advocate and the convening authority via the
preliminary hearing officer for consideration in
whether a case should go forward or not.

And the statute requires the
preliminary hearing officer to analyze and
organize that information in a way that will
better assist the SJA and the Convening Authority
in making the disposition decision.

The disposition recommendation,
although not a focus of the hearing, would be --
in our recommendation was an optional item.
Congress has now made that a mandatory item. That is, that's the one major change that Congress made in our recommendation. Instead of having a recommendation on disposition being optional with the convening authority as to whether they would get that from the preliminary hearing officer, now it is mandatory that the preliminary hearing officer make a recommendation.

In terms of the disposition guidance, under current law the UCMJ provides very little in the way of guidance on the exercise of prosecutorial discretion. The Manual for Courts-Martial provides broad principles without much in the way of useful guidance. Our group recommended to replace Article -- replace the current Article 33 and name it Disposition Guidance, requiring the President to direct the Secretary of Defense to issue non-binding guidance regarding the factors that commanders, staff judge advocates, and judge advocates should take into account when exercising their duties.
with respect to the disposition of charges in the interest of justice and discipline.

Under the proposal, the guidance would take into account the guidance in the principles of federal prosecution in the United States Attorney's Manual, with appropriate modifications to reflect the differences between military and civilian practice. The conference report adopted that recommendation with only minor technical changes. So now that will be a part of military law, to have something akin to the U.S. Attorney's Manual guiding commanders and their staff judge advocates in these disposition decisions.

Sentence is an area which received a great deal of attention in the report and a great deal of attention in Congress. As you all know from the work that you have done, current law authorized a court-martial to adjudge any punishment, or no punishment at all, subject only to the maximum punishments established under Article 56(a) by statute and by any mandatory
minimum punishment.

So for most offenses in the UCMJ, an appropriate punishment is -- or, excuse me, an authorized punishment is anywhere between zero and what the maximum is. The UCMJ contains very few mandatory minimum punishments, including mandatory punitive discharges for certain sex offenses and mandatory confinement, life with the possibility of parole, for premeditated murder. But with those few exceptions, only the maximum governs.

Under current practice, the court-martial adjudges a single sentence for all offenses resulting in conviction, not a separate punishment for each offense. And under current law, the accused does not have a choice of sentencing forum.

In contrast to civilian life where judicial sentencing is the norm in most jurisdictions, the military accused cannot have judicial sentencing unless the accused forfeits that opportunity to have a court-martial decide
the issues of guilt or innocence. That is our current system.

Now, our group recommended replacing the current system with judicial sentencing based upon published parameters and criteria and with segmented sentencing for each offense rather than unitary sentencing for all offenses. The implementation of parameters and criteria, we have drawn upon the best practices at state and federal level, and we have replaced the current practice. And there would have been a group headed by the chief judges of each service to develop those parameters and criteria.

The Military Sentencing Parameters and Criteria Board made up of those chief judges would have collected and analyzed sentencing data to inform the determination of the parameters and criteria that would be used at trial. And those procedures would have been developed with public notice and comment.

They would have been -- the parameters and criteria would have been published in the
Manual for Courts-Martial, establishing an appropriate range for each offense. And the purpose of the guidance was to focus the discretion of the military sentencing on an appropriate range with limited authority of a judge as in federal law to go above or below, so long as the judge gave reasons on the record that would be subject to appeal.

We also proposed a system of segmented sentencing where the sentencing would take place where the judge would adjudge a sentence for each offense of which the person was convicted rather than a unitary offense for all. And then the judge would decide whether those sentences would run concurrently or consecutively.

The conference report did not adopt the concept of using sentencing parameters and criteria. So that is not in the conference bill. So we will not have sentencing parameters and criteria at this time, as the legislation was adopted.

And the conference report also did not
adopt the concept of using -- mandating judicial sentencing only in all non-capital cases.

Instead, while the conference report established judicial sentencing as the norm, the default practice, the accused will have the option of electing sentencing by members of the court-martial panel. So that is kept as an option.

Under the statute that has passed both Houses, what will happen is the court-martial will conduct the trial. There will be findings and sentence. And after the sentence, if it's -- if the accused has chosen at the beginning to have a panel of members for the merits portion of the trial, then the accused will have an opportunity after findings to decide whether there is a sentencing by members. If not, the default goes to sentencing by a judge.

So to recap, at the beginning of the trial, the accused decides whether or not to select a judge-alone proceeding for the entire proceeding. If the accused does not choose a judge-alone proceeding at that time but goes with
members for the trial on the merits, then the accused will be sentenced by the judge, unless the accused chooses to have sentencing by the members at that point.

Under the conference report, the conference retained segmented sentencing but only when the judge does the sentencing. So when the judge does the sentencing, the judge will adjudge a sentence for every offense, and then decide whether it runs concurrently or consecutively.

When the members do the sentencing, they will do a unitary sentence. That is something that was different from what was in the legislative process, and so it will be an interesting task for the Joint Service Committee to put together recommendations in the Manual for Courts-Martial to the President as to how that will be implemented. But I'm confident that that system can be made to work.

Under the legislation, the government will be able to appeal a sentence on the ground
that a sentence violates the law or is plainly unreasonable. That is new. In the Military Justice Review Group recommendations, the ability of the government to appeal was tied to the concept of parameters and criteria.

Now it's not tied to parameters and criteria. It is tied to a plainly unreasonable standard and, again, opportunity in the Manual for Courts-Martial for the President to give guidance as to how that practice will be implemented.

The accused retains the ability under the conference report to appeal any sentence as being inappropriately severe, so long as the sentence includes confinement for more than six months. For cases where the sentence of confinement of two years or greater, or a punitive discharge, the service courts must examine the appropriateness of every sentence regardless of whether the accused has raised this as an issue. That's the current system.

That is the -- for every sentence --
the difference there is that that now goes down
to a six-month floor. But for every case that is
over six months, the Court of Criminal Appeals
will have an independent obligation to determine
whether the sentence is appropriate or not.

The conference report retains the
current mandatory sentencing minimums for certain
offenses, including rape and sexual assault.

Pretrial agreements is another area
that received significant attention in the
legislation. The current UCMJ does not expressly
address pretrial agreements. Pretrial agreements
have grown up as a matter of practice in which
the convening authority has agreed to limit his
or her action on the sentence.

This will be a major change --

CHAIR HOLTZMAN: Excuse me. Judge,
could you move the microphone closer to you?

HON. EFFRON: Sure.

CHAIR HOLTZMAN: Please. Thank you.

HON. EFFRON: Under current law -- is
that better?
CHAIR HOLTZMAN: Yes. Thank you.

HON. EFFRON: Okay. Under current law, the court-martial does not see the punishment terms of the agreement before adjudging the sentence. That's a big difference between military and civilian life.

Instead, the judge only sees the quantum portion -- that is, the punishment level -- of the agreement after the sentence is adjudged. The court-martial is unaware of the punishment. And if the court-martial, being unaware of the punishment, adjudges a sentence below the ceiling in the deal, the accused has the benefit of the lower amount. That's the current system, colloquially known as "beat the deal."

If the sentence that comes in by the court-martial is above, then the convening authority has bound himself or herself to lower it. That's the current system.

Our group proposed changing that to a different process, to a more transparent
procedure, under which the sentencing details of
the agreement are placed on the record before the
sentence is adjudged. And the other change that
we recommended is that the convening authority
will not only be limited to a deal -- the
accused, not only to a deal that sets the
maximum, but they can set a range. That is, they
can -- the deal could beat the sentence between a
certain upper and lower limit. That is also
authorized under what we proposed.

And the judge at trial, and the
appellate court on review, would be able to
reject an agreement if it was plainly
unreasonable. That was based on the sentencing
criteria, and that was part of the Military
Justice Group recommendation.

The conference report largely followed
our recommendations, except they did not
authorize the military judge to reject the plea
on a plainly or reasonable standard. That
reflected their decision in the conference to not
authorize the use of sentencing parameters or
criteria.

So, to summarize, under the new system, the sentencing authority, which in most cases will be the judge, will see the terms of the deal. The judge will then, if the judge agrees that it's a lawful agreement, the judge will then adjudicate the sentence within those terms. And it's not simply setting a ceiling, but it can be -- the judge can act within a range, if that's what the agreement is.

So that's a major change in military practice, changing our pretrial agreement to be somewhat more similar to civilian practice but still within the unique military system.

In terms of appellate access, this is another area of change. Under current law, the Courts of Criminal Appeals automatically review every case in which the sentence extends to confinement for one year or more, a punitive separation, or death. That is automatic appeal, whether the accused wants it or not, unless the accused affirmatively waives it in a non-capital
In those cases, the Court of Criminal Appeals must affirmatively determine whether the findings and the sentence should be approved. That requires the CCA to review the entire record and, in effect, look at the case with fresh eyes based on the record.

The Court of Criminal Appeals must be convinced under current law, beyond a reasonable doubt, that the admissible evidence proves every element of every offense beyond a reasonable doubt. That's a unique aspect with the military justice system.

It also must engage in review of the sentence to ensure that the accused has not received an inappropriate sentence. Then, cases that don't fall within that automatic review -- that is, cases primarily that -- under current law that are a year or less -- would go to the Judge Advocate General if requested by the individual for review, for an office review within the Office of the Judge Advocate General.
And those cases could only get judicial review under current law if the Judge Advocate General sends it to the Court of Criminal Appeals.

Our proposals would have replaced automatic review with appeal of right. That is, the right to file appeal but not an automatic appeal in non-capital cases, lowering the threshold for getting to the CCAs to everything that involved a sentence of more than six months, and for sentences less than six months allowing anyone who went to the Judge Advocate General to appeal TJAG's decision to the Court of Criminal Appeals. So, in effect, our proposal was to let everybody get to the Court of Criminal Appeals, to have it primarily an appeal that the accused would have to file.

Congress -- the other thing that we recommended was to have statutory standards of review. Instead of having the Court of Criminal Appeals in effect have to redo the case by finding every element of every offense, and by finding the sentence to be appropriate, what we
proposed was that it would be up to the parties
to raise the issues before the Court of Criminal
Appeals, and the Court would only review the
issues raised by the parties or noticed by the
Court under a plain error standard, fairly
similar to the federal process now.

The conference report adopted some,
but not all, of those changes. It retains
automatic review by the Courts of Criminal
Appeals in every case in which the sentence
extends to confinement for more than two years or
which includes a punitive discharge. So if
there's confinement for more than two years, or a
punitive discharge, there is automatic review as
there is in capital cases.

The conference report expands the
opportunity for all service members to request
review by the Court of Criminal Appeals in cases
where the accused must first seek relief from the
Judge Advocate General under Article 69, when the
accused can get that type of review, the Article
69 TJAG review, further considered by the Court
of Criminal Appeals.

In cases in which there is no punitive
discharge, this is a very complex set that we are
still working through. No punitive discharge and
a sentence between six months and two years, then
the accused would have to file an appeal.

So to review that again, if it's a
punitive discharge and more than two years, there
is automatic review. If it's less than that,
that is six months to two years with no punitive
discharge, the accused has to file an appeal with
the Court of Criminal Appeals. And if it's less
than six months with no punitive discharge, they
go to the Office of the Judge Advocate General
first, and then can go from there to the Court of
Criminal Appeals.

So it's an improvement over the
current system from the perspective of appellate
access by giving everybody access, but it's a
little bit different from the way that we had
recommended it, main difference being retention
of the automatic review at the two-year or
punitive discharge mark, and basically removing
the standards of review that we had proposed for
appellate review.

Depositions is another area that I
know that you all are interested in. Our group

proposed amending Article 49 to better align
military deposition practice with federal
civilian deposition practice and ensuring that
they are ordered in military criminal cases to
focus on the use of a deposition at trial, so
that a deposition could be ordered only when it's
likely that the prospective witness' trial
testimony at trial would otherwise be lost.

Also, clarify that depositions could
not be used specifically for use at Article 32
proceedings. In other words, depositions are
permitted only at that point to preserve
testimony for trial, not for pretrial discovery
purposes. The conference report adopted without
change that proposal.

Now that's a lot, and that's only a
small portion of what Congress did. And we,
frankly, are still in the process of working through this because we had our report, our report was adopted by -- in large measure by the Senate, the House had adopted many but not all of those provisions, and the conference report didn't necessarily choose between the House and the Senate provision, but in many of those areas where there are differences, they came up -- as Congress is absolutely appropriately entitled to do under Article 1 of the Constitution, they came up with their own ideas as to how those issues should be dealt with.

So particularly in the area of sentencing and appellate access, it is going to take us some time to work through the implementing rules to develop a positive approach to what the Congress has proposed here for the legislation that will be before the President.

So in terms of timing, which I know would be of interest to you, the legislation gives up to two years for implementation. At the end of the one-year period, the President has to
prescribe the new Manual for Courts-Martial,

implementing the new legislation, and setting

forth the precise dates at which it will apply to

ongoing cases and to cases that are in

development or cases that are on review, and how

it will apply to specific offenses and when.

There is some statutory guidance

there, and also authority for the President to

address that in the manual. But I think for your

purposes to say, "When will this take effect?"

sometime -- assuming the President assigns --
signs this in December of 2016, sometime in

December of 2018 is when this legislation will

start applying to courts-martial, with all the

variations that you always have as to ongoing

cases and new and old offenses.

That pretty much concludes the

overview. And, as I said, that's a lot to take

in because we are still trying to take it in

ourselves. But we would be glad to answer any of

the questions you have about this or any other

matters.
CHAIR JONES: Tom?

MR. TAYLOR: Yes. Well, first of all, Judge Effron, thank you very much for this wonderful service that you perform for the entire community, and to you also, Mr. Sullivan, for your longstanding contributions in this area.

Judge Effron, how would you describe the philosophy that is represented by the changes that Congress made to your recommendations? Is there an underlying philosophy to do more or less to change more quickly or more slowly, to move the pendulum one way or the other? How -- I know you've thought about this, and I don't know how much you want to say about it, but how would you describe the philosophy?

HON. EFFRON: The conference report is fairly sparse in terms of setting forth any philosophy. It is very descriptive of what was done. And so I think that would be up to everyone -- the eyes of the beholder to decide what the philosophy might be behind it.

But I feel very confident in saying,
as I did at the outset, that Congress has
provided counsel and judges -- or, actually, to
start out even before that, the people who are --
the Joint Service Committee and those that are
going to be working on the Manual for Courts-
Martial provided tremendous tools to enhance the
fairness and efficiency of the military justice
system.

MR. TAYLOR: Going just to a couple of
the points that you made in terms of the
recommendations of your group, when you talk
about the disposition decisions and requiring the
Secretary of Defense to issue what I think I
heard you say is the non-binding guidance, why
have non-binding guidance so long as your
guidance is general enough to include factors or
criteria which I would suspect would be the kind
of guidance about which you are thinking?

HON. EFFRON: The experience and the
tradition in the federal sector -- and I can't
speak to all of the states -- has been that the
concept of prosecutorial discretion is very broad
to take in a wide variety of circumstances and applying it to individual cases. And there has been reluctance to write down factors that would guide people in making those decisions, lest the trial become a trial about -- whether the prosecutorial discretion authority, whether it be a prosecutor or any other authority, properly exercised that discretion in bringing a case to trial. And so that's why the federal civilian guidance -- and I believe the guidance in most states -- is considered to be non-binding. If it were treated as binding, there would have been a reluctance to write those things down.

MR. TAYLOR: Yes. I understand that. But is there an argument -- and I'm not sure your committee thought about it, or your group thought about it, that when you have relatively less experienced commanders vested with that kind of prosecutorial discretion, they don't have the basis of experience that an elected or presumably appointed prosecutor might have.

Was there an argument that maybe it's
okay to have more binding criteria just because they don't bring to bear the experience that a prosecutor would have in a civilian context?

HON. EFFRON: I think there is a tendency these days to look at military justice through the lens of common law, common law offenses. And I know that is certainly what your group is charged with and making important recommendations on. But traditionally most of what takes place in courts-martial are matters that have a direct impact on the good order and discipline of military units. And that's something that commanders have a lot of experience on.

They have a lot of experience in determining what the impact is of a particular form of behavior on the functioning of that unit in the highly critical areas of morale and discipline that are essential to having a military unit perform its combat functions.

Deciding in a particular case does something warrant a general court-martial or
special court-martial is not the only set of options. Maybe this can be handled through non-judicial punishment, get somebody's attention.

You know, we were talking about absences, disrespects, those sorts of things, or even some of the common law offenses that aren't necessarily going to be prosecuted a civilian way.

We prosecute a fair amount of barracks larcenies for things that many civilian prosecutors would say, "This is far below our threshold. That's not particularly important to us, whether somebody takes $5 out of someone else's wallet in a gym down here in Ballston."

I'm not suggesting that the Arlington prosecutors would or would not approach it that way, but I think you get the drift of what I'm saying.

For a military commander, in the cohesion that they need in that unit, when somebody takes $5 out of the wallet of somebody in a barracks, that is a very disruptive offense. Now, it may need a court-martial. It may just be
handled by non-judicial punishment or even a
counseling session. That's what commanders are
expert at.

MR. TAYLOR: Did you consider it
within your general charter to take a look at the
fundamental issue that Senator Gillibrand and
others have raised about the right place for this
discretion when it comes to sexual assault
crimes?

HON. EFFRON: Yes. It was within our
charter, and the group made the decision based
upon the recommendations of the RSP, that we
would not make any recommendations in that area.
We decided not to replow that ground. So it's
not something that we made an independent,
comprehensive study of.

MR. TAYLOR: So just one final
question that certainly reveals my ignorance
about the sentencing practice. But when the
government can appeal a sentence that they
consider plainly unreasonable, is plainly
unreasonable a well-understood and defined term
in terms of civilian or military practice?

HON. EFFRON: In civilian practice, it is tied primarily to the sentencing guidelines in the federal system. In the absence of the parameters and criteria that were going to emulate those guidelines, it will be up to those who are working on the Manual for Courts-Martial to put together a useful set of criteria that will make that a positive tool rather than a source of constant litigation.

MR. TAYLOR: Thank you very much, Judge Effron.

CHAIR JONES: Admiral? VADM TRACEY: Thank you, Judge. This may be similar to Mr. Taylor's questions, but -- and I realize we haven't had a chance to digest everything that is in the conference report, but of the things that you have looked at that were either recommendations were not accepted or they were modified, what things concern you the most either in terms of their impact in and of themselves or the complexity they represent to
the practitioners?

HON. EFFRON: When I was asked this
the other day, I will draw, like Dwight, my
fellow baseball fan, on a baseball analogy. If
we are -- we got about 85 percent of the specific
recommendations we made and -- people vary on
this -- I'd say somewhere between 50 and 60
percent of the substance of -- you know, the
important substance for what we're doing.

Now, in baseball terms, if you are
hitting .500, you're doing really great. If
you're fielding .500, you're terrible. Well, we
look upon this as we're on the offense. We are
making a recommendation to Congress as opposed to
playing defense. So I'm going to take the
position now that we're very happy with
everything that was done, that we -- that there
is very good progress made, new tools out there.

As I mentioned, figuring out how to
write the rules for the sentencing procedure and
for the appellate process, where Congress has
added words in there that weren't in either bill,
will be a bit of a challenge. I don't see those
as monumental challenges, and that's the type of
thing that we normally expect out of the
legislative process. That is, you don't get
everything that you want, and you don't
necessarily see coming out of conference
something that was in either the House or the
Senate bill. We sometimes see that blending.

So I'm not particularly concerned
about any aspect of the legislation at this time.
I think it is a positive step forward that the
Congress has made here.

CHAIR JONES: I am wondering a little
bit about Article 32, and I was wondering if you
could put a little more flesh on the bones for
us. I mean, we were all here today and heard
that -- what the Subcommittee heard was that they
are all just paper exercises now. How is this
going to change, or is it, with your proposal?
Well, it's not a proposal anymore.

HON. EFFRON: Right. One of -- as you
may recall from my presentation before the
subcommittee, one of the -- we were given a year
to put together an analysis of every aspect of
the Code. So we had to make some decisions at
the beginning on how we were going to do that.

One of the decisions we made at the
beginning is that we were not going to revisit
any recent legislation -- that is, legislation
that has been passed in the last two or three
years -- with two caveats. One is if we were
doing something with another part of the UCMJ
that would affect, let's say, Article 32. We'd
look to make sure they were reconciled.

Secondly, in looking at something
recent, if there were some clarifications that
would be important, we would look at that. So
that's the way we looked at Article 32. We did
not revisit the fundamental decision to -- that
Congress made to remove the longstanding, open-
ended discovery type hearing that the Article 32
had been, and change it more to the preliminary
hearing.

We just worked on how we could make
that preliminary hearing more useful to the SJA
and the Convening Authority and the process.

So --

CHAIR JONES: And how did -- did that
consist of your guidance with respect to what the
duties of the hearing officer were?

HON. EFFRON: Yes.

CHAIR JONES: Was that pretty much it?

HON. EFFRON: That's pretty much it.

We were focused on getting the hearing officer
not to simply conduct this hearing and create a
record and then turn it over to the SJA and the
convening authority with a thumbs up or thumbs
down, but with a requirement to organize that
material in a way that focused on the specific
offense and the elements and focused particularly
on the matters that are going to bear on a
disposition decision, because the hearing officer
is not the person who makes the disposition
decision. It is only a recommendation at that
point.

CHAIR JONES: Is it safe to assume
that if a hearing officer has those duties they
are going to start wanting more information from
the parties? I mean, can they order more? I
assume they can. Order the defense or the
government? Well, not the defense but the
government to present them with more?

HON. EFFRON: That's part -- yes, and
that's part of what is going to go on with the
development of the rules in the Manual for
Courts-Martial is to see what additional guidance
needs to be given at that point to the hearing
officers in light of these new requirements.

CHAIR JONES: So that's where more
information will come.

HON. EFFRON: Yes. But I can't -- I
listened to the discussions this morning, and I
don't want to leave the impression that what we
have done has addressed the depth of the issues
that you were concerned with about the Article 32
here. We didn't do a stealth return to the old
Article 32 in the process.

CHAIR JONES: Excuse me, Mr. Stone.
I did have one more question.

I think you said you expected more

HON. EFFRON: Well, the process now

sentencings to be done by judges?

under current law is that you don't get

HON. EFFRON: Under the new system,

I think you said you expected more

you can proceed with a trial by members, and then

request a judge for the entire proceeding,

you will be sentenced by the judge, unless you

findings and sentence.

make a separate request at that time for

CHAIR JONES: Right.

sentencing by members.

And I have been a defense counsel, you

know, Dwight has been a defense counsel, and one

of the hardest discussions you have with a client

is to say, "in this case, we might have a good

chance of beating the charge at trial. But if

you lose, you're going to have -- if you go

before members. But if you lose, those members

are going to sentence you." That will no longer
be the case. It will be just like in civilian society where you have -- with this one caveat at the end, you could choose members. But other than that, you have the opportunity for, in effect, your military jury trial and then sentencing by the judge. How that will actually work in practice in terms of the numbers, only time will tell.

CHAIR JONES: I don't know why I have this impression -- I'm sure it's something I heard along the way over these hearings -- was that basically most members choose panels, and I think even through the sentencing stage. Well, maybe they never had the opportunity to switch to the judge sentence for --

HON. EFFRON: Number one, they didn't have the opportunity to switch. And, secondly, I don't know what the breakout is in the types of sexual assault cases they have, but the military justice system has been consistently running at a 70 percent or higher judge-alone proceeding.
That is, the --

CHAIR JONES: So you mean the whole proceeding.

HON. EFFRON: The whole proceeding, they have been -- because that is their only choice now, and they have been choosing between 70 and 80 percent consistently over several decades. There has never been a study as far as I know of what influences that. Certainly one factor will be that in many of the Services there is a de facto requirement that somebody waived the right to trial by members in order to plead guilty in a case.

So many of our guilty plea cases are judge-alone cases because that's a condition of the pretrial agreement. Again, how all of this will change, I don't know, but I think the practical matter is we know there will be some subset of cases in which the accused now has to forfeit trial by members in order to get judge sentencing. The accused will no longer have to do that. The accused can have a trial before the
military jury, and then have judge sentencing.

CHAIR JONES: Thank you. I think I understand it now.

Mr. Stone?

MR. STONE: Thank you. Let's stay with this -- some of these changes to sentencings for a minute. I understood from prior testimony we had heard that when a trial was done before the members, typically they sentenced before they left, right after they reached a verdict, because they were all going off to different assignments and they were only temporarily convened.

I don't know if that is correct, but it -- the reason it came up is because when we discussed restitution, I know that we had testimony that said, "Well, they're not coming back to decide on restitution. Everybody has moved on, including often the trial judge and the parties."

And you talked here about there being a break, I thought you said, where the procedures are a little different, and they can decide to
opt for the judge, or vice versa. Is there a
temporal break between the finding and the
sentencing now that is going to change what was
existing practice that the sentence used to
follow almost immediately? Or is that still
going to be the practice?

HON. EFFRON: Not as a matter of law.
There is nothing -- Dwight, correct me if I'm
wrong on this -- there is nothing in the statute
that we proposed or that Congress enacted that
requires anything more than the judge saying to
the accused, "We'll proceed with my sentencing
you. You have the right to -- unless you choose
to be sentenced by members." And there will be a
more formal way of saying that, and you could go
right into either one.

Now, whether as a matter of practice,

once we have -- if we do have, as Judge Jones
asked, whether we do have a system in which we
have even more judge sentencing, judges, as a
matter of practice, will want to have some kind
of break at that point, is another matter. But
as a matter of the law, as it was passed by
Congress, there is no requirement for any kind of
break at that point.

MR. STONE: I guess I'm asking because
I'm trying to find out if there's time for a
presentence report to be done, because the cases
we're talking about determine a person's career
or even a victim's career, and maybe the cohesion
of the whole unit, when there is a sexual assault
charge that has been tried. It's a big deal.
It's not one of your larceny-in-the-barracks type
cases.

So I'm wondering, did you recommend
anything or is there any understanding of yours
whether there will be a presentence report with -
- at the opportunity for input from the victim?

HON. EFFRON: There is not a
presentence report required in the statute.
There wasn't one required previously. What
practices will develop now that we have judge
sentencing will develop more over time.

Once Congress decided not to go with
parameters and criteria, then we have a very
different environment in which the sentencing is
taking place. It's going to be the type -- or
not a different environment, it will be more like
the current environment, which is primarily an
adversarial environment with the development of
sentencing information.

That is, every case that is now tried
is tried in which the parties present information
under rules of evidence, somewhat relaxed rules
of evidence and sentencing. That's the
sentencing system we have now, and that's the
sentencing system that Congress had re-endorsed
in this legislation. So it does not have a
presentence report.

We don't have a probation service. We
don't have a system to develop that. It's up to
the parties to bring that information to bear.

Now, there are opportunities for the
accused -- Article 6(b) specifically recognizes
that -- to make an input in the -- excuse me, the
victim -- the victim to make input in the
sentencing process and to be heard in the sentencing process. So the victim will have an opportunity to make that presentation at trial.

MR. STONE: So that will now be in the procedure that -- in the break between verdict being returned and sentence, the victim will get a specific opportunity. Somebody will say, "Does the victim wish to make a statement?"

HON. EFFRON: Yes.

MR. SULLIVAN: That's already in the system.

MR. STONE: That's already in there? Okay. But did your group consider requiring probation -- pretrial sentencing reports, or a group to work them up? Because a lot of times that may involve the person's family situation. It may involve -- even for the defendant, he may want to offer factors that are sympathetic but have nothing to do with the trial, so they wouldn't have been introduced.

HON. EFFRON: We gave some brief consideration to that. And, again, considering
the underlying purposes of the military justice system in terms of trying for prompt disposition of offenses, taking into account the factors of military good order in effect in the process, and the need -- whether you have members sitting on the panel or otherwise involved in the case, to proceed rapidly to their duties, we did not see the -- in RAND the balance weighing in favor of creating a probation service to put this kind of information together, but instead recommended continuing with the current system in which the judge would be the one working with the parties to develop that information.

In most military cases, the information on sentencing is readily available. The information on sentencing with respect to an individual's military record is available to the unit. You are dealing mostly with first-time offenders. Most of the people who are involved in the offense are nearby, and they can be called as witnesses or their statements, if they can otherwise be produced in admissible form, are
available.

So we felt that with the -- we viewed it as -- with a vast majority of cases that we are likely to have over time, that the current system can provide sentencing authority with the information that it needs to decide. But it's not an open and shut case. There is a great value to the presentencing report that exists in the federal system and in many -- and many states. To have that, you've got to make a big investment. That's a big investment in people to go around and track down that information. They have to be skilled in doing it. They have to be sensitive in doing it. And they have to be good writers as well.

Again, given the nature of the military justice system and the full offense of offenses that are considered, we did not see that as a place to put investment at this time.

MR. SULLIVAN: And if I could follow up on that a little bit, Mr. Stone, you mentioned, you know, evidence that might not have
been relevant on the merits, might be relevant in sentencing, and that's exactly right.

And so what you have in this system is

-- it's important to understand it's not that you
go right from the verdict to deliberation on
sentencing. There is a lengthy procedure that
happens there. In fact, it's often said that
courts-martial are tried much like civilian death
penalty cases where you have a bifurcated
adversarial proceeding. So once the sentence is
done, the judge will typically give the parties
some break. It might be overnight depending on,
you know, when it's done.

And then they will come back, and then
the prosecutor, the trial counsel, will present
evidence in aggravation. And the trial counsel
will -- if there is certain information they have
to present, they will typically present
additional documentary evidence. It's not at all
uncommon for the prosecution to call witnesses at
that proceeding, and then -- and it's an
adversarial proceeding, so the defense then
cross-examines those witnesses, and the members
are allowed to ask questions of those witnesses,
if it's a member sentencing case.

And then after that, the victim is
provided with an opportunity to give input, and
then after that the defense counsel is provided
an opportunity. And the rule -- and so you
mentioned -- you know, you raised a very good
point about, hey, there might be evidence that is
very relevant to sentencing that had nothing to
do with guilt or innocence.

Well, the aperture is very broad for
the defense at that point to bring in any
evidence in either extenuation or mitigation of
the proceeding. It can include an unsworn
statement from the accused, and then -- and so at
that point the defense puts on documents, almost
invariably the defense puts on witnesses.

In many courts-martial you have family
members testifying, you have, you know, fellow
service members testify, and then the government
gets a case to put -- gets an opportunity to
present a case in rebuttal. And then after that
each party gets to make an argument to the
sentencing authority, be it military judge or
members.

So the government makes a sentencing
argument, the defense makes a sentencing
argument. If it's a member's trial, the military
judge then gives instructions on sentencing, but
they'll give some instructions before arguments,
but then a lot of procedural instructions on how
you get the sentence afterwards. There are
different voting requirements based on the
severity of the sentence.

And then if it's a member's case, the
members go off and they deliberate, and then they
hold votes in closed session, and then come back
and deliver the sentence. And then if there's a
pretrial agreement after the sentencing authority
makes the sentence, the military judge will then
review the sentence under the terms of the
pretrial agreement.

So there is -- many times, literally,
the sentencing proceeding takes as long as the
court-martial, I mean literally. So there is a
very involved process and an opportunity to
provide that sentence or a lot of information but
within the context of an adversarial hearing.

MR. STONE: And that occurs after the
finding of guilt, for instance.

MR. SULLIVAN: Correct.

HON. EFFRON: Right. One thing that's
-- Dwight has given a terrific explanation of how
that works. In terms of the timing issue, this
might be helpful. In civilian life, there is an
expectation that there will be time after the
trial to prepare more information on sentencing
and to react to the presentencing report.

In military life, counsel will go into
trial, a contested trial, knowing that they have
to be prepared for sentencing afterwards. So
they are developing that information as part of
their pretrial preparation as well. So it's not
as if the trial ends and they say, "Oh, my
goodness, now I've got to figure out how to deal
with sentencing on the case."  But is going to --
counsel should be ready for sentencing at the end
of the trial.

MR. STONE:  And when you were telling
us before about new changes to pretrial
agreements, I presume -- and correct me if I'm
wrong -- you're talking about situations where
there is a guilty plea to the crime, but their
second sentencing hearing is what is going to
follow that is going to be contested.  Is that
right?

HON. EFFRON:  It depends on the nature
-- yes, the sentencing hearing will be within the
framework of the pretrial agreement, yes.  But
that will be contested.

MR. STONE:  But it's a guilty plea.
It's not just an agreement.  It's a guilty plea,
right?

HON. EFFRON:  Oh, yes.  You only have
pretrial agreements of the nature we're talking
about when there has been a guilty plea to at
least one offense.  It is not common, but it is
not all that unusual to have mixed pleas as well.
So you may have a mixed plea, and you may even
have some kind of agreement related to it that
then is -- results in a proceeding on the
findings after that, findings of guilt or
innocence on those issues to which the person did
not plead guilty.

And then the sentencing, that takes
into account both the offenses to which the
individual has pled guilty and whatever findings
the court-martial made on the contested offenses.

MR. STONE: On a somewhat different
issue that has concerned this panel since you
reviewed everything, and you can tell me whether
your group considered it or steered clear of it,
one of the questions was whether material that
has been considered confidential and not provided
at the military trial level -- typically 513
material, psychological reports of the victim
that only the judge saw -- whether that should
continue to be discovered basically as long as
that defendant appeals, routinely handed over to
the defense service on appeal. Did you look at that at all?

HON. EFFRON: That's a matter we looked at. It's not covered in the statute right now. It's covered in the Manual for Courts-Martial. So that will be addressed by the Joint Service Committee as it is developing the rules for the Manual for Courts-Martial that will follow on through the legislation. So we did not make a specific recommendation as part of this report on the issue of the disclosure of that information.

MR. STONE: Well, I gather that is governed by the Rule 1103(a), and I don't understand from what you just said why that would need to be reconsidered. I would be delighted if it's reconsidered, but why do you think that will be reconsidered in light of your changes?

HON. EFFRON: Well, one of the charters of this process is to look at the entire Manual for Courts-Martial as the legislation is being implemented, so -- it's so comprehensive --
so that every rule will get a fresh look as part
of this.

Now, the rules that are not affected
directly by the legislation, maybe get a -- not-
as-detailed a look. Whether they're going to
take another fresh look at 1103 will be up to the
Joint Service Committee as it looks through it.

MR. SULLIVAN: If I could jump in
there. The Joint Service Committee recently
proposed a change to that rule. It's out for
public comment right now. On Thursday, there
will actually be a public hearing on that
proposed rule change, and it would basically
adopt a multiple-track system where, if there is
sealed evidence -- and this deals with any sealed
evidence.

You know, it might be 513, or it might
be 412, there might be classified information.
And typically in a case you might have sealed --
if it's a child pornography case, which a
disconcerting percentage of our cases are, you
will have sealed exhibits in such a case as well.
And so the -- and you may have sealed matters in
discovery in other types of cases as well.

So the proposal from the Joint Service
Committee -- and, again, this is just a proposal
out for public comment, we're hoping to get a lot
of comments to further inform the decision. The
proposal is to say, look, if the material was
released to the counsel at trial, and the
appellate counsel want to see it, the appellate
counsel will have to go to the judge and say --
or go to the appellate court -- I'm sorry -- go
to the appellate court and say, "Hey, we want to
see it."

And in such a case there would be
pretty low bar or, again, where this was seen by
the trial defense counsel, pretty low bar to the
appellate counsel seeing it as well. And, as you
probably know, the current rule, if you've
followed the plain language of the current rule,
an appellate counsel automatically gets access to
it.

Now, in practice, that's now how the
rule was carried out in the Air Force, but I think the plain language of the rule is clear that an appellate counsel is automatically entitled to this.

So but then you would have a system sometimes where you have material that is sealed that was not seen by the trial defense counsel. It's going to erect the -- this proposal erects a higher bar that must be cleared by the appellate counsel to say, "Why is it necessary for the appellate counsel to see this material on appeal where it wasn't seen by the counsel at trial?"

So, again, it's going to -- the proposal is to have this two-tier system, and that's under consideration. But certainly, you know, it isn't a DoD recommendation at this point.

MR. STONE: Great. I'm glad to hear that. HON. EFFRON: And I can just -- just so that I'm clear on the record, our group looked at all the provisions of the manual for courts-
martial and going through the process to
determine which ones might be better articulated
in statute than in the manual.

In the course of doing that, we
prepared a very rudimentary set of suggestions
for the Manual for Courts-Martial, which we have
provided to the Joint Service Committee. So that
is -- I just want to make clear, it's not that we
didn't look at the Manual for Courts-Martial, it
just came out in a different product than our
legislative report.

MR. SULLIVAN: And if I may follow up
on that point, because there is something very
important to note, and that is Mr. Effron noted
before that the deadline -- most of these rules
will take effect within -- or the statutory
amendments will take effect within two years.

But there is a proposal, as Mr. Effron
mentioned, for the President to promulgate
implementing rules a year out. So it envisions
that you will have, you know, somewhere
approaching a year where the rules exist but they
aren't yet enforced, which obviously allows for a
training period, which you're going to need to
implement this.

So the Joint Service Committee is
working on the -- on this proposed manual to
implement these rules along with the Military
Justice Review Group. And, unfortunately, in the
case of the legislative proposals, we were
constrained by an OMB Circular. We weren't
allowed to release that to the public until it
was transmitted to Congress. That is not the
case with the proposed implementing rules.

So DoD will be putting those
implementing rules out. Just like we have the
proposal to change 1103(a) for public comment,
the proposed manual changes, which are about
literally half the size of this report right now,
so about that much, will be put out for public
comment, and obviously we would love to have the
expertise of the JPP in evaluating those
proposals when they are promulgated in notice
form.
MR. STONE: Great. I have one other area I'd like to ask if Judge Effron's group looked at, and it's one that we are continuing to discuss because it wasn't decided in this NDAA Committee report. And that is the question of, well, let's start with, how -- and this is a question I don't know the answer to. If the -- on appeal, the Appeals Court can look at every element and the admissible evidence as to every element as required to. How does the prosecutor know what it is he is defending in his brief on appeal, or does he routinely have to defend the admissibility of the -- each piece of evidence on every element to show that it was there beyond a reasonable doubt?

HON. EFFRON: As a practical matter, there are very few cases where the accused does not raise an issue in which the Court of Criminal Appeals nonetheless finds a problem in the case. So in terms of what the party has -- the government has to defend against, they will typically know that from the issues that are
raised by the accused on appeal.

With respect to issues that are raised by the Court, it is up to each Court's practice to decide what to do. But in most cases, if they identify a problem, they will give the parties an opportunity to brief that issue.

MR. STONE: That's what I was looking at. So the prosecutor knows either from the Court giving him an opportunity to discuss an issue that it's concerned about or from the defense's brief what issues are on appeal.

HON. EFFRON: Yes. With the important caveat that the Court itself has the authority to raise issues, it has the authority to decide them, and it is not required -- even though it's good practice, it is not required as a matter of practice to notify the parties that it is considering another issue.

That happens in civilian life as well. It is -- you know, it is a matter, certainly, that is debated among appellate practice experts whether that is a good idea. But in general it's
good practice for an appellate court to get the views of the parties on an issue, but it's not unheard of for appellate courts to decide a case on issues that have -- on which the parties haven't had an opportunity to brief.

MR. STONE: Okay. Now, going to the specific issue that concerns me, if either the Court or the defense counsel, who we'll assume for my hypothetical has now met the bar and gotten access to the victim's psychological reports, which the trial counsel -- trial defense counsel never saw, feels an obligation to be diligent, having seen those, and create or make some kind of an argument that they were improperly denied the trial defense counsel. I presume he is going to raise that or the Court is going to raise that in most of the cases, that that's not something that is going to slide by. And I guess my question is, is there some reason that the victim's counsel, who never got to defend against that argument at the trial level, because the defense counsel couldn't have
made it, because he didn't have those documents, whether this first-time litigation on these new arguments, whether there is some reason why victims' counsel shouldn't participate after an Article 6(b) issue has been raised in the appellate court by the defense or the Court?

HON. EFRON: There are two types of issues that arise in that context that you have identified. The first, which would arise beforehand, is where there is an issue at trial, and then the victim, under a theory -- for example, under the LRM case, seeks a writ and addresses that issue on appeal.

I just wanted to clarify that that's different. You're talking about a case in which now the case is on appeal, and the issue on appeal is not whether -- the underlying issue is not whether the information should or should not have been examined by the judge. The issue is whether the conviction should or should not be affirmed.

MR. STONE: No, that's not quite what
I'm asking.

HON. EFFRON: No, I understand. But that's the underlying -- then, as part of that issue, whether the conviction should or should not be affirmed, now, as I understand it, you are raising the issue -- the legal issue of whether the trial court erred by not examining the 513 issue. That's my understanding of what you're --

MR. STONE: Well, it's not clear by not turning over -- the 513 material over to the defense counsel.

HON. EFFRON: Or by not turning it over to the defense counsel.

MR. STONE: Yes.

HON. EFFRON: And so, at that point, or it could be -- it could be one of not examining it. Could be either one. Could be not examining it or examining it and not turning over. Either one of those could be raised.

That issue may or may not have a bearing on whether the conviction should or should not be affirmed. The appellate court
might look at it and say, "No error." Court
might look at it and say, "Error but harmless"
and still go ahead and affirm the conviction. So
it's in a different posture than it is at the
trial level.

I think the question there is, and one
that we did not examine, so I just raise this as
the thought as to what would be looked at here,
is can that issue be dealt with by, number one,
making sure that there is public notice that that
issue is under examination.

Hopefully, the amendments that we have
proposed for Article 140A in terms of publication
and timely availability of notice of proceedings
will mean that that -- when those issues are
raised, there will be public notice of it. And,
secondly, the question being, is it sufficient to
provide a victim with an opportunity to act as an
amicus in that case and bring the information to
the Court?

We did not examine that, and so I
simply say that -- raise that as a thought
process if that is viewed as something that
should be addressed, then the question is, is the
appellate process different from the trial
process, and does the amicus process or a
modification of the amicus process provide an
adequate opportunity for the victim's views to be
before the Court?

Dwight, did you have anything you
wanted to add on that?

MR. SULLIVAN: I don't think DoD has
a position on that.

HON. EFFRON: Yes.

MR. STONE: Well, I gather the short
is that you did not examine it, but I just want
for the record to say that is not the
hypothetical I was suggesting.

HON. EFFRON: I'm sorry.

MR. STONE: I was not suggesting that
the victim comes in as an amicus, because an
amicus brief may be denied, and an amicus brief
typically is not on behalf of a particular
client. It's on behalf of a policy.
I'm talking about the victim's counsel having a right to say, "I never got to hear this brand-new argument on appeal," and my client has a particular position, which, frankly, may not be the same as the government's, because the government can file their own reply. I want a right to reply in the first instance to an argument I have never heard that is brand new, because this is the first time they have seen the 513 material. That's the issue, and it's different than as you --

HON. EFFRON: I apologize if I misstated your issue. I thought I had, and then said that in analyzing -- I was not trying to put words in your mouth, but, rather, to explain what I thought would be one way of analyzing it would then be to say, "Okay. First, take a look at the amicus process, determine whether the amicus process is sufficient or not to provide that opportunity."

If it's not sufficient, are there changes that should be made in the amicus process
that would make it more useful for the parties, make it more useful for the victim and the Court than it is now, without necessarily making the victim a party at that proceeding? I was simply suggesting that as a thought process, as a way of doing it. I apologize if it sounded like I was attributing to you the amicus suggestion.

CHAIR JONES: Anything else, Mr. Stone?

MR. STONE: No, that's fine. Thank you.

CHAIR JONES: Ms. Holtzman, did you have some questions you wanted to ask?

CHAIR HOLTZMAN: No. I just wanted to thank the presenters for their presentations and for their service.

CHAIR JONES: Okay. I could barely hear you. Thank you, though.

CHAIR HOLTZMAN: It was just a thank-you.

CHAIR JONES: Okay. Great.

HON. EFFRON: Thank you.
CHAIR JONES: Thanks, again, Judge Effron and Mr. Sullivan, very much.

All right. Is it possible that we are adjourned? I believe there is no public comment. Is that correct?

MS. FRIED: That's correct, Your Honor.

CHAIR JONES: All right. Then we're adjourned. And thanks again.

HON. EFFRON: Thank you.

(Whereupon, the above-entitled matter went off the record at 2:04 p.m.)
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Before: US DOD

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