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

PRESENT:

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

WITNESSES:

Lieutenant Colonel Deanna Daly, U.S. Air Force - Senior Special Victims' Counsel, Appellate and Outreach, Special Victims' Counsel Division
Ms. Lisa Friel - Subcommittee Member
Captain Andrew House, U.S. Navy - Director, Navy and Marine Corps Appellate Defense Division

Ms. Laurie Kepros - JPP Subcommittee Member
Mr. Stephen McCleary - Deputy Chief of Staff and Deputy Managing Counsel, Department of Homeland Security, Office of the General Counsel
Colonel Katherine Oler, U.S. Air Force - Chief, Government Trial and Appellate Counsel Division
Colonel Jeffrey Palomino, U.S. Air Force - Chief, Appellate Division
Dean Lisa Schenck - JPP Subcommittee Member
Lieutenant Colonel Mary Catherine Vergona, U.S. Army - Chief, Policy Branch, Army Criminal Law Division
Ms. Jill Wine-Banks - JPP Subcommittee Member

STAFF:

Ms. Nalini Gupta - Attorney Advisor
Ms. Meghan Peters - Attorney Advisor
Ms. Terri Saunders - Attorney Advisor
Captain Tammy P. Tideswell, U.S. Navy - Staff Director

DESIGNATED FEDERAL OFFICIAL:

Mr. William R. Sprance
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MR. SPRANCE: Good morning, everyone.

I'm Bill Sprance, the Designated Federal Official. This meeting of the Judicial Proceedings Panel is now open.

At this time, I will turn the meeting over to the Chair, the Honorable Elizabeth Holtzman. Good morning, Madam Chairman.

CHAIR HOLTZMAN: Good morning, sir.

And thank you very much, Mr. Sprance, for opening the meeting and good morning. I would like to welcome the participants and everyone in attendance today to the 27th meeting of the Judicial Proceedings Panel. All five of the Panel members are present here today.

Today's meeting is being transcribed and the full written transcript will be posted on the JPP website.

The Judicial Proceedings Panel was created by the National Defense Authorization Act in fiscal year 2013, as amended by the National
Defense Authorization Act 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 begin with a
presentation from JPP Subcommittee member Ms.
Lisa Friel on the Subcommittee's Sexual Assault
Investigations on the Military report. The
Panel will then conduct deliberations on this
issue.

After a break for lunch, the panel
will deliberate on its Military Defense Counsel
Resources and Experience in Sexual Assault Cases
report.

Finally, the Panel will conduct
deliberations on its Victims' Appellate Rights
report. This session will include discussions of
the Department of Defense Joint Service Committee
on Military Justice's proposed amendment to Rule for Courts-Martial 1103A governing the review of sealed materials by appellate counsel. The Panel will also consider the written dissenting opinions of JPP member Mr. Victor Stone.

Each public meeting of the Judicial Proceedings Panel includes time to receive input from the public. The JPP received no requests for public comment at today's meeting. The Panel received nine written public comments. Seven of the comments are related to the Joint Service Committee's proposed amendment to Rule for Courts-Martial 1103A. One is related to defense counsel resources, and one is related to Military Rules of Evidence 412 and 513.

These written comments have been provided to the Panel members for their consideration. They're available on the table outside this room, and also posted on the JPP website.

Thank you very much for joining us today. We're ready to begin our meeting. Our
presenter is Ms. Lisa Friel, as I mentioned before, Special Counsel for Investigations at the National Football League and JPP Subcommittee member.

Thank you very much for joining us today, Ms. Friel. I see that she's accompanied by other members of the Subcommittee. I welcome each of you too and thank you for your service. Thanks for joining us today, Ms. Friel, and we look forward to hearing from you. You may commence.

MS. FRIEL: Thank you. Good morning, Panel members. I want to start off by thanking you for giving me the opportunity to testify here this morning, and more broadly, the opportunity last year to serve on your Subcommittee. As someone who has worked in this field for over 30 years and has seen so many sectors of our country try to best deal with this very difficult and sensitive problem, not just law enforcement but our educational institutions, our professional sports leagues, and what brings us here today,
our military.

I've seen firsthand over my time with the Subcommittee just how much the military has done to more effectively and sensitively deal with this problem. I've heard from so many caring and dedicated military professionals who are working diligently to make their Services' handling of these very difficult cases better, and we as a Subcommittee hope that our efforts and our expertise will assist them in this regard.

I'd like to tell you a little bit about my background as it informs the things I'm going to talk about today. I started, after I got out of law school, at the Manhattan District Attorney's Office as a prosecutor. I spent 28 years in that office, 25 of them in the Sex Crimes Prosecution Unit. I was the deputy chief for 11 years and the chief for my last ten years in that office.

During that time period, I either handled personally or oversaw thousands of
investigations. I had an opportunity to learn from what I always tell people are the best, people who have been in this business for decades before I got there. And I also had the opportunity to work for a great public servant, Robert M. Morgenthau, who taught us exactly one thing about investigating and handling any kind of criminal case, and that was to investigate as thoroughly as possible, get to the bottom of what happened and then do the right thing. And that's the philosophy that all the Subcommittee brought as we assessed how the investigations were being handled, as we learned from our site visits this summer.

After I left the DA's office, I went to a consulting firm. And I was there for about 3-1/2 years, and I consulted on issues related to sexual misconduct. I helped write policies, I did education and training, and I did private investigations.

My clients included lots of educational institutions, K through 12, high
schools, colleges and universities, businesses, and professional sports leagues, which is how I came to work at the NFL full-time, helping them enforce their personal conduct policy.

So, let me get to what we're here to talk about today. As you know, from July through September 2016, the members of the Judicial Proceedings Panel Subcommittee spoke with more than 200 Navy individuals from 25 military installations throughout the United States and Asia.

Our conversations focused on investigation, prosecution and the defense of sexual assault offenses. During this time, we heard very candid perceptions from the people we talked to about the military's handling of sexual assault cases.

We spoke to groups of military prosecutors, defense counsel, Special Victims' Counsel, victims' legal counsel, paralegals, investigators, as well as commanders, Sexual Assault Response Coordinators, victim advocates
and victim witness liaisons from all the
different branches of the military.

On the basis of the information we
received during these site visits, we determined
that we would have to conduct further research
into several topic areas in order to best inform
the JPP about what we had learned.

So we held meetings in September,
October, and December of this past year, 2016,
and continued in January of 2017, in order to
develop information and research needed to report
on these issues to all of you.

The report that I'm going to present
today covers just one particular issue, and that
is how the military is handling their sexual
assault investigations, and how Department of
Defense policies are affecting these
investigations, as well as certain practices that
we heard about in the field.

So I'd like to start with the first
topic, which is our finding that military
criminal investigative command investigators --
and I'm going to call them MCIOs so I don't have
to say the whole mouthful every time I talk about
them -- how our MCIOs, we determined, lack
necessary discretion and resources in handling
sexual assault investigations.

So let me first talk to you about what
we learned during our site visit in that regard.
Investigators in every military Service that we
spoke to told us that they no longer have all the
time they would like to devote to the most
serious sexual assault investigations that come
before them.

They explained that there are a number
of factors that have stretched their resources
and eliminated their discretion in investigating
alleged cases of sexual assault. Perhaps the
most often-cited problem is that the MCIOs are no
longer able to refer the less serious cases to
other military investigative agencies, even when,
in their opinion, those other MCIO investigators
have adequate training for doing so.

So, let me put this in the perspective
of changes of the law in this area. Prior to January 2013, sexual contact offense cases, as opposed to penetrative offense cases, were handled by Military Police investigators, with some variation among the Services.

However, with the change in DoD policy in 2013, MCIOs are now required to investigate every sexual assault investigation regardless of the nature of that alleged sexual assault.

The pre-2013 approach allowed the MCIO special agents the discretion to determine which offenses were more appropriately handled by Military Police investigators, or by an accused unit. And they did that depending on the severity of the allegation and on the victim's desire to participate in an investigation.

The MCIO investigators that we spoke to almost universally felt that the 2013 policy change has severely strained their resources, and has undermined their ability to investigate more serious sexual offense cases effectively and thoroughly. A majority of the agents who we
spoke to said that investigations involving sexual contact cases, which are often less complex than a rape case, must be given the same time, emphasis, and resources under the present policy as the most serious sexual assault cases.

And I think it's important to understand what we're talking about when we talk about sexual contact cases. Those are cases that might involve the touching of someone's buttocks. The touching, under present laws -- recently changed, but not yet effective -- of someone's shoulder. An attempt to kiss was another kind of sexual contact case that we were told by the investigators that they are commonly investigating.

Contrast this with a penetrative case. The investigators noted that they have to commit the same resources and time to the kinds of cases I just spoke about, even when the reported facts of what allegedly took place make prosecution of the sexual contact offense unlikely, in their opinion. And they also pointed out to us
something that we verified with other information, that over the last number of years, as reporting has increased -- which is of course a good thing-- their caseloads are more and more made up of sexual assault investigations.

So, this, in combination with their lack of discretion in now giving sexual contact cases to, for instance, the Military Police, has greatly strained their resources in their opinions.

CHAIR HOLTZMAN: Excuse me, I don't mean to interrupt. When you say "caseload," you mean their total caseload of all cases?

MS. FRIEL: Yes, yes. We were given the estimate by some of the investigators that as much as 60 to 80 percent of their caseloads are now sexual assault investigations of one kind or another.

In addition, they pointed out to us another example of where they have a lack of discretion that severely strains their resources. They told us that if a case comes from a SARC,
then regardless of what they find the facts of that case to be, they must continue to handle that as a sexual assault investigation.

So if they, in doing an interview of the victim, determine that it's not a sexual assault, it's a non-sexual assault, a physical assault, or they even sometimes find that it doesn't appear to be a crime at all, they told us that it is extremely difficult to close that case or to hand that case off to a Military Police investigator.

Another example they told us about of their lack of discretion involves sexual assaults reported by a third party witness, rather than the putative victim. They told us that in some instances they receive investigations reported by a third party who has seen or heard about something that they believe is a sexual assault. And when the investigator looks at that case, they find that either a victim is not at all cooperative, which in the investigator's professional opinion tells them that they're not
going to be able to go forward with that case in any way as a prosecution, or the victim actually tells them facts that makes the outcome not a sexual assault at all. And yet they are still told and they must investigate that case as thoroughly as if they had a cooperative victim who is telling them facts that indeed make out a sexual assault.

In addition, the investigators noted an ever-growing number of administrative requirements for sexual assault investigations which contribute to the strain of their having to investigate every reported sexual contact offense. They describe burdensome administrative tasks, such as duplicative requirements for documenting investigative activity, retaining evidence, and many internal reports.

I mentioned before that the definition of sexual contact is fairly broad at the present time, and it includes the touching of any body part for sexual gratification. That definition, I should point out to the Committee, has been
changed, and this change will go into effect, at the earliest, in June of 2017. And it does narrow the bodily parts of the body that would have to be touched to make out a contact sexual offense.

However, the combination of this not going into effect, at the earliest, until June, and the fact that we will continue to get cases that occurred before that time, because we all know from sexual assaults that they are often not reported right after they occur. And so our investigators are still going to be investigating contact cases that took place before the effective date of the new law, and that will continue to strain their resources.

I would like to point out to the Committee that the Response Systems Panel also addressed this issue, and they made the following recommendation. They recommended to the Secretary of Defense that he direct the commanders and directors of Military Criminal Investigative Organizations to authorize the
utilization of Marine Corps Investigative
Division, Military Police investigators, and/or
security forces investigators to assist in the
investigation of some non-penetrative sexual
assault cases under the direct supervision of a
special victim unit investigator who would retain
oversight.

On December 15th of 2014, DoD approved
this recommendation in part and referred the
matter for further examination to the DoD Office
of Inspector General, which is responsible for
establishing law enforcement policies.
Meanwhile, as I just stated, the present policy
is still in effect and these non-penetrative
contact cases have increased and overburdened our
investigators.

We reached out for -- the Subcommittee
reached out for the IG's office to find out how
they were coming along with looking into this
issue, and we found out from the Inspector
General that the Inspector General has proposed
revisions to DoD's policies concerning sexual
assault investigations and that DoD is in the final stages of reviewing and updating these existing policies.

The policy proposal we were told about implements RSP recommendation, it was 89 that I just quoted you, and includes two requirements that were not specified in the RSP's recommendation: that only the MCIOs will conduct the formal victim interview and the assisting law enforcement agencies must receive the requisite training on sexual assault investigations before they can assist the MCIO.

We were told in our site visits that these other investigative agencies are in fact getting that kind of training at this time, and in fact the MCIOs feel that they have sufficient training to be able to handle sexual contact cases at the present time.

So our assessment and our recommendations, the Subcommittee's. The changes in 2012 to Article 120 of the UCMJ and the changes in 2013 to the DoD's policies concerning
sexual assault investigations has significantly increased the volume of investigations for which the military's MCIOs are solely responsible. Collectively, these changes and other administrative policies have generated a flood of investigative activity for both strong and weak, serious and less serious sexual assault cases. Special agents at the sites stress that the increase in their caseloads has severely strained their investigative resources and they feel has harmed their ability to pursue the most serious sex crimes in a manner they feel is most appropriate.

These individuals concurred that the increase in their workload is primarily due to DoD's mandate that MCIOs investigate all reports of sexual contact. Cases that I said earlier may involve a relatively simple one-time touching of the leg or the buttocks, rather than the more serious and violent conduct.

The Subcommittee recommends implementing the December 2016 draft changes to
DoD's sexual assault investigations policy. The proposal -- that is, the IG's proposal that I mentioned a few minutes ago -- if implemented, will provide the MCIOs with access to needed additional resources.

Although MCIOs will remain responsible for all sexual assault investigations, permitting other law enforcement agencies to assist with those investigations should ease the current strain on MCIO resources, and allow the MCIOs to focus on the most serious cases.

The Subcommittee further recommends that this new policy be closely monitored and thoroughly reviewed one year after it takes effect, and that the DoD Inspector General assess the effects of new policy on the MCIO's ability to focus their time and effort on the most serious sexual assault cases.

Because we as a Subcommittee found in our field interviews of investigators that it's so essential to understanding the effects of statutory and policy changes, we also recommend
that DoD's review similarly incorporate site visits. I cannot stress enough how beneficial that we thought having these site visits and having all the different groups that we spoke to that I mentioned at the beginning of my remarks come in and speak to us. And they all spoke to us on a non-attribution basis, which made them, we felt, feel freer to tell us what they really felt about how things were working.

And so we recommend that when this is reviewed again in a year, that there be site visits and that they be done, that the people who come and speak to the groups speak on a non-attribution basis.

Should the DoD, after that kind of review a year from now, find the MCIOs continue to experience strains on their resources and a diversion of their expertise from the most serious sexual assault cases, we recommend the DoD IG might consider allowing MCIOs to transfer full responsibility to alternative military law enforcement agencies to address the problem.
The Subcommittee does not make this recommendation now in recognition that there are inherent difficulties in such transfers, including but not limited to accurately determining the seriousness of some offenses in the early stages of an investigation. The Subcommittee believes it is prudent to give the IG's proposed changes a chance to be implemented before suggesting more extensive policy changes are needed.

The JPP, together with the Subcommittee, is going to reach the end of its statutory term in September 2017. Therefore, we will not be in a position to monitor the effects of this policy or make additional recommendations about it to the Secretary of Defense. Congress has created a successor panel, the Defense Advisory Committee on Investigation, Prosecution, and Defense of Sexual Assault in the Armed Forces, and we as a Subcommittee respectfully recommend that this new panel continues to monitor this issue that we have identified.
The second area that I want to discuss this morning in terms of investigations is our finding that current policies and practice render investigations less thorough and less expeditious than we think they should be. We've identified six specific contributing factors to this issue, which I'm going to go through for the Panel this morning.

The participants in our Subcommittee visits raised a number of other issues that they felt collectively hampered an investigator's ability to conduct these investigations. Now, we do recognize as a Subcommittee that the comments we heard in some measure depend on the military Service, the location, the size of the location, the level of experience of the participants, and we certainly are not making any findings or recommendations based on a single anecdote.

However, we did hear across all the bases that there were some common problems, general themes were identified, and so that's what I'm going to address this morning with all
of you. And these common problems, as identified to us, suggested that there are some systemic problems that may exist, and we may be able to make recommendations to improve these problems.

So, to begin with, we heard that the initial investigatory interview of a sexual assault victim is often delayed, which is detrimental to a case. It's important to note that since the establishment of SARCs, military investigators and Military Police are no longer the first people to receive sexual assault reports.

(Phone ringing.)

MS. FRIEL: I'm just glad it's you and not me. Since the establishment of SARCs, as I said, the majority of sexual assault reports are coming to our MCIOs through the SARC office. And this is a relatively recent development. We then heard from the investigators that the first interview of victim then must be scheduled through the Special Victim's Counsel or the Victim's Legal Counsel, if the victim already
obtained counsel through the SARC office.

    If the complaining witness has not
retained counsel, as you all know, at that point
then it's incumbent on the MCIO to notify the
victim that they have a right to have an SVC or a
VLC assigned to them and they have a right to
have that done before this initial first
interview.

    The investigators told us that in fact
almost all the complainants in these sexual
assault cases are asking for an SVC or a VLC and
asserting this right so that they can have the
necessary advice before they sit down and have an
interview, and have that kind of support at their
first interview.

    The problem has become that there is
a delay caused in having that first interview by
the fact that an SVC or VLC has to be assigned.
They then have to get in touch with the victim
and set up a time that they can sit down and talk
to the victim. Then the interview has to be set
up at a time that works for the victim, the SVC
or VLC, and the investigator, and this all leads to a delay.

And the longer the time goes between when a complaint is first made or report is made and when that first interview can take place causes issues for the investigations. It's always best, in any kind of investigation of any kind of crime, to talk to the victim as early in time as you possibly can. And we have heard from the investigators in the field that sometimes this delay can take anywhere from weeks, and on some occasions months depending on the attorney's availability.

In addition to what I just pointed out as the negative consequence of a delay on a victim's memory, they also pointed out to us other things that are in fact true, that they're losing valuable evidence, perhaps digital evidence that's being written over. Victims are changing phones and you don't have the phone that's important available to you anymore. So there are a number of things, evidentiary things
that we are losing during this delayed period of time.

And then the final thing they pointed out is that oftentimes they can't really get into an investigation and start, for instance, finding other witnesses and other kinds of evidence that may not be in the victim's possession, until they've done that first interview and they know all the facts of the case and they know where to go to look for other evidence.

Another issue that they told us contributes to their ability to do as thorough an investigation as they feel necessary is that they feel discouraged from asking sexual assault victims questions that might be deemed as confrontational.

Before I talk a little more about what we heard from the investigators, I'd like to say something based on the over 30 years of experience that I have doing sexual assault investigations, and I've done a lot of training in this regard for a lot of investigators.
Investigating a sexual assault, I always say, is like peeling an onion. We know there are very few outright false reports. We all know that from FBI statistics and military statistics. I saw that in civilian life. But what there are are lots of initial reports that don't have all the facts and information told in the first interview that we need to know, and that a good sexual assault investigator knows that areas where victims are perhaps reluctant to reveal information. It may be information they feel makes them look bad, information that may get them in trouble themselves. And a good sexual assault investigator knowing that knows how to sensitively probe to get that information. That starts in a first interview. The hard questions have to get asked in a first interview, and a good investigator does that sensitively.

It is confrontational in the regard that you're saying to someone, "I really need to know," for instance, "how much you had to drink, and hiding from me how much you really had to
drink is not really going to be helpful to your case because of course the person you've accused knows exactly how much you had to drink. And if I go back to the bar to investigate how much you had to drink, I'm going to find out from the bartender or the waitress, and that's going to be a problem."

So that kind of probing questions begins in an initial interview, but it often, almost always, continues in subsequent interviews. An if you don't ask those questions in interviews prior to somebody eventually testifying in court, I've seen it time and time again blow up in court.

It doesn't just hurt the case in court and often lead to an acquittal, but it's a very uncomfortable situation for a victim to be on the stand and for the first time to have been confronted with something that they didn't say, that is detrimental, may make them look bad, and now has to try to deal with how to answer that question when they haven't been able to sit down
with the prosecutor and talk about how best to
deal with that issue.

And we heard from many, many senior
investigators that we talked to that they were
expressing a concern that they are no longer --
and this is a change, they told us -- feel that
they can interview a victim in a manner best
suited to elicit all the facts and circumstances
necessary to discovery what occurred.

The Subcommittee was told that
investigators are now taught not to probe too
deeply into the detail of a sexual assault
victim's account. They told us that they are
discouraged from confronting a complaining
witness with aspects of his or her account that
do not make logical sense or that conflict with
other evidence, including the victim's own
inconsistent statements.

The investigators stated, something I
just told all of you, that when done
appropriately such questioning is not
insensitive, and indeed is a crucial
investigative practice. As one senior agent explained, in investigative circles confrontation is a term of art and it does not entail the hostility connoted by the common use of the word.

A confrontational clarifying interview involves questions that invite a witness to explain new or inconsistent evidence or statements. While it's clear from the site visits that many agents -- that the Services differ in their approach to this technique, MCIO training, internal practices, or both, give many agents the impression that they have to accept the victim's account at face value, without thoroughly exploring discrepancies or seeking more detail in that account.

Internal MCIO policies may likewise discourage thorough questioning of sexual assault victims. We heard from agents that they are required to obtain a supervisor's approval before conducting any interview subsequent to the initial interview. They told us the imposition of bureaucratic obstacles to interviewing a
victim a second or perhaps needed third time was widely viewed as a deterrent, and field agents felt dismayed that their MCIO leadership would question their determination that a subsequent interview was a critical investigative step.

The third thing that we were told that the agents feel is impacting on their ability to do the most thorough investigations possible has to do with SVCs and VLCs limiting contact with the victim and also limiting the scope of the interview itself. We were told by a number of agents that SVCs and VLCs who attend the investigative interview sometimes object to certain necessary and relevant questions, or advise the victim not to answer them. Other investigators reported that the mere presence of the SVC or VLC dissuades them from asking probing questions out of a fear that they are going to be accused of being inappropriate or too hard on the victim.

The Subcommittee heard that on at least one visit an SVC/VLC objected every time an
agent asked a question about what sort of resolution of the case he or she wanted, even though his training courses had taught the agent this was an important and routine question to ask.

The Subcommittee was also told that SVCs/VLCs request that investigators who want to do follow-up interviews with the victim provide the questions in advance of the interview, therefore telling the victim before the victim can come in for a subsequent interview what those probing questions are going to be.

Sometimes the SVC or VLC will not bring the victim in at all for a subsequent interview, and will instead send written responses back to the investigator's questions. Of course, the investigators pointed this out as problematic because based on those written responses they may have additional questions that they now have to put in writing and send back, and that this is not the most effective way to tease out all the important facts and details of
a sexual assault.

The Subcommittee heard from the SVCs, we talked to them and VLCs, that indeed they want their clients to only be interviewed once, because they are afraid that if they are interviewed more than once that this creates inconsistent statements that will be written down and turned over to the defense, and something that the victims that they are representing will be cross-examined about at trial.

Our investigators also spoke about how this situation, to them, resulted in the loss of rapport-building opportunities with the victims. And this is something we heard from the prosecutors, too, that their inability to have the victim come in as often as they would like to build rapport and to make them comfortable enough to tease out all those important sensitive details was lost by this limitation, or attempted limitation, to just having one interview during the investigative stage.

The investigators also pointed out
that they were losing information as a result of this, since details about an incident are commonly gathered over time after a traumatic event such as the sexual assault. They also pointed out that follow-up interviews are the norm in the private sector during sexual assault investigations, something that I can testify before you as an absolutely 100 percent true statement. I don't know in 30 years that I ever handled a sexual assault investigation or supervised one in which there was not at least a second interview, and commonly three and four interviews, to tease out all the details.

The fourth thing the investigators pointed out to us that impacts on their ability to do thorough investigations is that they experience difficulties in obtaining needed and relevant evidence from the victims who file unrestricted reports of sexual assault. And I emphasize that because, as you all know, in the military, a victim of a sexual assault has a choice. They can file a restricted and
unrestricted report. We are talking about the necessary investigation that needs to go forward on an unrestricted report.

At several site visit locations, both trial counsel and investigators recounted cases in which victims, on the advice of their SVC or VLC, decline to turn over potential evidence to investigators.

The SVCs and VLCs that we spoke to, some of them openly acknowledged that they counsel their clients not to turn over, for instance, their cell phones to investigators, even when they realize that that cell phone may contain potential evidence.

Among the reasons that were offered by the SVCs and VLCs for this advice to their client were the financial loss to the victim when investigators retained the phone for forensic analysis, and privacy concerns over the vast amount of personal information that's typically contained on a smartphone.

However, the investigators told us
that both of these problems can be minimized if
not eliminated by modern forensic techniques for
imaging and searching cell phones, something that
I can tell the Panel is absolutely true. A cell
phone can be imaged in a matter of a couple of
hours, and it can take place while an
investigator is doing an interview. That cell
phone then can be searched with certain search
terms that narrow down exactly what the
investigator is looking for.

None of the SVCs or VLCs that we
interviewed expressed any concern that their
advice or advocacy could hamper the investigation
or prosecution of the case, and none seemed
concerned that keeping what could be relevant
evidence to an investigation could hurt that
case.

The investigators stressed to us that
the issue of searching a victim's cell phone or
other digital devices for evidence frequently
arises because the victim and accused are often
acquaintances who may have communicated by phone
or social media around the time of the alleged offense.

I think we all know that acquaintance sexual assault cases make up anywhere from 80 to 90 percent of sexual assaults, and therefore in 80 to 90 percent in these investigations, in today's world with the way people communicate, there is almost always going to be evidence of communication between our complainants and the alleged perpetrators in their cell phones and in other kinds of digital devices.

The investigators pointed out that in addition to communicating with the alleged perpetrator on these digital devices, that a victim often will have contacted someone else, a friend, a family member, close in time after the assault took place. And because as we know that delays in making an official report occur in these cases quite commonly, that initial outcry, we call it -- in my business, we call those recent outcry witnesses -- that initial outcry can form real corroborative evidence of what the
victim says happened, both in the content of the
text messages -- I've often seen victims who take
pictures of their injuries and send that picture
to someone else at that time.

If that report is delayed so long that
that evidence no longer exists on the victim's
cell phone, we may be asking that witness for
that cell phone because we find it there. That's
how important it is to get this kind of
corroborative evidence. So this is really
crucial evidence.

The investigators explained to us that
they continue the investigation without access to
this evidence, and that they have seen the
negative consequences of this. One agent
described a scenario that I have seen personally
and that we can all realize makes perfect sense,
the outcome of this, that when the phone didn't
get turned over and the victim was on the stand
for the first time, the victim was confronted on
the stand with text messages that the alleged
perpetrator had turned over to his counsel. The
prosecutor had no knowledge of those text
messages.

They were hard to explain for the
victim on the stand given her testimony about
what had just happened, and it resulted in
negative consequences. And I don't just mean
these kind of things result in acquittals, which
are of course a very negative consequence when
you have a real sexual assault, but I've seen
this: you see the pain of a victim of a sexual
assault having to deal with that kind of
difficult confrontation -- and that is a
confrontation at a trial. That is not a
sensitive question that's getting asked by a
defense attorney at the trial. That is a
confrontational question in front of a jury, and
maybe a whole group of other people, about
something that the victim did not disclose.
Perhaps there's something embarrassing, but
oftentimes I felt, in my experience, that if I
knew about it, we could talk about, "Why did you
say this after the sexual assault. Why did you
say you want to see someone again?" Which is a very common thing in an acquaintance sexual assault. Oftentimes, a sexual assault victim wants to confront the person who assaulted them. "Why did you do this to me?" So they need the time to think about what they said, prepare with the prosecutor to answer that question, and then answer the question, and oftentimes we lose that ability when the first time it's coming out is on cross-examination at trial.

So I go back to this is part of the reason it is so incredibly important in a sexual assault investigation or investigations to be as thorough as humanly possible and to get out all the facts and circumstances, all the evidence, give that to the prosecutor so the prosecutor can best prepare a victim to testify at trial, which is the best way to win these cases.

The fifth thing that was pointed out to us that is impeding the investigators' and the prosecutors' ability to be as thorough as possible, and therefore best prepare these cases.
for trial, is that there still seem to be some
tensions in the prosecutor/MCIO relationships.
Prosecutors and investigators repeatedly
described tensions in their working relationships
with one another.

The trial counsel did generally agree
the coordination on sexual assault investigations
has improved over the last couple of years, but
many still complain that investigators are all
too often to decline to follow up on what they
see the prosecutors as important leads. For
their part, the investigators express the view
that many requests for additional investigative
activity from trial counsel they feel are
unnecessary or are difficult for an investigative
unit that is already overburdened and
understaffed to execute.

Some prosecutors venture that these
difficulties may be the result of internal MCIO
protocols that stress timely completion of
investigative tasks and pressure agents to close
a case as quickly as possible. In the same vein,
though, prosecutors noted that they do feel investigators are reluctant to reopen a closed case except to document newly received lab results or a similarly significant event.

Internal MCIO policies were not clearly defined to us in our site visit, but some agents did mention internal deadlines of six months to close a case in one Service, 90 days in another Service. I think it's important to note that they close a case, MCIOs, when they find probable cause that the alleged sexual assault has occurred.

We all know that probable cause is a very minimal standard. It is nowhere near the standard that a prosecutor has to meet to be successful at a trial. So if our MCIOs are closing their investigations just having developed enough evidence to find probable cause, they may not be -- and this is what the prosecutors said, that they are not -- assisting the prosecutor in building enough evidence to prove a case beyond a reasonable doubt.
The last thing that -- the sixth and last thing that we were told that impacts on the ability to do a necessarily thorough sexual assault investigation is the length of time that it takes the forensic labs to develop and to report back forensic results. Several prosecutors and investigators raised this issue of delays to us in our site visits.

At one installation prosecutors reported that they typically wait at least six months for DNA results, for instance. The Subcommittee members were told that DoD labs generally prioritize cases that are pending court-martial, but notifying the lab that a court-martial is pending does not even necessarily result in expeditious testing.

What this does mean, however, is that your investigators are not getting that information prior to the decision being made to go ahead to court-martial. And this is often important. Whether it's DNA results or it's a result from cell phone or digital device
analysis, this is important evidence to be assessed to decide whether you should even be going forward to a court-martial.

So we also examined, in addition to the information we heard at our site visits, we examined some other sources of information. And I'd like to remind the committee of information that they heard in April of 2016. You all examined how MCIOs and other stakeholders in the military justice process were interacting with their SVCs and VLCs and address some of the issues identified, that I just identified.

You heard testimony in April of 2016 from senior officials within each MCIO regarding the impact of SVC/VLC representation and corresponding policy on sexual assault investigations.

These witnesses echoed for you the same concerns that the Subcommittee members heard at our site visits regarding the investigative delays caused by SVCs and VLCs, and noted that the policies continue to evolve to accommodate
SVC and VLC representation.

The JPP presenters also acknowledged that it is difficult to assess the impact in these delays on the overall quality of the investigation, and that these issues have become less pronounced over time. I'd also like to remind the JPP that the RSP also looked into this issue, and they examined the thoroughness of sexual assault investigations.

And on this subject, in 2013 and '14 they heard from prosecutors who at that time voiced concerns similar to those raised during the JPP Subcommittee site visits this past summer. The concerns about the premature closing of sexual assault investigations was particularly addressed to the RSP.

The RSP noted the disagreements between trial counsel and MCIOs, the same kind of disagreement that I just mentioned. And they stated at that time, according to MCIO agents, investigators complete thorough investigations following all logical leads prior to reaching any
conclusions. Military prosecutors, however, provided mixed reviews of the quality of MCIO investigations and often felt additional investigation was necessary.

Military prosecutors also conveyed that investigations are considered closed when they are passed to the commander for review, and that it's difficult to reopen cases for further investigations. Again, this is exactly what we heard this summer in 2016.

On the basis of what the RSP heard, they made a recommendation. It's their Recommendation 94A, and they recommended that the Secretary of Defense should direct MCIOs to standardize their procedures to require that MCIO investigators coordinate with trial counsel to review all the evidence and annotate in the case file that the trial counsel agrees all appropriate investigation has taken place before providing a report to the appropriate commander for a disposition. Neither the trial counsel nor the investigators should be permitted to make a
dispositive opinion whether probable cause exists.

We did hear in our site visits that this kind of coordination is taking place. The investigators are talking to the prosecutor before they make the determination that probable cause exists. But that's where it stops, and that's where the problem is, in the Subcommittee's opinion, is that these investigative resources need to be available to the prosecutors throughout the pendency of a case, indeed, I would say, throughout the trial. Things come up actually during a trial that you need an investigator to go out and investigate.

And in fact, the RSP recognized this, and in their Recommendation 94B they said, "to ensure investigators continue to remain responsive to investigative requests after the commander receives the case file, the MCIO commanders and directors should continue to ensure investigators are trained that all sexual assault cases remain open for further
investigation until final disposition of the case.""

The DoD did not adopt these recommendations, but they have referred them to various working groups within the military. At present, the MCIOs have to include in each investigative report the commander's decision whether probable cause exists to believe an offense was committed, as well as the appropriate disposition for the case, and to include information they must either leave open or reopen these cases.

Finally, I'd like to remind the JPP that the RSP's Comparative Systems Subcommittee examined processing times at military and civilian crime labs, and at that time heard testimony that the average time, turnaround time was 77 days. That's not what we heard on our site visits, as I stated, that that turnaround time varied anywhere from 90 days in a good case to over six months.

Witnesses noted to the RSP that the
time frame was dependent on several factors such as lab resources, current caseload, and the amount of evidence to be examined to a request.

So what are the Subcommittee's assessment or recommendations based on these six issues that were pointed out to us by the people we interviewed in our site visits that affect the thoroughness of investigations? In the wake of Congress' emphasis on sexual assault cases, DoD and MCIOs have written numerous policies designated to enhance the quality of sexual assault investigations.

Unfortunately, most MCIOs' specific policies are not publicly available, owing to the sensitive nature of the investigative methods. However, the Subcommittee repeatedly received comments during our site visits to the effect that investigators today have reduced access to evidence and to victims, but are responsible for investigating a broader spectrum of misconduct than ever before. Their investigations all carry more administrative burdens, such as duplicative
reports and forms, yet now contain less evidence owing in part to their own internal policies and practices regarding victim interviews.

Because of the strain on investigative resources, and for all the reasons that I've just discussed with you, some investigators resist undertaking, or simply are unable to do, the additional investigative work necessary to fully prepare a case for prosecution.

Further complicating the completion of a thorough investigation is the method of SVC/VLC advocacy that restricts the information that investigators and prosecutors can gather from victims.

Before I go on, I want to say that all of us on the Subcommittee recognized all the beneficial things that SVCs and VLCs are doing for the victims of sexual assault, the support their giving them, the information they're giving them, the knowledge that they're giving them, and don't want to take away from that at all.

But we do feel that, perhaps with
further training and education, that the SVCs'
input to the victims and advice could be modified
in a way that will make investigations more
thorough, that will make them more effective and
will result in better prosecutions, which of
course in the end is the best thing for a victim.

As I said, we heard from investigators
that they're likely to be the second or third
person the victim speaks to about an offense, and
they can only talk in the presence of the
victims' attorney, who may limit the breadth of
the inquiry or even advise the victim not to
speak to the investigator more than once.

The victims' decision to act on the
advice of his or her counsel is, as I said, not
inherently problematic. Rather, the problems
occur when, on the advice of counsel or on their
own, the victim limits their own participation or
fails to provide investigators with evidence
relevant to the investigation.

Even when the SVC/VLC provides the
investigator's question to the victim and
communicates the response back to the investigator, the investigator is losing valuable information because she or he is unable to personally observe a victim's demeanor or reaction an investigator's question.

Moreover, investigators may not fully comprehend or have additional questions based on the written or verbal responses of an SVC/VLC who does not allow the victim to be questioned directly after the initial interview. Denying follow-up interviews therefore prevents investigators from fully exploring and understanding what could potentially become very important issues in a case.

When a victim either declines subsequent investigative interviews or refuses to turn over relevant evidence, such as photographs, text messages, social media information, investigators and prosecutors make decisions about investigating and charging cases without processing all available evidence.

There's a general sense among the
investigators and the prosecutors that we interviewed at the site visits that they must press forward without a victim's full cooperation, and that that is an approach that raises concerns about the fairness of an investigation, but also about the overall fairness of a prosecution.

And as I said, they also expressed the concern that this severely impacts on their ability to achieve a positive result at trial on cases of sexual assault.

The Subcommittee heard a number of reasons why victims might not cooperate with requests for cell phones, concerns from not having access to their cell phones for an extended period of time to concerns about the privacy of information in their phones.

However, the Subcommittee heard from investigators and others that these kinds of concerns are misguided, and that in fact they can be accommodated with what is today's forensic examination techniques.
Case delays take many forms, and waiting on forensic lab analysis was one raised by our investigators and prosecutors alike at the site visits. Forensic evidence, as I stated, can yield important critical information, and the sooner an investigator or prosecutor has this information, the better the investigation, the prosecution, and ultimately the trial is going to be.

So we make the following recommendations and findings. It's delineated as Recommendation 2 in our report. To ensure prompt initial victim interviews, we find it is critical that the initial interview of the victim by MCIOs or other law enforcement agencies be conducted promptly after MCIOs receive a report of sexual assault.

Yet the Subcommittee heard frequent complaints that the MCIOs' initial interviews were being substantially delayed, often because Special Victims' Counsel or Victims' Legal Counsel were unavailable to attend the interview.
The Subcommittee therefore recommends that the Secretary of Defense take the necessary steps to ensure that Special Victims' Counsel and Victims' Legal Counsel (1) have the resources to schedule and attend the initial victim interview promptly after a sexual assault report is made, and (2) that they receive the training necessary to recognize the importance of a prompt victim interview by the MCIO to an effective and just prosecution.

Delineated Recommendation 3 in our report regards removing impediments to thorough victim interviews. As you heard, the Subcommittee heard complaints from MCIO special agents interviewed that there are various impediments that prevented or discouraged them from conducting victim interviews that were as thorough as they consider necessary.

Specifically, they felt procedures and policies discouraged or prohibited investigators from asking any question that could be perceived as confrontational during either the initial or
the follow-up interview, even when in their professional judgment such questions were vital to address conflicting statements given by the victim, or other evidence contradicting the victims' account. They also felt their investigations were impeded by policies and procedures that discouraged them from conducting follow-up interviews.

The Subcommittee accordingly recommends that the Secretary of Defense identify and remove these and any other identified barriers to thorough questioning of the victim by MCIOs or other law enforcement agency.

Our Recommendation 4, regarding examining and removing impediments to MCIO access to tangible evidence. The Subcommittee heard numerous complaints, as I told you, that investigators have difficulty obtaining evidence from the victim, particularly information on cellular phones or other digital devices. Investigators said the reasons that victims and/or attorneys gave for not turning over these
devices include financial loss to the victim while investigators retained the phone for forensic analysis and privacy concerns over the vast amount of personal information typically contained on a smartphone.

These concerns, while legitimate, can be minimized or eliminated by modern forensic techniques for imaging and searching digital phones. Therefore, the Subcommittee recommends the Secretary of Defense examine these problems and develop appropriate remedies that address victims' legitimate concerns and ensure that sexual assault investigations are complete and are thorough.

Finally, Recommendation 5 regarding reducing delays at forensic laboratories. The Subcommittee heard, as I told you, complaints from MCIOs and prosecutors that the length of time it takes to obtain results from forensic laboratory testing of evidence impedes the timely completion of sexual assault investigations.

Therefore, the Subcommittee recommends
at the Secretary of Defense review the resources, 
the staffing, procedures and policies at forensic 
labs within the DoD, to ensure more expeditious 
testing of evidence by forensic labs. That 
concludes, ladies and gentlemen of the Panel, the 
testimony that the Subcommittee would like to put 
before you this morning, and we're now available 
for any questions you might have about the 
material that we just discussed.

CHAIR HOLTZMAN: Thank you very much, 
Ms. Friel. I apologize to the members of the 
Panel and the public for not introducing the 
other distinguished, outstanding and experienced 
members of the Subcommittee who are before you 
today, starting with Ms. Laurie Kepros, Ms. Jill 
Wine-Banks and Dean Lisa Schenck. We really 
appreciate your presence here and your 
contribution to the work of the Subcommittee, and 
thank you very much, Ms. Friel, for your 
presentation.

MS. FRIEL: You're welcome.

CHAIR HOLTZMAN: We'll start with
Judge Jones.

JUDGE JONES: I just want to thank you for that very thorough presentation and also, even though I am a member of the Subcommittee, I think I can still thank all of my fellow Subcommittee members for the tremendous amount of work and thought that they put into this. I don't really have any questions with respect to the Subcommittee report on this issue. Thank you.

CHAIR HOLTZMAN: Mr. Taylor.

PROF. TAYLOR: Yes. Thank you very much. I'd like to start by thanking Judge Jones for her leadership on this Subcommittee. It certainly represents a great effort on the part of you as well as your committee members, and thank you Ms. Friel for this wonderful report, as well as those who accompanied you and assisted you with this.

I do have two or three questions that I hope to tease out some things that seemed a little, at least in my mind something that we
ought talk about a little bit, and that is I noticed that the draft DoD policy still called for the initial interview to be conducted by an MCIO investigator.

I'm curious about your thoughts of how much risk would be assumed if in fact the initial investigation, the initial interview excuse me actually could be conducted by a trained law enforcement officer, assuming that the allegation is something that's relatively minor in the big scheme of things like an offensive touching in the form of a kiss. So is that risk that we should be able to assume in order to move the more serious investigations farther ahead in the queue?

MS. FRIEL: I think that one of the reasons that DoD's IG made that recommendation was dual concern that I saw in civilian life as well, is that if the initial interviewer does not recognize in that initial interview that there is more to that case than just what appears, for instance, to be a simple contact case, that that
case may stay and proceed through the system as a simple contact case when in fact it might be an attempted more serious sexual assault, and that is something that we saw.

I know that information was presented to the various committees that have addressed this issue. So I think that's what the IG was getting at with that. That doesn't mean that there may not be cases that are so obviously just what they are. To give the example of something known as a contact case, someone grabbing another person's buttocks as they go by. There would not appear to be any more to that case than that, and that might be a category of cases that could be left initially to a different kind of investigator.

The problem is that when it becomes more than that, it becomes sometimes difficult to say was that just that kind of contact, or was that the beginning of a more serious sexual assault.

So I think that's what the IG was
getting at when they thought let's have our best
investigators, our best trained investigators,
our MCIOs, let's have them do the initial
interview at least, tease out those details and
then if it turns out as just that simple case,
then they should be able to let a different kind
of investigator take that forward for additional
investigation.

PROF. TAYLOR: Do you know whether as
part of the training for most MCIO investigators,
they are at least thinking at the same time
they're receiving the initial complaint about the
possibility that this same kind of activity may
have happened to other people? I know for
example in overseeing senior official
investigations for many years in the Pentagon,
that often a person was a serial offender.

So is part of the idea that you don't
just talk to the victim, but you find out from
the victim whether he or she might be aware of
similar instances that have happened to others?

MS. FRIEL: Yes. I think that's
absolutely true, and I'm so glad you said that, because if you remember at the beginning of my answer I said there's a dual reason for it and then I forgot to mention.

That is, the second reason that you'd like your more experienced investigator in the civilian world. We would have wanted our special victims detective to tease out that information because they're more apt to ask about it and to see if there's a pattern going on.

PROF. TAYLOR: Right. Regarding your third recommendation, when you were talking about the policies and procedures that MCIO investigators told you that they felt inhibited their work, did you have a chance in your Subcommittee to actually review the training given to MCIO investigators on this question of the extent to which confrontational questions might be used and how they might be used, so that there is actual policy out there that needs to be changed, or do you think this was more of a cultural phenomenon in terms of the interest that
we all are correctly focusing on victims at this point in time?

MS. FRIEL: We did not have an opportunity after we heard about this issue on our site visits to obtain policies or to get testimony actually on those policies, which is exactly what led us to recommend that the DoD identify and remove any identified barriers, because we did recognize, as you say, that we didn't have that other information.

We're just pointing out that we heard that across every site with investigators, that this is an issue for them or at least it's a perceived problem, and whether it's due to policies or as you point out just a feeling about the atmosphere, they all discussed it and in our professional opinion on the Subcommittee it is a real problem if they can't ask all the necessary questions and be as thorough as necessary.

PROF. TAYLOR: And of course the reason I ask is that it may be that this is not so much a question of policy as a question of
sensitivity in terms of how the training is being
delivered and the manner in which it's being
received, and how it's being actually implemented
when it gets to the field.

So it would be interesting to see what
that results in. So I do agree with the
recommendation, but I was just curious if you
could actually identify any policies or
principles.

My last question for now is that it
seemed to me that investigators could get a
search warrant if they wanted to, to get access,
for example, to a smartphone. Assuming that the
probable cause standard is met, assuming that the
victim decides on the advice of counsel not to
turn over the phone, did you come across
instances where MCIO investigators had said that
they had sought and been unable to get a search
warrant in a situation like this?

A commander's authorization would be
the military term for it, or was the general idea
okay, if he or she doesn't turn over the phone,
I'll just live with it, figure out what to do next?

MS. FRIEL: And I'm going to ask my Subcommittee members to weigh in on this, because I don't have perfect recollection of everything said at the site visits and didn't go on all the site visits. My recollection is we heard that it's burdensome administratively to get a search warrant, that by the time if they do go that way and get a search warrant, oftentimes they've lost important evidence because they've already asked the victim for that cell phone and that cell phone may no longer be available to them by the time they get a search warrant.

Certainly we heard from some people that they feel it's so burdensome and that they are not going to get a search warrant that they don't even ask. But I do want to open it up to my other Subcommittee members, and they may also have some information on the last question that you asked me.

MS. WINE-BANKS: I think part of the
problem that was raised was that it's often denied, and so they were very discouraged from going for search warrants. The other part, going to your earlier question, I think there was some testimony about being taught that there are limits to what you can ask, and they are being trained in only investigating a certain way, and that that was leading to part of the problem.

So that in terms of how they're taught not to be confrontational was more than just a discomfort with it. It was part of what they were taught.

DEAN SCHENCK: I'd also like to respond to the issue of the search authorization of the commander. The investigators have got to have probable cause to believe that there's going to be evidence of a crime in that phone, and victims generally don't -- that it's not usually a crime unless it's underage drinking or other, you know, tangential offenses.

So it's very difficult for the commanders to say there's probable cause to get
that phone from the victims. The accused, you know, a little easier.

MS. KEPROS: Can't miss an opportunity to chime in. The other thing I wanted to --

MS. FRIEL: She's a lawyer after all.

MS. KEPROS: Right. I think there's also interplay between the two topics that you've raised for us. One is that sensitivity topic and the other is search warrants, and I think there is a lot of concern about not making the victim feel in an adversarial position, and that a search warrant would certainly create that kind of dynamic.

And so considering that we have, for example, restricted versus unrestricted reports, and there have been very concerted efforts to put the victim more in control of what the process is going to look like in some respects, that even that act of turning to that sort of authoritarian solution may be undesirable, even if there is a loss of evidence.

That's partly why we think it's very
important that considerations like thorough understanding for the victim of how things can be done in a respectful way, what some of the potential consequences of lost evidence could be, that that's why those, you know, rapport-building opportunities, all those things become so important in terms of the ongoing progress of the prosecution, the investigation and the victim's entire dealings with the justice system.

PROF. TAYLOR: Yeah, just building off that question, again just to -- it seemed like just a few years ago, it was a few decades ago when I actually had the responsibility for prosecuting some of these types of offenses.

I thought that one of the keys of getting MCIO investigators to cooperate with you as a prosecutor was simply building that kind of rapport and having that kind of relationship, and I'm sure that Dean Schenck would probably echo that, that part of this is a matter of interpersonal relationships.

But even so, did you see instances
where because MCIO investigators were unable to unwilling to assist, that the prosecution ended up using paralegals or perhaps an assistant trial counsel, assistant prosecutor to go out and interview witnesses or follow up on leads as work-arounds, and overall is that a good work around if that's what's happening?

MS. WINE-BANKS: You hear much more about the defense having to use paralegals and not having the investigators. I can't think of any instance where somebody said that they had to use paralegals.

CHAIR HOLTZMAN: You mean trial counsel.

MS. WINE-BANKS: Trial counsel, yeah.

MS. FRIEL: Yeah, I can't either.

DEAN SCHENCK: Yeah. I didn't hear anything about that either. I think the prosecutors, because the MCIOs had so many cases that the prosecutors had to do a lot more hands on with those investigations, to try to move the cases that they thought were important along. So
there was some conflicts about first in/first out
or, you know, this is definitely clear cut.
Let's move it along and get it to trial.

So they just had a different agenda,
I think, and that's why the prosecutors were more
hands on about go out and investigate, ask this
person, this person, this person. So I did not
hear anything about sending out assistant trial
counsel or anybody in the office for those kind
of matters.

PROF. TAYLOR: Thank you, Madam Chair.

CHAIR HOLTZMAN: Mr. Stone.

MR. STONE: Thank you. I guess the
first question I'd like to ask Ms. Friel, because
I don't really understand it. But let me start
by saying I think that the five recommendations
are good recommendations on their face. I don't
-- so let me start there.

I'm fine with having, you know, I
think it's a good idea to have a prompt interview
set up and if there's other impediments to them,
remove them to the interviews or impediments to
tangible evidence or delays at forensic laboratories.

So I don't have any problem with those at all. I guess I didn't understand and I don't understand if those are the recommendations from your Subcommittee, how those relate to the other recommendations that are before us for discussion today. Just for example Recommendation 43, that says, and based on your Subcommittee's results, "In order to ensure the fair administration of justice, all the Military Services provide independent and deployable defense investigators under their control in sufficient numbers so that every defense counsel has access to investigators as reasonably needed."

I don't understand how these five you just made, do they supersede 43 and 44 and 45 and 46? Are they somehow supplemental to them? I don't -- why don't you tell me how they relate.

MS. FRIEL: They neither supersede nor supplemental. They are additional recommendations made regarding our findings with
regard to defense resources. I don't see them as supplemental or superseding.

In our last report, we set out for the Panel what we heard in terms of defense resources and our recommendations based on that. So I would just say these are additional recommendations about a separate area, about the ability of the MCIOs and prosecutors to do investigations.

MR. STONE: Okay. Now I'll tell you the reason I asked that question is when I looked at the earlier recommendations, which suggest that the MCIOs are not doing a job that satisfies the defense counsel in a variety of ways, and these recommendations that say the MCIOs are not satisfying the prosecution counsel in a number of ways, it led me to the conclusion, which I didn't see in here but I find almost inescapable that perhaps today the MCIO organization, the way it was set out in the past, is not tuned, fine-tuned enough to continue serving in that manner because now the number of sexual assault prosecutions is
probably half of all the prosecutions.

   It's taking up a huge burden of their
time, and it sounds to me like we're trying to
fix little pieces of a bigger system that ought
to be looked at.

   Maybe the defense should have their
own investigators, the prosecution should have
its own investigators, and there should also be
investigators available also on demand or on call
to the victims counsel, because the old system is
not serving really anybody in the way that they
would like.

   I guess it was -- did the Subcommittee
ever consider saying maybe it's time to ask to
have this whole system of MCIOs reexamined? I
know you build a bureaucracy and people have a
vested interest, but it sounds from these pieces
like it's out of sync with where the military
sexual assault prosecutions, which is a huge
percentage of the prosecutions, has taken us.
Did you get to that? Did you consider it?

   MS. FRIEL: So let me respond and
say, first I'll address something you said later
and then go to the earlier part of the question.
We did not hear from any of the SVCs or VLCs that
we spoke to, none of them expressed a desire to
have their own investigators.

So I'm going to address now what we
did hear. It's prosecutors who need more
investigative resources, defense counsel who need
investigative resources, and the present
investigative resources saying that they are
severely strained.

So we did look at, overall, what is
causing this problem, and I mentioned some of
them today and my colleague, Ms. Kepros,
mentioned the strains for the defense in our last
presentation. So we did look at it more
globally, and we think that as you point out, one
of the biggest strains on the MCIOs as resources
is the explosion of sexual assault cases over the
last number of years.

It's a good explosion. It has to do
with better reporting. It means that people are
more trusting of the military justice process to come forward and make these reports and that they'll be handled sensitively and appropriately. But that has left your MCIOs with a much greater caseload than they ever had before.

In addition, what's also added to that caseload is something I identified earlier, is the change in 2013 that told the MCIOs, those agencies, that they have to investigate every kind of sexual assault, every sexual contact case and that definition, as we said, got broader for a number of years and it's still going to be broader until about June of 2017.

That is severely straining all their resources. So I do think that we have to look at it as a resource thing. Whether you say it's an overhaul or whether you say it's an examination of do they have enough people to thoroughly and adequately investigate these cases, I think we're saying the same thing.

But I do think the defense resources is a different thing. I think part of the reason
that they don't have all the investigative
ability that the Panel or Subcommittee of the
Panel thought they should have is what I just
said resources, but it's also that they need an
investigator who was working for the defense
attorney who -- we have a system, whether it's
military or a civilian system, that has two sides
in a case, who are looking to do two different
things.

So you do your investigation from that
perception, and I think it's very important for a
defense investigator to have an investigator who
is theirs, who they can discuss their case with
confidentially, and can send that investigator
out, who may have a different kind of open mind
about looking for information than an
investigator who is working on the other side
might have.

That's of course as you heard and you
know, that's the way the civilian system works.
The defense attorney does not use the police
detective to do their investigations. It would
be unheard of.

MR. STONE: Well that's why I asked whether you would -- your suggestions, you know, go towards whether or not there should be an overall rethinking of what the MCIOs do. We did hear as a JPP Panel -- well you might not have -- we did hear as a Panel SVCs tell us that they don't have investigators in those individual cases where they might want one.

For example where their victim, their client says I think this same defendant engaged in the same behavior with his prior girlfriends, and the prosecution may say well, that's not something we're looking into here, unless you've got hard evidence of that, and only the sexual assault counsel is able to get enough detail from his client to maybe ask somebody to investigate that, even if it's a limited investigation.

MS. FRIEL: As I said Mr. Stone, we didn't hear that. But one thing I would say, listening to what apparently the Panel heard, is that's concerning to me to hear that it's the
Special Victims' Counsel who is the only one with access to enough information, as you say, to send out an investigator to do the kind of thorough investigation that should get done.

That's part of one of the issues that we brought up, is that I think it's, and the Subcommittee thinks it's extremely important for there to be a rapport with the prosecutor, such that a victim feels comfortable enough to reveal all the details that they have in their possession that are relevant to the investigation and the prosecution. That seems to have been impacted recently, so we heard.

MR. STONE: Have you in the past had legal cases where you had a victim's legal counsel involved, you personally?

MS. FRIEL: Yes. Not called victim's legal counsel, called their civilian attorney.

MR. STONE: I mean I certainly have, and I guess I don't understand, or I think it's an overstatement when you said before what -- that the two sides want different things. There
are three sides involved.

One of them is the victim, and because this is a closed military system, my opinion -- the opinion that I think I've heard from people over the last two years -- is that sometimes the victim knows that going forward is going to embarrass them or change their career in such a way that it will effectively end their career in the military, either from other members of their unit who don't like that the unit's morale was wrecked, or just simply because people are going to feel that they were a tattle-tail or they should have kept their mouth shut, or that this affects their own personal loyalty.

There's an inordinate number of ways, and it's totally unlike the civilian situation that occurs in schools, where they can leave that college and go to a different college, or in the regular civilian world, where people just decide to pick up sticks and move away and avoid that ongoing effect, which here they're going to have even if they opt for a transfer and wind up
having to be somebody at someplace else in the military that affects their career.

            The result is, and I see this in the civilian world where they have options, victims say to me if this testimony or this evidence, it could even be that they're, you know, it could be a text on their cell phone that they find embarrassing. It may or may not be accompanied by pictures they shouldn't have taken of themselves partially or completely unclothed.

            If that's going to go in, then I'll just eat this thing. I'll forget about it. I don't want this to go forward, and they have the right to do that. All these comments about it will be a more effective investigation and you might get to a better results, that's as you pointed out purely legalistic, and that sets aside the feelings that the victims have about whether or not they will come forward.

            To the extent and in the past this wasn't recognized, that they have an interest in this, such that they won't come forward but we do
want their problems counted, we're just going to wind up with more restrictive reports, if that -- if they even provide a restricted report.

So I think it's in some sense it's very paternalistic to say that the victim counsel doesn't know what they're doing and shouldn't be explaining to their client, whose only interest they have at stake, what it means if the client doesn't wish to provide every bit of recollection they have or evidence they may have, and they prefer to go forward without it.

I am sure, because I know I have done this, I said to those victims you understand this I think is likely to come out a trial, and you may be embarrassed with it at trial if you're cross-examined, and they say well, a ten percent chance that it doesn't come out is preferable to me than a 100 percent chance. That's the choice I want to make.

I tell them I don't think you should make that choice, but that is their choice. So you know, hearing that you think that victims
aren't always the most forthcoming or that they
need to have a rapport with the prosecutor
misunderstands the nature of the fact that their
attorney-client relationship is not with the
prosecutor; it's with their own counsel.

Most of these cases that you point out
relate to serial episodes and a hostile
workplace, and a woman who's patted on the butt
every day and sometimes several times a day,
because the other individuals in the unit think
they can get away with it -- which is intended to
drive her out of that unit -- is a very serious
offense that requires serious consideration.

Now, you've pointed out that the OIG
is trying to train people so they can assist the
MCIOs, and I think that's absolutely required.
But I don't want to see us go back in time to
when victims had no control at all over how they
were going to be dealt with in the military, and
the result is they didn't come forward at all.

So no, I don't think there's two sides
here. I think there's three sides. I don't
disagree with these five recommendations you make
because I think they're all good. But I do think
that your analysis that you just gave before is
somewhat short-sighted. Thank you.

CHAIR HOLTZMAN: Admiral.

VADM TRACEY: Thank you for your
report. I think I understood that an MCIO who
needs to re-interview the victim has to get
approval from a supervisor to conduct that
interview?

MS. FRIEL: Yes, that's what we were
told.

VADM TRACEY: Is it likely that the
supervisor has the same training as the MCIO does
with regard to sexual assault cases?

MS. KEPROS: I can speak to that. I
heard that reported to us, so that seems to be
true, that the people who are supervising units
that are handling these kinds of cases have been
in the trenches and had the same training and are
now managing that unit.

VADM TRACEY: And you may not know
this, but some of this training is relatively recent vintage, and if I'm the supervisor, is it likely that I've had to get retrained on the current status?

MS. KEPROS: I can't say this is representative at all, Admiral, but I know we heard from at least two supervisors that have sort of had their training tuned up, so that they are consistent with practices that are being embraced at this point.

VADM TRACEY: You also said that -- I think you said that you were not allowed to review the policy or training materials or procedures of the MCIOs because they're sensitive?

MS. FRIEL: I said we didn't see them because they're sensitive. They're not publicly available. I don't know if we're not allowed or not. I'll refer to our staff.

MS. PETERS: Right. We would have to make a specific request, but traditionally they're not publicly available. CID's internal
regulations are not something we can --

VADM TRACEY: And if you look at them they become publicly available?

MS. PETERS: It depends on who does see them and the nature of how we wanted to handle that. Certainly any information brought to the Panel would then become public.

VADM TRACEY: Okay. Of the recommendations that you made, which of them addresses the prosecutor/MCIO tension that you described?

I think Mr. Stone's discussion of the fact that we heard from defense counsel that they believe that trial counsel has extensive investigative resources available to them, as well as SMEs and is it the MCIOs who are their investigative resources, or can they spend money on other kinds of investigative resources?

MS. WINE-BANKS: I think what we heard is that they can ask the MCIOs through the trial counsel, but number one, it then goes to the trial counsel. So they don't --
VADM TRACEY: I'm sorry. I'm asking about the trial counsel.

MS. FRIEL: You're talking about the trial counsel?

VADM TRACEY: I'm trying to balance what I thought I understood, which was that trial counsel had access to investigative resources. Is that just the MCIOs, or are there other investigative resources that trial counsel can tap into?

MS. FRIEL: We just heard about MCIOs, and while theoretically they have access to them throughout the system, in practical effect they all told us that the minute the MCIO closes the cases, having found a probable -- enough evidence for probable cause, that it's extremely difficult to get them to do any more work, and for a combination of reasons.

But it seemed like the biggest reason at least that the prosecutors thought was involved is that they're totally overburdened and just have too much work to do, and so resist
doing additional work for them that the prosecutor feels is really necessary.

MS. KEPROS: I agree with that. It's what we heard in the field site interviews. I wanted to mention in our subsequent research, we have learned that in the special victim capacity, there are some dedicated prosecution investigators. It is Service-specific. It is not a widespread, system-wide policy. But there is a model for that that exists and that is utilized in some Services.

VADM TRACEY: But which of these recommendations do we think addresses this issue of an MCIO policy that drives them to close an investigation at the probable cause threshold, and there is the belief that there is an ongoing need for investigatory resources for the prosecutor?

MS. FRIEL: I think our recommendations that has to do with reducing the burden on the MCIOs would go towards that, since that was identified as one of the biggest reasons
that the prosecutors feel that the MCIOs resist
doing additional work after they initially close
a case.

VADM TRACEY: Okay. So without
access to the policies and training, we don't
actually know whether that's the policies, that
they shut them down at the probable cause
threshold or whether it is a matter of
prioritization then. So we don't actually know
the answer to that?

MS. FRIEL: Correct. We did hear
reference to some of these time limits, when can
stuff be closed, certain thresholds. We don't
have the policies in front of us. I think to
answer your question as well, I agree with Lisa
that 1 does go to that. Recommendations 3 and 4
do as well, because they have to do with the
ongoing relationship between trial counsel and
obviously access to the victim, whether it's
through the MCIO or some other means.

VADM TRACEY: It seems to me that
we've done a lot of hard work to improve the
approach to sexual assault cases in a set of stovepipes. Just listening to you, it seems as if there's some critical areas in which there's not a shared view of what the objectives are here.

Do these stakeholders ever have to go through a shared training regime, a shared training regime, not their parallel training regimes, ever get in a session together where they're reviewing the effectiveness of what we're doing and the effectiveness of the changes that had been made to your knowledge? Is there any attempt to integrate across?

You referenced it in execution it's an adversarial process, but they have a common objective here. Is there any?

MS. FRIEL: I totally agree there's a common objective, and in the civilian world we did exactly that kind of, you know, cross-training of getting everybody involved to understand what the other sides did, so they could most effectively deal with what they were
doing. But I don't have the answer --

DEAN SCHENCK: I did hear some MCIOs say they did go to courses where there were prosecutors, but they weren't the prosecutors they're working with. So they went to the federal school, FLETC, and there may have been prosecutors there. So they were in the audience, and some of the JAGs said they went to courses where there were investigators.

But there was never like all Army investigators, Army JAGs attending the same conference, you know, at the JAG school for example.

MS. WINE-BANKS: Admiral, I think actually we didn't hear that the existed, and it might be a very good idea because the stovepiping that you reference has been a problem, where investigators do not report to the prosecutor. They report to the top, the investigation head.

So they follow those rules and don't always understand when the trial counsel says I need an additional thing or I just heard
testimony during trial and I need to rebut that.
I need you to go out.

They're not available to do that. But maybe with a common understanding, that would be helpful and if there was a common training that might be a good addition.

DEAN SCHENCK: We have a pending report on training, so we could address that issue when that -- when we submit that report.

JUDGE JONES: I'm sorry. I was just going to say that the testimony that we heard about the special victim capability was obviously an effort to have the investigators in the same module or whatever you want to call it with the prosecutors, so that there wouldn't be a problem if a prosecutor wanted a little bit more done in that special victim capability.

They're there, they're an integral part of the unit, and so they don't have that issue or complaint. Again, it's -- I was under the impression it was a pretty well established program, but I can't tell you in which of the
Services or, you know, how much. But special victim capability was something we heard a lot about. Maybe we should go back and do a little research on it.

So I mean I think that was one effort to get to this problem, and I think barely that we really don't -- we didn't really do it as a subcommittee, how do we increase or better communications between the NCIS and individual prosecutors. We just never got there.

CHAIR HOLTZMAN: Admiral, may I ask a question about your question?

VADM TRACEY: Sure, okay.

CHAIR HOLTZMAN: Are you, because I thought it was even broader than the trial counsel issue, that what you're saying is -- and it related to a little bit to what you were saying, Mr. Stone -- which is: who's looking at the overall picture here of the relationship, of the adequacy of the investigative function in general, and not just defense counsel, not just as we've done here? Is that what you're trying
to --

I mean part of the problem is that, you know, the Subcommittee may answer it and maybe my colleagues disagree. But there was so much that was heard at these site visits, trying to get that information and the problems we identified from that information in front of the -- in a forum that the JPP could recommend.

Obviously there could be larger issues to be addressed by this, and I think that the questions are important and appropriate. But you know, I think it's also important to get these specific issues out and how to address the broader ones, I mean that's a very interesting challenge and point and maybe we can discuss that later this afternoon.

Okay. I just wanted to again thank my colleagues for the extraordinary effort that they put into this, and I just wanted to make one point in terms of the suggestion that Mr. Stone made, that somehow there was not an adequate concern or attention to the issue of victims,
because I mean as a former prosecutor myself, you get a lot, an enormous amount to deal with victim's concerns.

That's vital to having an effective prosecution system. It's also the right thing to do in general. I'm sure that's been true for Ms. Friel, even though the Manhattan DA's office and not the Brooklyn DA's office.

(Laughter.)

MS. FRIEL: No comment.

CHAIR HOLTZMAN: I'm sure it's true with the other boroughs. But I just want to read the last sentence and Recommendation No. 4.

"Therefore, the Subcommittee" -- and this to remove impediments to MCIOs' access to tangible evidence, but I think this applies across the board, that the Subcommittee "recommends that the Secretary of Defense examine these problems and develop appropriate remedies to address victims' legitimate concerns, and ensure that sexual assault investigations are complete and thorough."
I think that is an important balancing act, and I think that if there's any impression that this report does not reflect concern about victims throughout, I think that's a misimpression. Certainly it's not intended. If there are no further questions, I think we are finished with the Panel.

Thank you very much again for your excellent work.

MS. FRIEL: Thank you.

CHAIR HOLTZMAN: Can we take a five minute break?

CAPT TIDESWELL: Yes ma'am.

CHAIR HOLTZMAN: Can we do five minutes, because we're on a tight schedule.

CAPT TIDESWELL: Yes ma'am.

CHAIR HOLTZMAN: Thank you.

(Whereupon, the above-entitled matter went off the record at 10:40 a.m. and resumed at 10:49 a.m.)

CHAIR HOLTZMAN: The new math five minutes. Please, let's okay. So I think we'll
I'll leave it up to the Panel here. So I think we'll proceed to the next item on the agenda, which is the deliberation on the Sexual Assault Investigations in the Military report. Does somebody want to make a motion about that or comment about that?

MR. STONE: Wait. Are we talking about the very last report we just heard?

CHAIR HOLTZMAN: Yes.

MR. STONE: Okay.

JUDGE JONES: Well, I would move to accept the recommendations of the Subcommittee as the recommendations of the JPP in their final report.

CHAIR HOLTZMAN: Is there any discussion?

MR. STONE: I guess the discussion I would probably point out is I think that again, examining the report or taking the approach of the report from one piece of the stovepipe does not, is not something I am ready to endorse. I don't mind the recommendations.
I would agree with the recommendations, but I think each time we write a report that just looks at effects on one piece of the system without at each point recognizing the offsetting effects on victims and maybe even defense counsel in this case, I think that that is not the balanced way that I want to get to the recommendations.

I think there is sufficient evidence that there aren't enough resources to the MCIO to everybody happy, and as a result and MBSVCs, and therefore they're not getting fast enough interviews and they're not getting, you know, fast enough results on the tests, the forensic tests, and they're not getting people to do follow-ups.

I think that's true, but I think it's across the board. I don't think it's just limited to one group. So I'm fine with the recommendations, because the recommendations do not say, at least I don't think they say that this is only a problem for the prosecutors. So I
think that that's, you know, something that I
don't have a problem with in terms of
investigations generally.

But I do think that the report itself
is just looking at a piece of the problem and
that's not going to get us where we want to go.

VADM TRACEY: So is it possible for
the Panel to accept the report, noting that the
issues raised in the defense resources suggest
that you -- suggest that there's a common set of
issues here around adequacy of investigatory
resources, policies and practices?

CHAIR HOLTZMAN: Would you like to
make that as a suggested addition to the --

VADM TRACEY: Well, at least a note
from the Panel that we recognized that we've seen
now multiple reports raising this family of
issues around different sides of --

MR. STONE: And make that as sort of
an introductory comment to this and maybe the
other report as well? I could accept that.

JUDGE JONES: I think the principle
you state is absolutely correct, each of you,
that obviously this is one segment of the problem
and the issues, and I don't -- I think we should
acknowledge that. That's fine. What's the
status of the defense --

CHAIR HOLTZMAN: We're going to come
to that. We're getting that later, yes.

JUDGE JONES: Okay.

(Simultaneous speaking.)

JUDGE JONES: With that addition,
Admiral, I would be happy with, you know, that we
should accept this report.

MR. STONE: I agree.

CHAIR HOLTZMAN: Any other comments?

So all in favor of accepting this committee
report, with the addition made by -- proposed by
Admiral Tracey, say aye?

(Chorus of ayes.)

CHAIR HOLTZMAN: Opposed?

(No response.)

CHAIR HOLTZMAN: The report is
adopted. Thank you. Okay. Next item on the
agenda, Captain, is that the Deliberation on the Defense Counsel Resources?

TT Yes ma'am, it is.

CHAIR HOLTZMAN: Okay.

TT This is on the JPP report.

CHAIR HOLTZMAN: Okay. I think it would be a good idea probably -- I'm sure everybody's done his or her homework and read the entire report again -- but just to refresh everyone's memory, should we have someone present a brief precis of this so we can move forward?

MS. SAUNDERS: Certainly. Ma'am, as you recall in December, the Subcommittee presented the report on defense resources to you, and at that time the decision was made to hold off on accepting the report, pending some additional information that was requested.

Specifically, what was requested was that we inquire as to the status of the Response Systems Panel recommendations that had been made, that corresponded or were very similar to three of the recommendations made in this report. So
between December and now, we've gone back to the Services to ask for that information, and they have provided responses, which are --

You have at Tab 5 in your materials the complete responses of the Services, but we have also summarized those responses at the appropriate points in the report before you. If you'd like, I can do one of two things. I can either go through the recommendations and then discuss the additional information with each recommendation, or I can summarize it all now, whichever you prefer.

CHAIR HOLTZMAN: Well, I think you should do the whole -- summarize the whole thing, and then let us decide whether we want to accept it or not.

MS. SAUNDERS: Okay. So this report, as you recall, was divided into several different topics. The first topic was on -- and probably the primary topic -- was on defense investigators, and if you recall Ms. Kepros presented this report in December and she noted a
lot of the Subcommittee site visit feedback that they received over the summertime, which was universally among defense counsel.

But not just defense counsel, we heard a lot of this -- they heard a lot of this from prosecutors as well at different site locations, that they desperately need, you know, investigators of their own. They talked about there are existing procedures whereby they can request defense or investigative help through the trial counsel and through the convening authority. But we heard during site visits -- and you have also heard testimony corroborating that, which is that those requests are often denied.

There was discussion that previously, under the old Article 32 system, that was specifically designated as a discovery tool for defense. The victim in the sexual assault case was frequently called to testify and was able to be cross-examined by the defense counsel.

Under the new Article 32 process this is no longer required, and victims -- we heard --
and other witnesses frequently do not appear to testify. Typically, what the Subcommittee heard on site visits was that Article 32s have become paper cases, where statements of victims and other witnesses are submitted, as well as other evidence and that is all. Typically, live witnesses are not called.

So what had once been a discovery mechanism for the defense counsel is no longer available to them. In fact, in the new Article 32 it specifically states that this is not a discovery mechanism for the defense counsel. So, the RSP recommended back in 2014 that defense counsel be provided their own investigators, you know. At that time, it was still under the old 32 system.

I think the Subcommittee felt and what they told you in December was that if it was required back then, it is even more so now, with the changes in the Article 32 process, and that often they are -- they are trying to use their own paralegals or defense -- the defense counsel
themselves are frequently called on to try to do their own investigation of various aspects of the case, but they are hampered by another issue that this report discusses, which is a lack of resources.

So they often don't have paralegals available to them or other people who can help with the investigation of these cases. There's also the additional problem of when a defense counsel needs to do -- conduct additional information, whereby they may end up conflicted out of the case, based on becoming a witness in the case.

So that kind of covers the defense issue. When we received the responses from the Services regarding the Response Systems Panel recommendations, the Response Systems Panel did recommend that defense counsel be provided their own independent investigators. The responses from the Services varied.

Of course, we heard from the Navy -- as you've heard before -- that they have
implemented that recommendation and that they have at this point hired eight independent defense investigators, which they have testified before you have been incredibly helpful to them and has resulted in them being able to have access to evidence that they have not -- would not previously have been able to get, and has resulted in acquittals in some cases.

The Army provided their response. They talked about existing mechanisms such as requesting a defense investigator through the convening authority. But they also did state that they are looking at the Navy's program to determine whether it's feasible for them to implement that. And the Air Force also -- the Air Force also said that they were looking at the Navy's program, to determine the feasibility of implementing that in their Service.

The Marine Corps' response stated that they felt existing mechanisms for the defense to be able to request investigative help were sufficient. They did not
feel that anything more was required. I would point out that you did get a public comment from the Marine Corps Defense Counsel Assistance Service basically saying that they, you know, agreed with both the RSP recommendation and with the JPP Subcommittee's recommendation that they be provided additional investigators, because they felt it was necessary for them to be able to do their job adequately.

In fact, they pointed out that they had put together a package to go up to their leadership in 2015 requesting such investigators, but that was denied. So that was -- those were the responses from the Services on that particular issue.

If you'd like, I would like to read the recommendation for this issue and then Mr. Stone has also provided an alternate recommendation that he would like to see adopted. So I will read both of those, and --

CHAIR HOLTZMAN: Can you also indicate whether this -- on recommendation -- I guess
you're talking about Recommendation 43? Is that what --

  MS. SAUNDERS: Recommendation 43.

  CHAIR HOLTZMAN: But is there anything with regard to the additional work that was done after the last meeting that pertains to Recommendation 43? Is that included in this report at this point?

  MS. SAUNDERS: It is included. I did summarize the Services' responses to the requests for information.

  CHAIR HOLTZMAN: And where is that contained?

  MS. SAUNDERS: That is in --

  CHAIR HOLTZMAN: In the back of the report?

  MS. SAUNDERS: It's in the main body of the report. I'm going to provide you --

  CHAIR HOLTZMAN: At page 12? Is that it? This one --

  MS. SAUNDERS: It's actually on page 11. There's a -- you'll see a box on page 11
that has the Services listed and what their responses were -- the summarized responses from them on this issue.

CHAIR HOLTZMAN: Right, but there's additional language. I'm just trying to get what's changed from the last time this report was presented to the Panel.

MS. SAUNDERS: We did not have the Services' responses the last time.

CHAIR HOLTZMAN: Right, and plus on page 12 it looks to me as though you have added some language with regard to the Recommendation 43. Am I correct? Because you're referring to the fact that Article 32 -- or am I incorrect in that regard?

MS. SAUNDERS: All right. There is -- Mr. Stone had made a comment. I don't know if that's what you're referring to, on the --

CHAIR HOLTZMAN: What is the blue --

MS. SAUNDERS: The blue text.

CHAIR HOLTZMAN: -- the blue stuff? Is that Mr. Stone's comment or is that something
else?

    MS. SAUNDERS: No. The blue text is
the analysis. It's pulled from the Subcommittee
report, you know, perhaps phrased a bit
differently, but not substantively different than
what the Subcommittee's --

    CHAIR HOLTZMAN: Okay. So there's
nothing here that --

    MS. SAUNDERS: There's nothing
substantively different.

    CHAIR HOLTZMAN: Okay, all right.

    MS. SAUNDERS: The phraseology may be
a little bit different.

    CHAIR HOLTZMAN: So -- okay.

    MS. SAUNDERS: Mr. Stone did -- in the
pink highlighted section on that page, Mr. Stone
had made the comment that he feels that there
should be deleted, because it's conclusory and
probably belongs, if anywhere else, in the body
of a recommendation.

    The sentence that he is referring to
says, since the RSP issued that report, statutory
changes to the Article 32 process have made
defense investigators even more necessary. So
that is his -- that was his comment -- Mr.
Stone's comment regarding that sentence.

CHAIR HOLTZMAN: So now you're going
to read the Recommendation 43 and the proposed
recommendation by Mr. Stone.

MS. SAUNDERS: Correct. So the
proposed Recommendation 43 for the JPP --

MR. STONE: May I ask a question
before we get to recommendations?

MS. SAUNDERS: Please.

MR. STONE: I had also submitted, in
addition to the recommendations, some other word
changes throughout the report. There weren't
very many, maybe -- one, two, three, four, five,
maybe -- I don't even think there were ten. Can
I ask whether those word changes had been made or
not made, as a group or individually?

CHAIR HOLTZMAN: Excuse me, I want to
take this in order. We're on Recommendation 43.
We're not on the rest of the report.
MR. STONE: Well some of these relate to that part. They come before 43.

CHAIR HOLTZMAN: They come before 43?

MR. STONE: Yeah.

CHAIR HOLTZMAN: Where? I'm not seeing anything in my version --

MR. STONE: Replace the word demonstrate with the word suggest, that kind of thing. That one's before that.

CHAIR HOLTZMAN: I have page three. I see no changes on page three and I have page four, which is Recommendation 43.

MS. SAUNDERS: Mr. Stone, I did make those changes, and they are notated either in track changes or with a comment in the text.

MR. STONE: All right. So then I don't have to be concerned about any dispute about those few semantics changes that are in there, that those didn't bother the people writing the report.

MS. SAUNDERS: Well, what I --

MR. STONE: They weren't meant to be
totally different. They were just meant to be, I thought, slightly clarifying ambiguities. Is that the way they were taken, if they're all adopted? Other than the recommendation changes.

MS. SAUNDERS: I included all of the changes submitted by all the members of the Panel, and I put them in track changes and I -- you know, depending on the nature of them I also put -- included the comments of the individuals. So that would be -- so that the Panel -- the rest of the Panel members could see those changes and determine whether they were comfortable with those changes, or whether they did not want to adopt them.

So what my plan had been to go through the recommendations, and then go through the body of the report to talk about those specific changes. I am happy to address those.

MR. STONE: I guess the problem is that the copies we have don't show the track changes that any of the members submitted, except for my -- in yellow the --
CHAIR HOLTZMAN: No, they do show changes on pages 12 --

MR. STONE: All right. Then I don't have that copy. I'm sorry.


CHAIR HOLTZMAN: Thirteen, page 14, page --

MR. STONE: Oh yeah. I do see some on those pages.

CHAIR HOLTZMAN: All right. So can we just do this -- Mr. Stone, would you mind if we do this in order? I just want to have --

MR. STONE: Well, it's just that it skipped some of my changes, but all right.

CHAIR HOLTZMAN: I don't mean to do that, I just --

VADM TRACEY: We're looking at page three of the document, page four of the document.

CHAIR HOLTZMAN: Right.

MR. STONE: Right, I know.

MS. SAUNDERS: Mr. Stone, I have the
changes that you had suggested. I have them -- I have the email, so I'm happy to go through that with you at some point to make sure.

MR. STONE: Okay.

MS. SAUNDERS: If I did miss something, it was completely inadvertent. But I believe I got them all.

MR. STONE: Okay, okay. No, that's fine. Okay, that's fine. That's all I wanted to hear.

CHAIR HOLTZMAN: So -- yeah, and we'll get to them later.

MR. STONE: Okay.

CHAIR HOLTZMAN: All right. Is that correct, Ms. Saunders?

MS. SAUNDERS: Yes, that was my plan to --

CHAIR HOLTZMAN: All right, great.

Thank you.

MS. SAUNDERS: -- go through.

CHAIR HOLTZMAN: So, let's do the recommendations on page four.
MS. SAUNDERS: Okay. So Recommendation 43, the proposed recommendation in the blue box reads, in order to ensure the fair administration of justice, all of the military Services provide independent and deployable defense investigators under their control in sufficient number so that every defense counsel has access to an investigator as reasonably needed.

The word reasonably, you'll note, is in track changes, and that was Ms. Holtzman's suggestion that we add that. So that is the only difference between this recommendation and what was proposed by the Subcommittee.

CHAIR HOLTZMAN: And then you have a proposed recommendation by --

MS. SAUNDERS: And then Mr. Stone's proposed alternate recommendation for this issue reads, in order to assure the fair administration of justice, all of the military Services provide a mechanism and budget to ensure there are independent and deployable investigators under
the independent control of counsel for the
prosecution, the defense and the victims, so that
every counsel has access to an investigator as
needed.

    MR. STONE: And I would just add the
word reasonably that was put into the other
recommendation above it. I think that's a useful
term.

    CHAIR HOLTZMAN: Okay.

    MS. SAUNDERS: So should I continue or
do you want to just --

    CHAIR HOLTZMAN: Yeah, I think we
should.

    MS. SAUNDERS: Okay, so that --

    CHAIR HOLTZMAN: Unless anybody
disagrees, let's just go through all of this and
then we can --

    MS. SAUNDERS: So Recommendation 44
deals with the resources of defense counsel, and
if you recall what you heard from the
Subcommittee back in December, they talked about
during their site visits they heard routinely
from defense counsel about lack of resources, about -- there was one particular defense counsel who mentioned that in a large office of ten defense counsel, they had only one paralegal to assist them.

So they talked about understaffing, both of defense counsel and of administrative and other support for them. So the recommendation based on that was that -- and I'll read the recommendation, Recommendation 44, which states, the military Services immediately review Service defense organization 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 independent audit of defense staffing across all military Services, to determine the optimal level of staffing for the Service defense organizations in the long term. Organizations that have conducted similar kinds of assessments
of public defender resources in various civilian jurisdictions may be of assistance in conducting this audit. We did add that wording based on the JPP comments during the last meeting on this.

The proposed alternate recommendation submitted by Mr. Stone reads as follows. The military Services immediately review Service organizations' staffing of counsel, paralegals, highly qualified experts and administrative support personnel, and take steps to alleviate any reported understaffing.

The Secretary of Defense should direct an audit of this staffing across all military Services, to determine and achieve the optimal level of staffing for these Service organizations, and consider the referral of excess cases to civilian prosecution authorities in the medium and long term. Organizations that have conducted similar kinds of assessments in various civilian jurisdictions may be of assistance in conducting this audit.

And then moving on to the next topic,
which is expert approval, the Subcommittee spoke
to you in December and you heard about what they
had been told during these site visits, both from
prosecution and defense -- so it was not limited
to just defense counsel -- about their difficulty
in obtaining needed expert -- both witnesses and
consultants -- in a timely fashion, and of the --
and having the requisite experience and
credentials that they need.

We had heard -- and I think you had
also heard similar things in JPP testimony. They
have been -- what they told you is that they
frequently made requests for expert witnesses and
consultants to the convening authority, which is
what's currently required under the Rules for
Courts-Martial, and those are often denied.

They then have -- the next step for
them is to make the same request to the military
judge. What they pointed out to the Subcommittee
members is that this comes much later in the
process, as the military judge does not have
jurisdiction over the case until after referral
of charges.

So now they're after the referral of charges. They're talking about trial dates. It's getting very close to the time where the trial is going to occur before the defense counsel might be provided the expert that they feel that they need.

There was also commentary that it's much easier for the prosecution -- and we had several prosecutors who reinforced this -- where because they are working for the convening authority or they have easier access to the convening authority, that they can get experts at a much earlier stage in the process, and typically can get the experts that they specifically want for that case.

Defense counsel pointed out that when they do make these requests, it has to go through the convening authority. It has to go to the convening authority and typically through the trial counsel, and they have to provide reasons why these experts are necessary, often tipping
their hand to the prosecution about potential
defense strategies.

So that was -- they identified that as
something that they found very problematic. We
also included information from the -- from the
Response Systems Panel report. They had
interviewed a number of civilian defense counsel
who have stated that they typically have their
own sources of funding for expert witnesses and
consultants, and they have to obviously manage
their money in an appropriate way to be able to
accommodate the various requests that they
receive from their individual counsel.

That way, they can hire the experts
that they need when they need them, often at an
earlier stage when they might help inform a
defense strategy. So Recommendation 45 goes to
this particular issue, and the current proposed
recommendation reads as follows.

The Secretary of Defense direct the
Joint Service Committee on Military Justice to
draft appropriate rules and legislation as
necessary to vest defense expert approval and
expenditure funding in the Service defense
organizations.

You'll notice as necessary in track
changes there. That was a suggestion from Mr.
Taylor, I think, who was wondering whether
legislation was necessary, and I think that was
an appropriate thing to point out, Mr. Taylor.

I think what would probably need to be
changed would be RCM, Rules for Courts-Martial
703. So that is not obviously a legislative
change, so that perhaps this statement is too
broad and we can certainly address that. Then
the word expenditure was suggested for inclusion
by Ms. Holtzman.

The alternate Recommendation 45
submitted by Mr. Stone reads as follows. The
Secretary of Defense direct the Joint Service
Committee on Military Justice to consider
modifications to the MCIO program, so that expert
approval authority and the concomitant obligation
of expenses are placed under the control of the
most senior level of each Service's prosecution, defense and victims' counsel organizations.

The next and final issue and recommendation in this report concerns experience in staffing levels for defense counsel among the Services. The Subcommittee members told you in December that what they heard during these site visits, it varied a lot by Service in terms of the experience level of defense counsel.

They heard -- particularly from the Army and Marine Corps, and you also heard testimony to this effect back in May from -- at the May public hearing for the JPP. They heard that -- particularly for the Marine Corps and for the Army -- that it is often the case that brand new attorneys -- brand new to the JAG Corps -- are assigned to defense billets.

What they also stated of course was that these people are typically not the ones who are trying the most complex sexual assault cases. They have -- every branch of Service has, you know, more senior defense counsel that they
typically would assign to these types of cases. However, the Subcommittee members did tell you that they did speak with a couple of defense counsel on the site visits who did -- very early in their careers, having not done very many trials -- find themselves as defense counsel on sexual assault cases, and they found it a very uncomfortable experience in doing so.

So all defense counsel I think that the Subcommittee members spoke to reported that they did not feel that defense counsel -- or that brand new attorneys should be assigned to defense billets right away, without having any prior litigation or military justice experience.

So the -- there was also the additional issue of term, how long these defense counsel serve in their billets. The Response Systems Panel had made the recommendation prior to this, back in 2014, that there should be minimum term limits for defense counsel, that they should -- you know, absent extenuating circumstances, they should serve as defense
counsel for a minimum of two years.

When we asked for a response for that -- regarding that issue from the Services, most of the Services did say yes, we typically do have our defense counsel serve for two years or more. The Marine Corps did state that that was up to the staff judge advocate or to the leadership, and that they based that on their individual circumstances. So they did not necessarily commit to having members serve for two years.

You heard testimony from several Marine Corps representatives that often they are seeing defense counsel in these positions for maybe 12 to 15 months and then they move on.

So the proposed Recommendation 46 reads, the military Services permit only defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in sexual assault cases. 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 on a case by case basis by the Service Judge Advocate General or Staff Judge Advocate to the Commandant of the Marine Corps. The words on a case by case basis you'll note in track changes were a suggestion submitted by Mr. Taylor that we've included.

The proposed alternate recommendation submitted by Mr. Stone reads as follows. The military Services permit only counsel with prior military or criminal litigation experience to serve as lead prosecution, defense, victims' counsel and military trial judges in sexual assault cases.

The military Services are urged to expedite the development of a formal process, and to consider using objective and subjective criteria to determine when counsel and trial
judges are qualified to serve as lead counsel and as trial judges in a sexual assault case.

In addition, the military Services are urged to set a minimum tour length applicable to counsel and trial judges in such cases, except when a lesser tour length is approved in a specific case by the Service Judge Advocate General or the Staff Judge Advocate to the Commandant of the Marine Corps, or voluntarily waived on the record by both the prosecution and defendant in the case.

I should have noted also when I was speaking about this earlier that there is a provision in the FY '17 National Defense Authorization Act that does speak a little bit to experience.

It speaks to the experience both of trial counsel and defense counsel, and suggests a five year pilot program to determine -- to ensure that the most qualified counsel are prosecuting and defending sexual assault cases. That information is included in the report.
CHAIR HOLTZMAN: Okay. Now before we get to vote on various recommendations, do you want to --

MS. SAUNDERS: Should I walk you through the remaining changes in the report?

CHAIR HOLTZMAN: Yeah right, starting on page, I guess, 12, right?

MS. SAUNDERS: So on page 12, within the blue text -- the second paragraph -- the pink highlighted portion of that is a suggestion from Mr. Stone, and the sentence reads, since the RSP issued that report, statutory changes to the Article 32 process have made defense investigators even more necessary.

Mr. Stone's comment is delete the first sentence as conclusory and probably belongs, if anywhere, in the body of a recommendation.

The next paragraph down -- also within the blue text -- Mr. Stone had suggested another change, which was to in the second line delete the word demonstrate and instead insert the word
suggest, so that that sentence would now read,
these changes to the Article 32 process, as well
as the limitations of MCIO victim interviews,
suggest that the need for defense investigators
is even greater now than it was when the RSP made
its recommendation.

MR. STONE: And I might add the second
one really takes into account the earlier change.
It pretty much says the same thing but in a
different way that is not quite so conclusory,
and I think reflects what the interviews found.
I don't think it's much different, but I don't --
it's not a conclusory statement.

MS. SAUNDERS: You'll note that the
recommendation itself, it appears -- there's
track changes and some deletions down there.
What we did -- at Mr. Stone's suggestion -- was
take the exact language of the recommendation
which was down there and simply insert it into
the blue box to make it a little easier to read.

So there's no substantive change
there, it's just simply being placed -- the text
is simply being placed into the blue box.

CHAIR HOLTZMAN: I'm not sure I understand that.

MR. STONE: Before it wasn't in a blue box, and so it was confusing as to whether we were or weren't saying exactly the same thing as Recommendation 43.

But since we were, they simply took that paragraph that wasn't in a blue box and they took out any of the that's or extra commas and put the blue box in, so you could see that the conclusion of that section of the report was that recommendation.

MS. SAUNDERS: And that's at the bottom of page 12. You'll note that there is some text that has been lined through at the very bottom. That is the text that Mr. Stone is referring to that is now inside the blue box at the bottom of that page.

CHAIR HOLTZMAN: How does this recommendation for -- I'm still not following you. On page 43, I'm just trying -- and I'm not
arguing, I understand what you've done. There's something called Recommendation 43 on page 12. How does that differ from Recommendation 43 on page four?

MS. SAUNDERS: It is exactly the same. It's just being placed at the appropriate point in the body of the report where it's being discussed.

CHAIR HOLTZMAN: Where was it before?

MS. SAUNDERS: It was still in there. It's just that we didn't have the words Recommendation 43, and --

CHAIR HOLTZMAN: What did we have?

MS. SAUNDERS: I'm sorry?

MR. STONE: It was a little bit different.

CHAIR HOLTZMAN: So what you're saying is before, this sentence appeared not as a recommendation.

MR. STONE: Right.

MS. SAUNDERS: What it -- the way it used to read, the paragraph -- which was not in a
blue box -- read, the JPP --

CHAIR HOLTZMAN: I don't care whether it was a blue box, green box --

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: -- any kind of box.

Was there a recommendation --

MS. SAUNDERS: There was.

CHAIR HOLTZMAN: -- similar to 43?

MS. SAUNDERS: There was.

CHAIR HOLTZMAN: So the similar -- the language that was similar to 43 is what's in this comment on the side. You changed that.

MS. SAUNDERS: Exactly.

CHAIR HOLTZMAN: So you've shortened the Recommendation 43?

MS. SAUNDERS: We've taken out the words the JPP recommends and then started with in order to.

CHAIR HOLTZMAN: So that's all that's changed?

MS. SAUNDERS: That is all that has changed.
CHAIR HOLTZMAN: Thank you, okay. Got it. Sorry.

MS. SAUNDERS: And you'll note that will be the same for all of the other recommendations as well that you see.

CHAIR HOLTZMAN: Okay. So you want --

MR. STONE: It obviates the necessity of flipping back and forth to see if there's a word that is or isn't the same. That's what it does.

CHAIR HOLTZMAN: All right. And page 13, you have a change?

JUDGE JONES: Can we add this point of discussion, Mr. Stone? I'm completely with you on this one.

MS. SAUNDERS: Okay, we will -- going forward, that will be the approved method. At the bottom of page 13, there's an additional change. Right at the very last sentence in the blue text, the very last word on that page, the word show is lined out -- and this is at Mr. Stone's suggestion -- and the very first word on page 14
he would rather -- he suggested the word suggest be placed in there, so that the sentence would now read, however, reports of defense counsel from the installation site visits and information presented to the JPP at its May 2016 public meeting suggest that understaffing and under-resourcing of defense offices continue to be a problem, especially for the Army and the Marine Corps.

So that is that suggestion. What you see all of -- again, all of the crossed out text and that -- it being placed into the blue box is exactly as worded previous.

CHAIR HOLTZMAN: Okay. So then we have, on page 15 -- all right, is that your next change?

MS. SAUNDERS: There are no changes on page 15.

CHAIR HOLTZMAN: Well you have -- well.

MS. SAUNDERS: Oh no, okay. Oh, oh, I'm sorry. We have two different copies floating around. Let me go to the one you are looking at.
At the bottom of page 15, this is one of Mr. Stone's recommendations.

The sentence that is highlighted, furthermore, military defense counsel, like their civilian counterparts, should not be required to reveal their theory or defense or defense strategies to the government so early in the process before trial.

The comment from Mr. Stone reads, delete third sentence beginning furthermore, as this is not part of the factual report.

MR. STONE: It's also true that there are some defenses that do have to be revealed early, like alibi defenses. So it overstates something and it's not necessary to what's coming next. So I don't think there was -- I don't think we should be saying something that isn't true and wasn't documented and isn't necessary to the recommendation.

CHAIR HOLTZMAN: Okay, next one.

MS. SAUNDERS: Okay, the next one on page 16, the first --
CHAIR HOLTZMAN: Same change that you made before?

MS. SAUNDERS: Right, exactly, and then -- but then we also note in sexual -- the words in sexual assault cases --

CHAIR HOLTZMAN: Where? Where are you?

MS. SAUNDERS: I'm on page 16 and I'm under A, site visit information.

CHAIR HOLTZMAN: Well we don't -- oh I see, yeah.

MS. SAUNDERS: Okay. The words in sexual assault cases -- Ms. Holtzman, you had asked that those words be included in that sentence. The next change --

CHAIR HOLTZMAN: On page 18.

MS. SAUNDERS: Page 18 is again another comment from Mr. Stone. The first highlighted portion in pink reads, at least two years -- I'll read the whole sentence. In order for defense counsel to build core skills and necessary experience, it is important that they
have the opportunity to serve in the position for at least two years.

That portion that reads at least two years, Mr. Stone's comment reads, replace at least two years with a specified minimum period of time, absent a particularized exception by either a superior officer or the client.

The next highlighted portion, simply not. The sentence reads, this is simply not sufficient time to enable defense counsel to gain necessary experience, as defense counsel on site visits attested. The words simply not -- Mr. Stone's comment is replace simply not with not always.

CHAIR HOLTZMAN: Okay. So now we can get -- I guess we can start with the recommendations and then go to specific language, if that's okay. So let's -- is there something we've missed?

CAPT TIDESWELL: No, ma'am.

CHAIR HOLTZMAN: Is that okay?

MS. SAUNDERS: Yes.
CHAIR HOLTZMAN: All right. So going to Recommendation 43, Mr. Stone you want to speak on behalf of your proposed substitute?

MR. STONE: Yes. In terms of this and all the other recommendations we're going to get to -- so that I don't have to repeat it each time -- I'm not in favor of building the stovepipes higher. I'm in favor of us sending the message that -- and we've heard it here today that the prosecution also doesn't think they have control and sufficient numbers of deployable investigators when they want to follow up on something.

Therefore, I believe that we should tell them that we need all the Services to have independent and deployable investigators under the control of that Service. I know -- and you'll see in the later recommendations related -- well this even says provides a mechanism and a budget.

I mean, it seems to me that's what the top people in each Service are there for, to
decide how they're going to spend their
resources, I mean, and whether a particular case
is so important that they put two lawyers on it
or one lawyer on it, or whether they assign, you
know, one investigator and they tell him he's got
a week to do this or three days to do this, it
depends on how they evaluate the cases and what
their client wants.

So I do agree to move the deployment
mechanism and the budget to the various Services,
but I want to do it in tandem, so that they
understand we're moving them together. We're not
going to move one stovepipe and then say later
well wait, is there something left for the others
and have you gauged them?

So that's the idea, to move them in
tandem. If there's another question about
language that I changed, feel free to ask me.

JUDGE JONES: I don't -- I don't
actually have a problem talking about mechanism
and budget, although I don't know if that
necessarily needs to be there. But my real issue
with this is that, you know, the Subcommittee
looked into the needs of defense investigators,
and we also -- as you just heard this afternoon --
looked into the investigators themselves and
their needs and issues.

Your recommendation or this
recommendation expands it to the prosecution and
victims' counsel, giving sort of a general
recommendation that each of those categories also
needs additional investigators. We haven't
really examined that, and I don't think there's a
basis in this report to say that with respect to
victims' counsel or to some extent even with
respect to prosecution.

I mean, the history here is that as
the RSP saw in 2013, early '14, the defense
counsel did not have access to any investigators.
The prosecutors have always used NCIS as their
primary investigators, and NCIS has never really
been available to defense. So there's been a
need there since the beginning of our look at
this problem.
This report was meant to focus on a need that continues today into 2017 for defense counsel. I'm concerned that if we try to broaden this to prosecution and victim counsel, we're going into uncharted territories and it's something that hasn't been looked at yet. There can be very little doubt that the prosecution -- and I know I mentioned special victim capability already.

But the prosecution tends to get the resources it needs, and the defense tends not to. It seems to me with that background and the focus of this report, we should stick to the defense.

CHAIR HOLTZMAN: Any other comments?

Mr. Taylor.

PROF. TAYLOR: Yes. First of all, I endorse everything that the Judge said. But there's an additional problem that I see here, and that is that the way the proposed recommendation that you made, Mr. Stone, is written -- and maybe you didn't intend it this way -- you talked about deployable independent
investigators under the independent control of counsel for the prosecution.

Because of scandals that dated back to the 70's and 80's, all of the MCIO investigators work in a stovepipe. The reason that it's that way is because commanders in those earlier years were shutting down cases that should have been investigated. When it came to light that that was the case, the solution was to create these independent stovepipes for MCIOs.

So in order to maintain that independence and integrity, it would not be possible really -- unless you changed the whole structure in a way that seems undesirable to me -- to reorient them and have them work for the prosecution.

CHAIR HOLTZMAN: Admiral Tracey, if you have a comment.

VADM TRACEY: I think I agree with Mr. Taylor in that regard, although I think the sentence construct would put independent control for prosecution investigators under the
prosecution and defense investigators under
defense, and victims' counsel under victims. I
think that's what your sentence construct is
intended to do.

PROF. TAYLOR: But to the extent that
it involved prosecutors having control over
MCIOs, that would be contrary to the settled
history about what happens when that occurs.

CHAIR HOLTZMAN: I would like to make
another point there, which is not only that that
would change the present system, but there's no
evidence that the Committee had -- Subcommittee
had on this subject. So I think it would be
irresponsible to make a recommendation without
having looked into the subject matter at all in
connection with this Subcommittee report.

MR. STONE: Well my general response
is that we heard testimony this morning that the
prosecution can't get investigators because there
aren't enough to go back when they want them to
go back and do more, and they can't get results
in time. It delays the cases.
So I think we do have the evidence in front of us that came from the same Subcommittee, and to the extent that the OIG is out there and maybe wasn't out there in the past to look into abuses when investigators work for the prosecutors or are under their control, I think that's sufficient and I would not object if somebody wants to change the language so that it says that there are sufficient numbers of independent and deployable investigators available to, instead of under the independent control. That's fine with me.

But I object to us piecemealing this thing at this point. I think that we did hear enough to know that the MCIOs are just -- as we kept hearing -- overburdened and I don't see the point of saying this for one group without recognizing it goes across the board because our job here is to get a process that works better all around.

That's why this Committee was set up.

As I said earlier today, it may be that the MCIO
organization has to think about some reorganizational modifications. That's maybe just a fact of that there are so many more sexual assault cases than there were.

But I object to keeping it the same and saying how we're going to throw resources to one slice of what it does or another slice of what it does, without thinking about the whole system.

So that's where my recommendation is coming from, and if Mr. Taylor wants to suggest some words. If the rest of it doesn't bother him, I'm perfectly happy to accept friendly amendments to the words. But I would continue here and in the other recommendations to treat all the independent groups, because we certainly heard from some victims' counsel in some of the Services earlier on in testimony before us that they also do not have investigators or sufficient investigators to meet their needs.

It's way lower than what the prosecution and defense need, I think. I think
the defense's need is less than the prosecution, because by then the prosecution has put together a body of evidence to be looked at, so you don't have to start from scratch.

But in any case, I think that all three have to be examined, and they all have to be dealt with at the same time.

CHAIR HOLTZMAN: Are we ready to vote?

Okay.

VADM TRACEY: Is there an opportunity to talk about the bullets underneath after we vote on the recommendation?

CHAIR HOLTZMAN: Sure, we can -- absolutely, I'll agree. If you want to do that, yes we could. Let's -- does that affect your vote on --

VADM TRACEY: No, it doesn't.

CHAIR HOLTZMAN: Okay. So let's just -- since we have the arguments fresh in our mind, let's vote on the proposed recommendation first by Mr. Stone. All in favor say aye?

(Chorus of aye.)
PROF. TAYLOR: Oh, I'm sorry.

JUDGE JONES: What are we voting on?

I'm a little confused.

CHAIR HOLTZMAN: In favor of the proposed recommendation by Mr. Stone.

PROF. TAYLOR: I'm sorry, I take that back.

CHAIR HOLTZMAN: Okay. All in favor?

MR. STONE: Aye.

CHAIR HOLTZMAN: Opposed, say no?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

Now we go to Recommendation 43. All in favor say aye?

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed.

MR. STONE: No.

CHAIR HOLTZMAN: The ayes have it.

The recommendation is adopted.

VADM TRACEY: So if I could?

CHAIR HOLTZMAN: Admiral, please.

VADM TRACEY: I have the same comment
in several of these. We refer to the RSP recommendation in the notes. I am mindful of the fact that executives tend to read executive summaries and not much else, so we refer to the RSP recommendation. We don't capture in the bullets what the status of those recommendations are. I would recommend that you can encapsulate that in a single sentence.

In this particular instance, the fact of the Article 32 changes coming after the RSP recommendation is a significant issue that I think deserves to be called out. You do call it out in the text, but I would just bring that up forward in a bullet. I would recommend --

MS. SAUNDERS: Thank you, ma'am.

CHAIR HOLTZMAN: So the bullet would say more or less what Admiral --

VADM TRACEY: I think it's the sentence that's in the body of the report. It is actually -- unfortunately, it's the one that Mr. Stone objects to. I can live with some modifications to that. It's on page 12, "Since
the RSP issued that report, statutory changes to Article 32 process." I mean, you could combine these two sentences I think into one that just states the facts, that the Article 32 process was changed after the RSP recommendation went in. People who are not tracking this as closely as the JPP --

CHAIR HOLTZMAN: Right.
VADM TRACEY: -- won't realize the timing.
MS. SAUNDERS: Okay.
CHAIR HOLTZMAN: Right. So in other words, what you are proposing is that paragraph 2 in the blue on page 12 --
VADM TRACEY: However we modify it with Mr. Stone's --
CHAIR HOLTZMAN: Yes --
VADM TRACEY: -- recommendation --
CHAIR HOLTZMAN: -- should be incorporated as a bullet --
VADM TRACEY: Yes, just incorporated as a bullet under the --
CHAIR HOLTZMAN: -- under Recommendation 43. Okay. Any objection to that?

MR. STONE: I am not sure I got what we're doing here.

CHAIR HOLTZMAN: All right. What --

MR. STONE: Are we using --

CHAIR HOLTZMAN: But we have --

MR. STONE: -- the last paragraph --

CHAIR HOLTZMAN: No. We are going to the first --

MR. STONE: -- before the Recommendation 43 on --

CHAIR HOLTZMAN: No.

MR. STONE: -- page 12?

VADM TRACEY: No, no.

CHAIR HOLTZMAN: The middle paragraph.

MR. STONE: The middle paragraph.

CHAIR HOLTZMAN: On page 12.

VADM TRACEY: Again, "Since the RSP issued that report" --

MR. STONE: Okay.

VADM TRACEY: And you recommended a
change to that. However --

MR. STONE: Yes.

VADM TRACEY: -- we change that paragraph when we get done reviewing page 12, I recommend that sentence, the resulting sentence, be included as a sub-bullet under the recommendation in the executive summary because I think it's a principal change in the environment that factors into why people should look at this.

CHAIR HOLTZMAN: Right, and we're not reaching the question of whether to adopt your suggested change, Mr. Stone, or not, okay? That is not -- that will be determined at a later point, so we're not ignoring your proposal, we're just deferring it.

JUDGE JONES: So it's the second bullet --

CHAIR HOLTZMAN: It would be --

JUDGE JONES: -- Admiral?

VADM TRACEY: It would be the second bullet.

JUDGE JONES: Right, okay.
CHAIR HOLTZMAN: Okay. Any objection to that?

MR. STONE: I object only because we don't have data that shows it. This is all anecdotal evidence, so without --

CHAIR HOLTZMAN: So --

MR. STONE: -- data, that is why I had --

VADM TRACEY: The fact --

MR. STONE: -- said --

VADM TRACEY: -- that --

MR. STONE: -- "suggest."

VADM TRACEY: -- Article 32 has changed is a fact.

MR. STONE: That is true.

VADM TRACEY: The fact that it has changed the number of witnesses who actually appear and can be questioned, that's a fact.

MR. STONE: Okay.

VADM TRACEY: So I am suggesting that the fact of Article 32 changes occurring after the June 2014 RSP report is an important fact for
someone who only reads the executive summary to consider.

MR. STONE: What you just said, I had no objection to, but I am not sure if that's what is incorporated in that language, so it is --

VADM TRACEY: Page 12 to --

CHAIR HOLTZMAN: Well, in fairness, there is one other fact that she -- that is contained. They are making it more difficult for defense counsel to gain access to important information regarding the government's case. I don't think there is really any dispute about that.

MR. STONE: Oh, I think there is. I do, until I see --

CHAIR HOLTZMAN: Oh, you don't --

MR. STONE: -- some evidence --

CHAIR HOLTZMAN: You don't think --

MR. STONE: -- because --

CHAIR HOLTZMAN: -- that --

MR. STONE: -- I don't think --

CHAIR HOLTZMAN: -- the 32 changes
made it more difficult for defense counsel to get access --

MR. STONE: I --

CHAIR HOLTZMAN: -- to the government's --

MR. STONE: -- haven't seen evidence. I know that the defense counsel don't like the changes --

CHAIR HOLTZMAN: No, no, no --

MR. STONE: -- but I don't know that it makes it more difficult for them to gain access to important information regarding the government's case, because the government still has to turn over anything that is exculpatory that's in their possession.

CHAIR HOLTZMAN: But they don't have to turn over the witness, the victim.

MR. STONE: They've got to turn over the statement that they have from the victim.

CHAIR HOLTZMAN: That is -- but they don't have to turn over the victim, and the victim had to testify in the past. That is a big
difference.

   MR. STONE: She had to show up and be
put on the stand. She didn't have to testify.

   CHAIR HOLTZMAN: Oh, okay. All right.
I am just pointing that out. So if that is your
objection, then we note that. So let's --

   MR. STONE: Thank you.

   CHAIR HOLTZMAN: -- do we want to also
address the other issue that Mr. Stone commented
on so we can -- so we can decide how much of this
paragraph to -- on page 12 to adopt into the
bullet?

   Mr. Stone's comment, "Delete the first
sentence as conclusory," so we wouldn't say that
since the RSP issued that report, statutory
changes have made defense investigations even
more necessary, investigators more necessary.

   VADM TRACEY: So with your edit, Mr.
Stone, I think that paragraph would then say "The
new Article 32 pre-trial hearing process" -- it
is blotted out on my copy, I don't know what the
next word is -- "witnesses including victim
testify at Article 32" -- "fewer witnesses including the victim testify at Article 32 hearing unless evidence is presented, making it more difficult for defense counsel to gain access to important information regarding the government's case." Just that sentence I think addresses my concern that a reader of the executive summary won't realize that the Article 32 changed after the RSP recommendation was made.

CHAIR HOLTZMAN: Well, yes, that is -- anybody else have a comment about that?

JUDGE JONES: I don't have a problem with that.

CHAIR HOLTZMAN: Well, I do have a problem with that because I do think that we need to say -- need to have some introductory sentence which says -- which is a factual sentence that since the RSP issued the report, statutory changes have been made to the Article 32.

I also personally do not have -- I do not think there is any -- because I think the Subcommittee has adduced enormous amount of -- of
material on this subject, has made defense investigators even more necessary, but there may be some way, less conclusory way of making --

JUDGE JONES: I guess --

CHAIR HOLTZMAN: -- that point.

JUDGE JONES: -- I am content with the sentence on 12 that basically says these changes suggest that the need for defense investigators is even greater, so I am just saying the concept --

CHAIR HOLTZMAN: Okay.

JUDGE JONES: -- is in there on page 12.

CHAIR HOLTZMAN: Okay. So maybe we could just --

JUDGE JONES: So we may not --

CHAIR HOLTZMAN: -- say --

JUDGE JONES: -- need it in the bullet, that's all.

CHAIR HOLTZMAN: But I think we do need something that says that the report -- that the statutory changes have been made.
JUDGE JONES: Oh yeah.

CHAIR HOLTZMAN: So part of the first sentence needs to be there.

JUDGE JONES: So you would -- oh --

CHAIR HOLTZMAN: You could say since RSP issued that report, statutory changes have been made to the Article 32, period.

MR. STONE: Okay. That -- that, no, no, no, changes have been made, I understand. That is fine.

CHAIR HOLTZMAN: Okay.

MR. STONE: That is factual.

CHAIR HOLTZMAN: Okay. So now we can vote on whether we, as amended, move that paragraph to the bullet, second bullet on page 4.

All in favor?

(Chorus of ayes.)

CHAIR HOLTZMAN: Any opposed?

MR. STONE: I am going to abstain because I don't agree with the recommendation, so it doesn't make sense to move it.

CHAIR HOLTZMAN: Okay. It is carried,
adopted.

  Okay. We are up to Recommendation 44.

Mr. Stone, do you want to speak in behalf of your proposed changes?

  MR. STONE: Sure.

  CHAIR HOLTZMAN: Great.

  MR. STONE: Let's see. The changes that I have made here again go to staffing across all Military Services in terms of counsel, paralegals, highly qualified experts, and administrative support personnel, which is the same types of people that are being looked at.

  Let's see. And I -- the reason I look at all of them, because it says in the JPP recommendation, not mine, "to determine the optimal level of staffing for the Service defense organizations in the long term," and instead, I put in here "to consider" -- "achieve the optimal level of staffing for these Services or organizations, and consider the referral of excess cases to civilian prosecution authorities in the medium and long term."
It may well be that the -- that there are not sufficient resources to fairly staff or correctly staff at an adequate level all the various Services. I have no doubt in looking at things that go on in the government that many times, people have to steal from Peter to pay Paul, and I don't want to just look again at one organization and say, oh, we'll take them from here and we'll put them over there, because that in itself can upset the balance.

So therefore, I think they have to look to all of the people that they have available, what the budget is for those people, decide what they can do, and decide if they can't find what they think is the necessary minimum amount, then they should consider referral of excess cases to civilian authorities, either in the medium or long term. If the number of sexual assault cases goes from 50 percent of their caseload to 90 percent of their caseload, I think that is going to be inevitable, but that's a projection they should think about, and that is...
why I want them to think about that, because they
do at all portions have to be properly funded,
and that includes the defense counsel and the
defense side of the equation.

So that is the main change that I made
in there, and that is the reason. Again, I am
not interested in building one stovepipe higher.
I am interested in doing, based on what we heard
here from the subcommittee, both on defense and
prosecution, and previously to this Panel from
SVCs who said in some of the organizations that
they didn't have enough -- in fact, that is borne
out by what we heard this morning, that there
aren't enough SVCs to get around, and that is why
interviews of victims are often delayed, because
they can't get them there in time.

So that supports this recommendation
that says you have to look at all three. You
can't unbalance the situation without thinking
about what you're doing elsewhere and make a -- a
proper evaluation. If you're providing the
services, you do it to everybody at an adequate
level, and if you can't, you think outside the box. That is what my recommendation is.

CHAIR HOLTZMAN: Yes, Judge Jones?

JUDGE JONES: Yes, I have pretty much the same argument to this, to including the prosecution organizations in this recommendation -- which I assume that is what you meant when you took defense out of there, correct, you are broadening this recommendation -- for the simple reason that we have an imbalance that we know about already, and it's a serious one.

Defense organizations had no investigators, and defense organizations, when you look into the testimony that we have now heard at least twice, through two panels, have virtually no extra help in the form of paralegals and other types of staffing. They are simply totally underfunded. It is something we found in 2014. We have seen it again. We are not getting the same kind of outcry from the prosecution, and we have not examined the notion of victim's counsel also receiving these resources at all.
So I am -- I am opposed to taking this beyond a recommendation related to the defense because they are the ones who need it, and we have the demonstrated evidence to show that, and much more extensive than, you know, some of the other things that we heard. Of course, prosecutors would always like to not just have an investigator, but to have him do more for them. We're talking about a defense organization that is totally underfunded for what it needs to do.

CHAIR HOLTZMAN: Any other comment?

MR. TAYLOR: I just have -- I just have a couple thoughts on that one.

As you are probably aware, there are a few military installations that have exclusive jurisdiction, so where there is exclusive federal jurisdiction, there would be a problem I suspect in getting local civilian courts to take it because they have no jurisdiction, which means you would have to rely upon the U.S. Attorney's Office or something like that, and then the question would be the same questions we are
considering now in terms of capabilities,
training skills, and so forth.

But I understand what -- I think I
understand what you're trying to say or do here,
but I would just throw out one other way to think
about this. There was a time when Services that
had a little excess capacity were willing to loan
on a temporary basis Special Victims' -- not
Special Victims' Counsel, but prosecutors and
defense counsel to another Service so that they
would be temporarily detailed, let's say, to
handle cases on behalf of another Service, and
these again would be fully qualified people.

So I don't know whether the
Subcommittee thought about that or not, Judge
Jones, or whether that is something that you
think would be worth considering at least as part
of this independent audit to consider the
feasibility of having Services shared among the
Military Services when it comes to dealing with
an excess number of cases in one Service and a
little extra capacity in another Service.
JUDGE JONES: It is not something that anyone specifically raised during -- that I remember or recall or have seen from the review. I don't -- I have absolutely no problem with that notion. It makes perfect sense. I did not get the impression that -- that from any of the prosecution people who got -- you know, came before us, that they had extra time on their hands, but there may be, you know, Services somewhere -- we certainly did not speak to everybody -- that could share or, you know, send their prosecutors to help out.

But no, it is not something that we looked into at all. I don't think it is a bad thing when you're trying to figure out how to fund to look at every possible source, you know, that might help make more sense in terms of the distribution of resources, but -- but no, we -- we didn't -- we didn't hear anything about that.

CHAIR HOLTZMAN: Do you -- do you want to include that? Are you making --

PROF. TAYLOR: Well, I would suggest
a friendly amendment, and it would be at the end
of the sentence that begins "The Secretary of
Defense should" --

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: -- "direct an
independent audit of defense staffing across
Military Service organizations, et cetera," "in
the long term and temporary details from one
Service to another to ensure expeditious
disposition of allegations," or words to that
effect, and we're talking about Defense Services
here of course only.

CHAIR HOLTZMAN: Okay. Let's take
this in order. So any objection to Mr. Taylor's
proposed amendment? Well, why don't we do --
before we take his amendment, why don't we do Mr.
Stone's first? That is the proper order.

So first, Mr. Stone's proposed
recommendation, ready to vote on that? All in
favor, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Opposed?
(Chorus of nays.)

CHAIR HOLTZMAN: The no's have it.

Now going to Recommendation 44, Mr. Taylor's amendment, all those in favor, say aye. I mean, is there any further comment?

(Chorus of ayes.)

CHAIR HOLTZMAN: Hearing no no's, that suggestion is adopted.

Okay. Recommendation 45. Oh, sorry, yes, sure.

VADM TRACEY: In this instance, the Services have actually -- there has been a request for the Services to respond to the recommendation, and they responded in I think May 2016 saying that defense resources were adequate.

MS. SAUNDERS: Ma'am, we actually just requested an update on that from the Services, and it is summarized in the report, but the Services generally felt that they were -- that their defense Services were adequately resourced.

VADM TRACEY: So I do think it is important again to inform a reader of the
executive summary that the RSP recommendation has been acted on and responded to, and then what we're saying is that in our site visits, which took place after that response was submitted, we were still hearing that defense resources were inadequate. So I think there is a sequencing of events for this one that is important.

MS. SAUNDERS: Yes. I will note that even in the January 2017 responses from the Services, they still maintain that they feel that they are adequately resourced, so -- but I can include that as well. Okay.

MR. STONE: I already asked that there also be a sentence there at that point that states that the JPP heard testimony on this date that the prosecution services are not able to get investigators to follow up as often as they would like, and they complain about the fact that there were not enough SVCs to allow quick interviews of victims, and they often have to wait to hear them.

CHAIR HOLTZMAN: Okay. First, let's
go to Mr. Stone's recommendation -- well, anybody
want to comment on that?

    VADM TRACEY:  Just seems that that
would belong in the report that we're going to do
on prosecution resources.

    MR. STONE:  We did that report.  Isn't
that what we just did a few --

    CAPT TIDESWELL:  No sir.

    MR. STONE:  -- minutes ago?

    CAPT TIDESWELL:  What we did this
morning was the Subcommittee report.

    MR. STONE:  Oh --

    CAPT TIDESWELL:  There will now be a
follow-on --

    MR. STONE:  -- the Subcommittee --

    CAPT TIDESWELL:  -- period for
adopting and --

    MR. STONE:  Yes.

    CAPT TIDESWELL:  -- modifying, however
you all wish.

    CHAIR HOLTZMAN:  Well, we have already
adopted --
CAPT TIDESWELL: We have already done it.

CHAIR HOLTZMAN: -- that report.

CAPT TIDESWELL: Well, yes, yes, but he wants some additions made.

CHAIR HOLTZMAN: In the report? We have already voted on that.

CAPT TIDESWELL: Then --

CHAIR HOLTZMAN: It's finished.

CAPT TIDESWELL: -- it's a moot point.

CHAIR HOLTZMAN: That is finished.

CAPT TIDESWELL: Yes ma'am.

CHAIR HOLTZMAN: I mean, I guess you could make some comments --

CAPT TIDESWELL: Fair enough.

CHAIR HOLTZMAN: -- with regard to the report, but that report has been adopted.

CAPT TIDESWELL: Yes ma'am.

CHAIR HOLTZMAN: I'm not going back over that.

CAPT TIDESWELL: Yes ma'am.

CHAIR HOLTZMAN: Sorry.
(Laughter.)

MR. STONE: My comments are based on the fact that Recommendation 44 says "optimal level of staffing." It does not say "alleviate a problem." Well, it says that, "alleviate reported understaffing," but it also directs them to determine optimal level of staffing for the Service defense organizations. I think when you talk about optimal level of staffing, at that point, you have to look at what the staffing is for everybody when you're looking at optimal levels, or otherwise I just think it is too parochial. That is why I asked for those other two sentences.

CHAIR HOLTZMAN: I -- I join with what Judge Jones said, which is what the Subcommittee heard, and it was not only from defense counsel, it was from trial counsel as well and other people associated with the criminal -- with the military criminal justice system, that the defense, the absence of proper resources for defense organizations was undermining the whole
military justice system.

And the failure to focus just on that, in my opinion, dilutes the concentration on that issue and dilutes attention to that issue, and -- and I think that's an issue that is critical because it has not been addressed properly since the RSP made its recommendations several years ago, and it is not likely to be addressed because it is not, frankly, politically as sexy as prosecution. We all know that, and we see that in states and localities, budget for defense organizations are -- are way down on the totem pole.

So I don't think that just talking about general levels of -- of resources for all attorneys in the military justice system is really the appropriate way to go when there is such a stark need that the -- that the -- the Subcommittee's visits uncovered, so I am opposed to it.

MR. STONE: And I would just add for the record to my last comment on this is that we
have not seen published cases that show reversals because of an objection that the defense did not have enough investigators, which is where those objections should show up, and we have not seen a tremendous increase in the percentage of prosecutions as a result of defense investigators not being available, so without any kind of data that contradicts what the military responded, I don't take anecdotal evidence as warranting a new recommendation in a parochial fashion.

CHAIR HOLTZMAN: Okay. All in favor of Mr. Stone's Recommendation 44, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: All opposed?

(Chorus of nays.)

CHAIR HOLTZMAN: The no's have it.

VADM TRACEY: I think we were --

CHAIR HOLTZMAN: Yes.

VADM TRACEY: -- working on --

CHAIR HOLTZMAN: Your --

VADM TRACEY: -- sub-bullets to that recommendation --
CHAIR HOLTZMAN: Correct.

VADM TRACEY: -- and the addition of

disposition of the RSP recommendation has been

approved and referred to the Service Secretaries,

who have reported --

CHAIR HOLTZMAN: Right.

VADM TRACEY: -- back that defense

resources are adequate.

CHAIR HOLTZMAN: Right.

VADM TRACEY: That is different from

what our site visits suggest.

CHAIR HOLTZMAN: Right. So what was

the language saying, roughly?

VADM TRACEY: I think we have on page

13, "The Secretary of Defense approved the RSP's

recommendation that defense offices be adequately

resources and staffed and forwarded it to the

Service Secretaries for action. According to the

recent Services' response to the RFI," the first

two sentences there, I think --

CHAIR HOLTZMAN: Right, are adequately

-- okay. So you would want those first two
sentences to be incorporated --

VADM TRACEY: As the --

CHAIR HOLTZMAN: -- in a bullet?

VADM TRACEY: -- second bullet.

CHAIR HOLTZMAN: That's the second

bullet.

VADM TRACEY: Right.

CHAIR HOLTZMAN: All -- any comment on

that?

(No audible response.)

CHAIR HOLTZMAN: No? All in favor,

say aye.

(Chorus of ayes.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: Abstain.

CHAIR HOLTZMAN: Okay. The

recommendation about the bullet addition is

adopted.

Okay. I think we're up to

Recommendation 45, and Mr. Stone, do you want to

discuss your proposed recommendation?

MR. STONE: Yes. My recommendation,
unlike the JPP Recommendation 45, directs the Joint Service Committee to consider modifications to the MCIO program, the whole program, so that the control of each Service's expert approval authority is under that organization. We just -- you know, then the defense -- the prosecution, as we heard this morning, won't be complaining about how long it takes to get back forensic reports. They will be deciding where they go and how much resources they're going to put to that. They are not going to be able to complain about they can't get follow-up investigators except in their own chain of command. They will have a chain of command, and it won't be the MCIO program that seems to be taking the criticism for not being in every place at once.

And so it seems to me again that is the way we ought to be proceeding, and that is what my modification is intended to do. And again, I am not opposed to modification in the language, but as you can see, it is broader than
continuing to build up the stovepipes. Thank you.

JUDGE JONES: I think --

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: -- this particular recommendation speaks to expert approval authority, and I would again not make a recommendation beyond the defense organizations for all the reasons I have already stated. I don't know -- I am a little confused about where the MCIO program comes in, Mr. Stone?

MR. STONE: Well, they are talking about defense expert approval and expenditure funding, and I think it relates to both investigators and experts, if you'll see --

JUDGE JONES: This is really limited --

MR. STONE: I think they are both involved.

JUDGE JONES: This is really limited to experts, where we have heard over and over again, if they get expert approval at all, it is
too late in the defense function, and -- and again, and this has been uniform for several years in the testimony I have heard, frequently, almost always, the prosecution function has no problem getting, you know, the expenditures they need for experts. So this is really very limited I think to experts. I mean, I know it is because that's all --

MR. STONE: Well my question --

JUDGE JONES: -- we are really talking --

MR. STONE: -- for the staff --

JUDGE JONES: -- about.

MR. STONE: -- is it -- do the -- is it through the MCIO organization that the expert request is approved? No?

JUDGE JONES: No, no, they have nothing --

MR. STONE: Okay.

JUDGE JONES: -- to do with it as far as I know.

MS. SAUNDERS: It is through the
convening authority, sir.

JUDGE JONES: So this moves it from
the convening authority to the --

MR. STONE: Okay.

JUDGE JONES: -- so that the defense
organization itself --

MR. STONE: Right, okay, so in that
case, I accept that correction, and I change
modifications to the convening authority's
authority -- well, convening authority's
authority is not good English, but the convening
official's authority so that expert approval and
a concomitant obligation of expenses are placed
under control, et cetera, each senior level of
the Services.

JUDGE JONES: And that is broader too
because there is no recommendation here to take
the convening authority's approval out of the
system for the prosecution. We didn't hear that
there was any need for that whatsoever. This is
very narrow. It is a big change, but it is a
narrow recommendation, and we are just
recommending that the defense organizations
themselves will be able to -- to give expert
approval to defense counsel.

MR. STONE: Doesn't that mean --

JUDGE JONES: We are not --

MR. STONE: -- that --

JUDGE JONES: -- touching, we are
taking --

MR. STONE: Doesn't that mean --

JUDGE JONES: -- away --

MR. STONE: -- the convening authority
can't veto it?

JUDGE JONES: Yes, it does mean they
can't --

MR. STONE: So it is --

JUDGE JONES: -- because it's a
budgetary --

MR. STONE: -- affecting their
authority.

JUDGE JONES: It's a -- well, you are
right, but we are not -- we are not taking the --
it away completely. We are not saying that the
convening authority does not still deal with the prosecution requests. There has been no discussion about taking the prosecution's requests away from the convening authority. This is just for defense expert approval.

CHAIR HOLTZMAN: Any other comments?

PROF. TAYLOR: I would just like to add that the only reason I added "as necessary," and of course it is highlighted there, was because as a matter of internal regulations, I think the Secretary of Defense can do this without having legislation. So unless it was the intent of the -- unless it was the intent --

CHAIR HOLTZMAN: Oh, wait, wait, wait --

PROF. TAYLOR: -- of the Subcommittee --

CHAIR HOLTZMAN: Mr. Taylor, we are not up to Recommendation 45 in the blue, we're in --

PROF. TAYLOR: Oh, I am sorry.

CHAIR HOLTZMAN: -- Recommendation 45
in the yellow.

PROF. TAYLOR: I thought we were
moving on --

CHAIR HOLTZMAN: Sorry.

PROF. TAYLOR: -- fair enough, thank
you.

CHAIR HOLTZMAN: Okay. Any further
comment on Mr. Stone's proposed recommendation as
amended?

(No audible response.)

CHAIR HOLTZMAN: All in favor, say
aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: All opposed?

(Chorus of nays.)

CHAIR HOLTZMAN: The no's have it.

Now we are up to Recommendation 45, and Mr.
Taylor --

PROF. TAYLOR: Thank you.

CHAIR HOLTZMAN: -- we're in the blue,
so you're --

PROF. TAYLOR: Sorry for my premature
Unless the Subcommittee intended this to be elevated to congressional level and actually have legislation put a firmer stamp on it than the Secretary of Defense, I thought it might be helpful to suggest "as necessary" because it certainly is within the Secretary of Defense's purview to create this funding stream without legislation.

CHAIR HOLTZMAN: Mr. Taylor, would you accept a modification to your proposal? What about instead of "draft appropriate rules and legislation," if we said "appropriate measures as necessary"?

PROF. TAYLOR: That would be fine with me, but of course that -- that is Judge Jones's language --

CHAIR HOLTZMAN: Oh yeah.

PROF. TAYLOR: -- not mine.

JUDGE JONES: Well, I don't think there was significant thought given to what we might create if we had to go to the legislature,
so I take your point on that, and I would accept
that as an amendment. And I -- appropriate
measures in the hands of the Secretary --

CHAIR HOLTZMAN: Or you could say
"appropriate rules and other measures" -- "or
other measures." I am not wedded to that. I
just think the legislation is very narrow.

JUDGE JONES: Right, and may not be
necessary.

CHAIR HOLTZMAN: Be necessary, right.

JUDGE JONES: Right. Rules and
measures as necessary? I am happy to have the
Staff play with that if they don't like "rules
and measures as necessary," but that would be
fine with me.

CHAIR HOLTZMAN: Any comment about
that, opposition?

(No audible response.)

CHAIR HOLTZMAN: Okay. All in favor
of the amendment, say aye.

(Chorus of ayes.)

CHAIR HOLTZMAN: Opposed?
(No audible response.)

CHAIR HOLTZMAN: The ayes have it.

Now Recommendation 45 as amended. All in favor, say aye.

(Chorus of ayes.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: Aye.

CHAIR HOLTZMAN: Wait. Yes, you are opposed, or no, you're --

MR. STONE: I am opposed.

CHAIR HOLTZMAN: Okay.

MR. STONE: I am opposed.

CHAIR HOLTZMAN: Sorry. Just want to make sure we get you on record.

VADM TRACEY: Again on the sub-bullets?

CHAIR HOLTZMAN: Yes, sure.

VADM TRACEY: Is it correct that the procedures require that the request for defense counsel is processed through the trial counsel and approved by the --

CHAIR HOLTZMAN: Convening authority.
VADM TRACEY: -- convening authority?

JUDGE JONES: Yes.

VADM TRACEY: Again, for purposes of people who will only read this, may I recommend that in the second bullet, we amend the last sentence, something to this effect: "Given that defense counsel's requests must be processed through the trial counsel, such statements often force defense counsel to prematurely reveal trial strategy." My argument being the convening authority is responsible for both, right?

CHAIR HOLTZMAN: Right. So that would be a third bullet, right?

VADM TRACEY: I think you would just amend the last sentence of the second bullet.

CHAIR HOLTZMAN: Okay. And so what would it say now? I am sorry.

VADM TRACEY: "Given the requirement"

--

CHAIR HOLTZMAN: Right.

VADM TRACEY: -- "for defense counsel to submit such requests through the trial"
counsel, such statements often force defense
counsel to prematurely reveal trial strategy."

CHAIR HOLTZMAN: Okay. So you're
adding some language at the --

VADM TRACEY: Correct.

CHAIR HOLTZMAN: -- at the beginning
of that?

VADM TRACEY: Yes.

CHAIR HOLTZMAN: Okay. Any further
discussion?

(No audible response.)

CHAIR HOLTZMAN: All in favor of the
amendment, the bullet amendment, say aye.

(Chorus of ayes.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: Abstain.

CHAIR HOLTZMAN: Okay. The amendment
is adopted. I guess we are up to number 46,
Recommendation 46. Mr. Stone, do you want to
discuss your proposed recommendations?

MR. STONE: Sure.

CHAIR HOLTZMAN: Thank you.
MR. STONE: My recommendation is based on a couple things. The first is that we know that the military is already considering a way to figure out what kind of tour length qualifications, maybe even certifications, they want to give people for -- in order to participate in sexual assault cases. I think we can encourage them to expedite that process. I think it's a good process, but I don't think we should be out ahead of them.

I don't know that we can set a minimum tour length and decide. I don't think we have any evidence about a particular number of years or days. Myself, I would not be surprised if they come back and they say it's a number of trials. You might have been -- you might have a two-year tour and had one sexual assault trial because of where you're located, and somebody else might only be on that tour four months and have already seen ten of those trials.

So -- so I don't think talking about minimum tour length is necessarily where they are
going to wind up in terms of figuring out who is properly qualified to hear that, so I didn't want to say a minimum tour length of two years or more, especially since the military is considering that. I think that we heard testimony here in our prior sessions complaining about the short tour lengths of some trial judges, and we also heard it about some counsel previously for the prosecution, that people wind up getting transferred into a situation where they have to take over because somebody else is unavailable, and they really are not qualified to handle a case of this seriousness, so I think it has to apply -- definitely has to apply, even for the defense's sake, to have a qualified trial judge and other counsel.

And I believe that what the recommendation that the Fiscal Year '17 recommendation is that the Military Services are considering and have the freedom to consider qualifications for all of the participants, not just the defense counsel, so I think it is good
for us to urge them to do it.

And the last change I have at the end is "were voluntarily waived on the record by both the prosecution and defendant in a case," and that again is meant to cover the situation where you have a brand new judge or a brand new defense counsel or prosecution, and nobody has an objection because this is a person, although they have only been on the bench two months, all they have heard was sexual assault cases, including some very big ones. They have a lot of experience. They previously served in a different capacity where they dealt with sexual assault cases, and everybody is confident that that person is going to do a good job.

And so I think that, like with any other right, you have to recognize that people may want to waive that situation, and in that situation, I just put down "prosecution and defendant." I did not include the victim in that particular one. It does not mean the victim should not have -- victim's counsel should not
have minimum qualifications, but I don't think
deciding on whether there are enough
qualifications for the other participants is a
particular victims' issue, and when we're not
involved in a victims' issue, I am satisfied to
let the parties who were previously there decide
what should happen.

And if they can both agree that they
are happy with a judge who is one month shy of
the minimum tour length, or a defense counsel who
is one month shy, or you may have -- you may have
a defendant who was previously represented by a
defense counsel on a non-sexual-assault case and
really liked that counsel, and so that person
says I want Mr. X, if you don't mind, I know he's
on this base, I have complete faith in him
because of my prior experience with him, and if
he wants a waiver to get that defense counsel who
is available, I don't imagine the prosecution is
going to care either.

So I think that has to be looked at
before you set inflexible rules because we're
dealing with a big system, and there's lots of circumstances that can arise.

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: Yeah. The first part of this really relates to how much the Military Services permit only defense counsel with prior military justice or civilian criminal litigation experience to serve as lead defense counsel in sexual assault cases, so -- and that does not -- that does not really talk about, you know, you had to have been a defense counsel for two years, more or less.

The section about two years is a different concern, and I was not sure whether -- whether you were criticizing that because you thought we were saying you had to have a minimum tour length in order to be lead counsel. I --

MR. STONE: Yes, I was looking at the next sentence, that says "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."

JUDGE JONES: Right.

MR. STONE: So therefore I think we are talking about the lead counsel, and --

JUDGE JONES: No, we are talking about the lead counsel --

MR. STONE: Okay.

JUDGE JONES: -- that is still a very flexible standard. Then, when we say "In addition, the Military Services should set the minimum tour length for defense counsel at two years or more," the point of that, obviously, the Marine Corps told us we can't do it, and we're never doing it, so -- because we're always moving our people around.

The point of that was that once someone became a defense counsel as opposed to the section on lead, they would at least have two years of experience in order to -- to develop the expertise. I mean, that is -- that was what I intended by that. It obviously is not clear.

We did not want defense counsel being
moved around. We wanted them to have a two-year tour --

MR. STONE: So you --

JUDGE JONES: -- as defense counsel.

MR. STONE: Right. I guess I don't understand then how the two pieces relate. If you have someone who is really qualified, but now there is a promotion waiting for him, I don't see why we have to say, no, you can't leave, you have to stay here for another couple of months because you have to do a minimum two-year tour, even though there's enough other people on this base who would be qualified to serve as lead defense counsel. So I am not even sure in that case, if that's how these are supposed to be read, why a tour length fits into qualified.

I think we want qualified counsel, and if that minimum tour length is not related to qualified, then --

VADM TRACEY: So we could set a minimum tour length so that defense counsel can get experience, defense counsel can get
experience.

MR. STONE: Well, any counsel, but okay, let's say defense counsel --

VADM TRACEY: Staying in the role for some minimum amount of time, and I think that as framed, the recommendation allows for case-by-case exceptions to be approved by the SJA.

MR. STONE: If they are qualified, I guess I don't understand, if you want somebody, you needed him in a different role, why the tour length matters at all as long as there are qualified people behind him to fill the slot.

VADM TRACEY: If it's as extreme a demand as to require them to get pulled out, this recommendation would allow the staff to -- you'd have a staff judge advocate make that call, the TJAG or the Marine Corps SJA to make that --

MR. STONE: Well --

PROF. TAYLOR: Could I ask a clarifying question? Do you mean literally two years in the same tour, or could it be two one-year tours? For example, people often deploy for
nine months or six months, and they might have a
stint as a defense counsel for shorter periods
than two years for the reasons Mr. Stone
outlined, so I am just -- this is a clarifying
question.

JUDGE JONES: We meant two years as
defense counsel.

PROF. TAYLOR: Two consecutive --

JUDGE JONES: In the --

PROF. TAYLOR: -- years.

JUDGE JONES: -- in the role of a
defense counsel.

CHAIR HOLTZMAN: But he is asking
consecutive years.

JUDGE JONES: Oh, oh yes, that was the
point.

PROF. TAYLOR: That was -- that was my
question --

JUDGE JONES: Yes --

PROF. TAYLOR: -- right.

JUDGE JONES: -- I am sorry, yes.

CHAIR HOLTZMAN: I mean, am I correct?
1 Doesn't this kind of imitate or reflect --

2 JUDGE JONES: The Navy --

3 CHAIR HOLTZMAN: -- a report -- well, one, I think the, right, the Navy has it, but

4 isn't it something that the RSP also recommended?

5 JUDGE JONES: Yes, it is.

6 CHAIR HOLTZMAN: So it's not coming

7 out of the blue, in other words, totally, am I correct?

8 JUDGE JONES: No, you are completely correct.

9 CHAIR HOLTZMAN: So maybe --

10 JUDGE JONES: This is something the RSP recommended. My recollection of it then and

11 now is that we're talking about making sure that defense counsel -- what we saw is that the

12 prosecution counsel tended to have more experience at their role than defense counsel did, which is a separate matter from who you are

13 going to make a lead defense counsel, I completely agree.

14 There may be somebody who comes in who
has civilian experience, as you say, who is ready
to go right in there and be lead defense counsel.
But what we saw as a system problem was that
defense counsel were getting moved out of that
role and thrown into another role, with at least
what I recall from two or three years ago, and
not -- not being able to develop their skills,
and -- and some of it -- I think some of it was
drawn from the fact that of course in the Navy,
you know, they have their system where you don't
get moved around so much from one role to the
other, and so there is -- there is, you know, you
have the chance to develop an expertise. It was
meant to give people a chance to serve in one
role for this length of time.

I mean, I am happy to go back and dig
up the research we did before.

MR. STONE: Did anybody look at
whether or not this is going to discourage
certain people from taking that tour because
their normal tour, as was mentioned, might be
nine months or a year, and therefore it will set
back their qualifications to get promotions and various things? Because you are starting from the proposition that they have to be skilled, so I don't know how able to develop their skills plays into tour length if we are going to say we want them skilled from the first sexual assault case they take.

CHAIR HOLTZMAN: No, it doesn't --

JUDGE JONES: No --

CHAIR HOLTZMAN: -- say that, that they have to be skilled for the first sexual assault case. It says that they can develop -- we want them to develop their -- how can they be skilled for the first sexual assault --

MR. STONE: Because --

CHAIR HOLTZMAN: -- case?

MR. STONE: -- they take non-sexual-assault cases and try them, just like new prosecutors start with misdemeanors before they go to felonies.

CHAIR HOLTZMAN: Well, exactly, so we don't know how experienced they are, but we want
them to have experience in the handling of sexual
assault cases, and that requires a certain period
of time.

I think you heard Ms. Friel talk about
the number of years she served as Bureau Chief.
She had to be really experienced after ten years
-- maybe I misstated --

MS. FRIEL: Just old.

CHAIR HOLTZMAN: Sorry?

MS. FRIEL: I said just old.

CHAIR HOLTZMAN: Oh, just, oh, right,
well, and experienced. I mean, how many years
did you serve as Deputy Bureau Chief?

MS. FRIEL: 11.

CHAIR HOLTZMAN: 11, and ten years as
Bureau Chief?

MS. FRIEL: Yes.

CHAIR HOLTZMAN: 21 years? You think
she was experienced? I do.

MR. STONE: But that is not going to
come close to a minimum of --

CHAIR HOLTZMAN: I understand --
MR. STONE: -- two years.

CHAIR HOLTZMAN: -- that, but --

MR. STONE: It's not the --

CHAIR HOLTZMAN: -- let's try --

MR. STONE: -- same thing.

CHAIR HOLTZMAN: -- seven months against two years --

MR. STONE: Well --

CHAIR HOLTZMAN: -- I mean, I think there is some point, just to support what the Subcommittee recommended and what Judge Jones is talking about, is that there is some real value in having people have the benefit of going through a lot of cases, being able to evaluate them, evaluate witnesses, evaluate victims, handle cross-examination, all the techniques in these cases, understand where the investigator needs to do more or needs to do different things.

I just think that that kind of experience is invaluable. In the private, in the civilian sector, 21 years. I mean, that tells you something about the value of that experience.
We're talking about two years. Yes, of course, there are negatives. I think Mr. Stone you absolutely are correct in pointing out the disadvantages.

But on the other hand, if we're talking about a system that has so hollowed out in my opinion from what I have heard -- now maybe it is anecdotal and maybe it's not correct, I am certainly willing to admit that I could be making a mistake here -- but when you have a system that has so hollowed out the defense capacity -- I am not saying it is intentional or it is mean or it is deliberate or anything like that, but that is so hollowed out, you need to build it up. In my opinion, that is what this is about. Maybe I misstated it.

JUDGE JONES: No, but you know what, it's a fair question. I am virtually certain this meant serving as a defense counsel for two years, not -- not that you had to stay in one place for two years.

PROF. TAYLOR: Well, that was exactly
my point --

JUDGE JONES: Right.

PROF. TAYLOR: -- because it could be that you could be working in a defense position in a tour in -- in continental United States and then deploy for a year as a defense counsel. You have two consecutive years --

JUDGE JONES: Right.

PROF. TAYLOR: -- but it's not like a tour --

JUDGE JONES: Right.

PROF. TAYLOR: -- if that makes sense.

JUDGE JONES: Well, we may have the wrong word, and we may have had that wrong word since we started.

PROF. TAYLOR: I think -- I think if we think in terms of two consecutive years of service as a defense counsel --

JUDGE JONES: Yes.

PROF. TAYLOR: -- that is what you're really after as opposed to tour lengths, tying it to tour lengths. Is that correct?
MS. SAUNDERS: Can I mention one thing too, that the Subcommittee also considered, just to bring this up, is that the two-year tour length also was so that clients could have the same attorney, that that person would be in the position for two years. There were some complaints from defense counsel that they were having to leave and get -- get -- they were -- their clients were having to get new attorneys, so it alleviated that -- that problem --

JUDGE JONES: Well Terri then correct me, either from your recollection from RSP or the most recent ones, is this also location, a two-year tour, meaning what it probably means in the military, which is a tour at one place?

MS. SAUNDERS: A tour is typically at one location. I don't know that we specifically parsed it out that way, or that the Subcommittee specifically parsed it out that way, but that was one of the concerns that was raised, was you did have one of the defense counsel from the Marine Corps testify before you in May, and I know she
pointed out these 12 to 15 months, counsel is coming in, and they are moving on after this very short period of time, that the -- that means that some of the clients did not have -- you know, were forced to get new attorneys, you know, during that period of time before their case went to trial, because sometimes these cases take so long to go to court. I just wanted to throw that out there for consideration.

JUDGE JONES: Well, I don't know how the rest of the Panel feels about this second half of this recommendation, because I do -- I am not sure that's in the -- it's in the body of the report itself.

MS. SAUNDERS: And that may have been in the Subcommittee report body, but perhaps that part didn't transfer over, but we could certainly include information to that effect, because we did --

JUDGE JONES: Well maybe --

MS. SAUNDERS: -- the Subcommittee did --
JUDGE JONES: Yes, I wouldn't ask the
-- this Panel to vote on the second half of that
until we're sure what we are recommending, or we
can decide what we think a good recommendation is
if one is needed.

I -- my thinking on it was, as I said,
that somebody should have two years, at least two
years before they get transferred out of the
defense role. I don't know if anyone is ever
going to be happy in terms of clients because you
are always going to be moving, and there's always
going to be some clients you're going to be
leaving behind, so I am not so persuaded that it
has to be a two-year tour at one place.

I at least have -- was always focused
on making sure they got two years of defense
experience before they became either a prosecutor
or some other capacity in the legal system.

PROF. TAYLOR: And Judge Jones, I
agree with that. I agree with the two
consecutive years of defense experience. I think
it may be unnecessarily tying the hands of
military commanders who have to move people
around to say it has to be in the same location
as opposed to two consecutive years.

VADM TRACEY: So could we modify this?

"In addition, the Military Services should
consider assignment policies that ensure that
defense counsel gains a minimum of two years, two
consecutive years of experience in the role"?

CHAIR HOLTZMAN: Well, and maybe, to
the fullest extent practicable, at the same
location.

JUDGE JONES: Yes, at the same
location.

PROF. TAYLOR: Yes, that would be
fine.

CHAIR HOLTZMAN: Am I allowed to say
that Subcommittee members sitting in the audience
are shaking their heads yes?

MR. STONE: I am sorry --

CHAIR HOLTZMAN: Because they have a
better idea of what they meant than I did?

(Laughter.)
JUDGE JONES: Well, that encompasses both the thoughts, Admiral, so I would accept that.

CHAIR HOLTZMAN: So just maybe Mr. Stone do you want to have it read back to you, more or less, what it is --

MR. STONE: Well, did we -- we haven't voted on I don't think my recommendation yet or this one, have we? We haven't voted --

CHAIR HOLTZMAN: No.

MR. STONE: -- on proposed, my proposed 46 or the blue --

CHAIR HOLTZMAN: Let's do -- let's --

MR. STONE: -- 46, so --

CHAIR HOLTZMAN: Okay.

MR. STONE: -- you're in --

CHAIR HOLTZMAN: Let's vote on --

MR. STONE: -- charge, go ahead.

CHAIR HOLTZMAN: All right. Let's vote on Mr. Stone's proposed 46.

MR. STONE: And let me start by saying that based on this last discussion, I would
entirely strike the language in my proposal that
says "In addition, the Military Services are
urged to set a minimum tour length applicable to
counsel and trial judges in such cases," and then
I would just have the phrase "except when an
exception is approved in a specific case," et
cetera, and I would leave that in related to the
-- when people are qualified to serve.

And I say that because I believe
people have to be qualified to serve as lead
counsel no matter how long or short they have
been there. I don't think it helps the Service
in finding people to do that to say that they are
locked into minimum tour lengths for people who
would like to do that job, and I think this has
to include the qualifications of lead
prosecution, defense, and victim's counsel and
trial judges because I think as we have heard in
prior JPP sessions, sometimes the complaint is
that the prosecution counsel was naive and might
not have brought the case if he had had more
experience and/or might have acted differently,
and therefore I think they should have experience as well.

I think that we have not seen cases reversed on this basis by the military courts of appeals. We have not seen an increase in the number of acquittal -- acquittals because of experienced or inexperienced counsel. I think that there is no question it would be nice to have some kind of a process because these are serious cases, but I think that has to be across the board.

And I would just like to add, and this goes for all my recommendations, these recommendations have been explicitly harking back to recommendations from the Response Systems Panel. Those recommendations came about from testimony that was never presented to me or this Panel, so I have no problem making the suggestions that I am making that hark back to testimony that this Panel heard earlier in its existence. So that does not trouble me at all.

I am not saying I would reject
responses to those Panel recommendations, I am just saying it is clear that the JPP has the authority to look back at what it has heard and what has been presented, and that is exactly what I am doing in my alternatives. So that is how I justify wanting all of these counsel, including the trial judge, to be experienced. We have heard complaints about that, with exceptions being made by these high officials that are named or voluntarily waived.

CHAIR HOLTZMAN: Judge Jones, do you want to make a comment?

JUDGE JONES: Yes. I am not sure what -- what your actual recommendation is, Mr. Stone.

MR. STONE: You want me to read it?

JUDGE JONES: No, I can read it. You took out the last part of it?

MR. STONE: I took out from the sentence that says "In addition," which is the last sentence, and I modified it so that the exception language being approved in a specific case relates to the qualifications of lead
counsel.

JUDGE JONES: All right. Well just reading your first sentence again, for the same reasons, I would not expand this recommendation to victim's counsel and military judges, since we have not considered that. So -- so I -- and I think that the first part of the Subcommittee's recommendation is virtually the same as yours without that.

CHAIR HOLTZMAN: Any further discussion?

(No audible response.)

CHAIR HOLTZMAN: Let's vote on Mr. Stone's Recommendation 46. All in favor, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Opposed, say no.

(Chorus of nays.)

CHAIR HOLTZMAN: The no's have it. Now we go to Recommendation -- and the proposed recommendation not accepted. Recommendation 46 in blue, is there any discussion of this?
PROF. TAYLOR: I would just like to add, Madam Chair, that when I asked to put it on a case-by-case basis for the approval, what I was fearful of was blanket approvals --

CHAIR HOLTZMAN: Yes.

PROF. TAYLOR: -- by a senior official.

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: And I think I would like to add a friendly amendment to my own friendly amendment, and that is to put "personally approved" so that that cannot be delegated to some lesser official, which under normal interpretation you might be able to do, so how it would read is "personally approved on a case-by-case basis."

CHAIR HOLTZMAN: And also, is there any objection to that?

(No audible response.)

CHAIR HOLTZMAN: All right. Secondly, should we incorporate the prior conversation about your --
PROF. TAYLOR:  Yes.

CHAIR HOLTZMAN:  -- proposal?

PROF. TAYLOR:  Yes.

CHAIR HOLTZMAN:  So --

PROF. TAYLOR:  I think between what Admiral Tracey and you said, that's it, the substance of it.

CHAIR HOLTZMAN:  Ms. Saunders, do you have it down?

MS. SAUNDERS:  I am afraid I do not have all of it --

(Simultaneous speaking.)

VADM TRACEY:  "In addition, the Military Services should consider," and we may need to modify that given Mr. Taylor's amendment to that, "should consider assignment policies that provide defense counsel two or more consecutive years of experience in the role to the maximum extent possible at the same location."

CHAIR HOLTZMAN:  Right, feasible.

VADM TRACEY:  Right, "to the maximum
extent feasible at the same location," period,
and then "Exceptions to this policy should be
personally approved."

PROF. TAYLOR: Well, I would just add
that that changes it considerably if you say
"consider" instead --

MR. STONE: Right.

PROF. TAYLOR: -- of "set."

MR. STONE: Yes.

PROF. TAYLOR: So I think we need to
stick to "set." At least, that was my -- my
suggestion. Judge Jones?

JUDGE JONES: Yes, set, sorry.

CHAIR HOLTZMAN: All right. Everyone
in favor of those amendments, say aye.

(Chair Holtzman, Judge Jones, Prof.
Taylor, and VADM Tracey said aye.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: Opposed.

CHAIR HOLTZMAN: Recommendation 46,
the amendments are accepted. Recommendation 46
as amended in the blue box, all in favor say aye.

(Chorus of ayes.)
CHAIR HOLTZMAN: All opposed, say no.

MR. STONE: No.

CHAIR HOLTZMAN: The ayes have it.

Recommendation is adopted.

VADM TRACEY: Again, just the status --

CHAIR HOLTZMAN: Sure.

VADM TRACEY: -- of RSP recommendation?

CHAIR HOLTZMAN: You mean bullet number 3?

VADM TRACEY: Yes, just request status if it has been approved in part --

CHAIR HOLTZMAN: Oh.

VADM TRACEY: -- referred for further study?

MR. STONE: Which one are you suggesting?

CHAIR HOLTZMAN: Bullet 3 on page 6, Mr. Stone, just to explain what happened to the RSP recommendation --

MR. STONE: Oh, okay.
CHAIR HOLTZMAN: -- by the Defense Department, okay? Now just a procedural question: if we had not actually approved the language, can we do that on a phone call? Can we do that if we circulate? What is the -- Mr. Sprance, what is our --

Oh, okay, fine.

PROF. TAYLOR: Well we have also done it just based on circulation.

CHAIR HOLTZMAN: Okay, fine, so we could circulate --

PROF. TAYLOR: It's too hard to do a --

CHAIR HOLTZMAN: -- it, and if there's any --

PROF. TAYLOR: -- conference call --

CHAIR HOLTZMAN: -- objection to the language, fine, then we will -- if necessary, we'll have a phone conversation, okay.

So are we up to page 12? Yes, we have Mr. Stone's language on page 12 to consider. The -- I guess the first is the one in I would say
it's paragraph -- in the blue, are we all in the blue? -- 1, 2, paragraph 3, where you propose changing "demonstrate" to "suggest." Is that correct, Mr. Stone? Is that what you are --

MR. STONE: "Suggest," yes, "suggest" is the word I put in.

CHAIR HOLTZMAN: Okay.

MR. STONE: Used to say "demonstrate."

CHAIR HOLTZMAN: Do you want to explain that?

MR. STONE: Oh, I -- to demonstrate something, you've got to have evidence. Suggest is what anecdotal testimony means.

CHAIR HOLTZMAN: Okay. Any objection?

JUDGE JONES: No.

CHAIR HOLTZMAN: I have no objection either. So without objection, that is adopted. I guess the next one is on page 13.

MR. STONE: Same comment.

CHAIR HOLTZMAN: Okay. "Suggest" instead of "show" --

MR. STONE: Yes.
CHAIR HOLTZMAN: -- any objection to that?

JUDGE JONES: No.

CHAIR HOLTZMAN: No objection, it is adopted.

Next one is -- do we have a next one? It is on page 16. Where does it start? Oh, I am sorry, it starts on page 15, the bottom of 15. Is that correct? Is that the next, Mr. Stone, bottom of page 15?

MR. STONE: Yes.

CHAIR HOLTZMAN: That sentence, do you want to explain your proposal, sir?

MR. STONE: Excuse me?

CHAIR HOLTZMAN: Do you want to explain your --

MR. STONE: Sure --

CHAIR HOLTZMAN: -- proposal?

MR. STONE: -- sure. That is not part of the report either. That is commenting on a legal matter which I don't think is even accurate because there's plenty of times when the strategy
has to be replied -- disclosed early, like in an
alibi situation, and it is not necessary to what
follows. That is not the reason that we want to
invest expert approval authority and expenditure
funding in the Service defense organizations. We
want to do it because they have not been getting
them.

JUDGE JONES: So I agree that you do
have to notice alibi, but in the context of what
we are talking about here, I think all that was
intended is -- is to say, and this is a fact,
that since it has to go to trial counsel, the
trial counsel inevitably get information about
the defense that they would not otherwise get.

MR. STONE: I don't know that that is
the case when it goes up through the chain. I
don't know that they don't have an independent
person in a prosecution service who is not
related who signs off and sends it to the
commanding officer. I don't think they comment
and say no, don't give them the expert, so I
don't know. We didn't hear testimony about
whether that is insulated or not, and as I said, this jumps to a conclusion we don't have evidence on.

MS. SAUNDERS: On site visits --

JUDGE JONES: Well --

MS. SAUNDERS: -- I think --

JUDGE JONES: -- it is my understanding that --

MS. SAUNDERS: -- a number of members did hear from defense counsel and prosecutors that that is the process, that it goes to the trial counsel.

JUDGE JONES: It goes to the trial counsel on that specific case, to the convening authority, so that is why I -- and I totally agree that alibi does not make a difference, but, you know, when you are asking for, you know, a psychiatric expert on something and you have to develop the relevance, you may not want the trial counsel to see that on their way to getting approval from the convening authority, so that was the intent of this.
VADM TRACEY: And we comment on that in the --

JUDGE JONES: Yes, we do.

VADM TRACEY: -- changes that we made in the executive summary, so we made some reference to it. It might be editable, what we say here.

CHAIR HOLTZMAN: Maybe we wanted to add that it could say should not in general be required to reveal.

PROF. TAYLOR: Yes, or you could add something like at the end "unless otherwise required by law."

CHAIR HOLTZMAN: Yes, all right, okay, good.

PROF. TAYLOR: If you added that at the very end, "unless otherwise required by law," then it would cover alibi and anything else we can't think of right now.

CHAIR HOLTZMAN: Right. Okay.

JUDGE JONES: That would do it for me.

CHAIR HOLTZMAN: Yes. Any objection
to Mr. Taylor's amendment to this language? No objection?

JUDGE JONES: No.

CHAIR HOLTZMAN: The language is amended. Now in light of that, do we accept Mr. Stone's -- Mr. Stone, are you still proposing your amendment in light of Mr. Taylor's amendment?

MR. STONE: No, I will accept that friendly language --

CHAIR HOLTZMAN: Okay.

MR. STONE: -- friendly amendment language.

CHAIR HOLTZMAN: Great, so we don't have to vote on that, so that -- so the "furthermore" language as amended remains. Is that it?

MR. STONE: No, page 18.

CHAIR HOLTZMAN: Okay. Sorry.

MS. SAUNDERS: Ma'am, also on page 16, the words "in sexual assault cases" --

CHAIR HOLTZMAN: Okay.
MS. SAUNDERS: -- in the --

CHAIR HOLTZMAN: Is there an objection to that language?

MS. SAUNDERS: That was, Ms. Holtzman, that was your suggestion.

JUDGE JONES: No objection.

CHAIR HOLTZMAN: Yes, it seems -- okay. Since there is no objection, that is accepted.

Now we are up to page 18. I guess we're in the last paragraph. Wow, okay.

(Laughter.)

CHAIR HOLTZMAN: All right. So Mr. Stone, do you want to explain the two --

MR. STONE: Yes.

CHAIR HOLTZMAN: -- proposals that you have made --

MR. STONE: Sure.

CHAIR HOLTZMAN: -- please? Thank you.

MR. STONE: The first substitution would be for, instead of "at least two years," it
would say "for a specified minimum period of time absent a particularized exception by either a superior officer or the client," because I don't want to prejudge the military group that is examining how long the tour should be. If they decide it is 23 months or 22 months or 21 months, based on what assignments of tours are, two tours might be 18 months, or they might even come back and say, you know, a number of days rather than months.

I don't know how they determine it, but I think it's enough for us to recommend a specified minimum period of time, especially since you have now approved a recommendation that goes to two years. I don't think we have to be quite so directive when this is pending before them.

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: I -- I -- so what is your actual change that you would like?

MR. STONE: Instead of -- it's in the first box that says TS-3. Instead of --
JUDGE JONES: I am on page 18.

MR. STONE: -- the declaratory --

JUDGE JONES: Oh, I see.

MR. STONE: -- statement would confirm that we think it is --

JUDGE JONES: I got it.

MR. STONE: -- important for them to serve a minimum tour, which is something I am not sure anymore that I agree with. Actually, based on what I just heard, I guess my recommendation now is to strike that entire sentence and just begin with the next sentence. I just don't think it adds anything that I am in favor of. I want qualified counsel. I don't care how long the tour is.

JUDGE JONES: Well, this goes to what we just discussed and voted --

MR. STONE: Yes.

JUDGE JONES: -- on in the other recommendation, which is that in order to gather the skills and experience, we would like them to serve in the position for at least two years. I
think we already voted on that. This does not say you have to serve in a position for two years to be lead counsel.

CHAIR HOLTZMAN: Okay. Are we ready to vote? Everyone in favor of Mr. Stone's proposal, say aye.

MR. STONE: Aye.

CHAIR HOLTZMAN: Those opposed, say no.

(Chorus of nays.)

CHAIR HOLTZMAN: The proposal is not accepted. Mr. Stone, you have a next one --

MR. STONE: Yes.

CHAIR HOLTZMAN: -- next-to-the-last -- three lines down from the end.

MR. STONE: The next one is right at the bottom, the last sentence of the report before the recommendation. I would strike the whole sentence now because now that I understand that you want them to serve a tour irrespective of whether they are qualified to be the defense counsel, I don't think it makes sense to say this
is simply not sufficient for -- to enable them to
gain the necessary experience. They needed to
have it before they even served as lead counsel,
so I am not going to -- I can't endorse the whole
sentence. I would strike the whole sentence.

I think you're tying the military's
hands at times when we're pushing them to come up
with resources and -- and make allocations and
solve all the problems, and I don't want to make
their life any tougher than it is to try and
figure out where to get attorneys to volunteer
who are experienced and maybe have moved on that
will come back to that position because their
commanding officer says I need you, you have been
advising the commanding officer for the last
three or four months or whatever, but, you know,
in the past, you were a terrific defense counsel,
and we don't have any around here that can
fulfill that role. I would like you to go back
there.

So I don't want to -- I would simply
strike that whole sentence as unnecessary.
JUDGE JONES: All right. I think there is the -- there is the possibility, and in fact, it is built right into the recommendation, that there's a case-by-case basis analysis, and you have just been talking about specific cases where a different decision would be made.

And again, just so there is no misunderstanding, everyone has to try their first sexual assault case without having tried any others before it, but they are not the lead counsel. So we are talking about building the skills here of new defense counsel so that they can get two years of defense experience, and that is not the same as finding someone who is qualified to be lead counsel. And as I understand it, frequently, you know, when there is a need for a more senior counsel, that person travels to help out, case-by-case basis.

CHAIR HOLTZMAN: Okay. Those in favor of -- well, let me just say, I don't have any objection myself to striking the words "simply not" and just leaving it at "this is not
sufficient time" so that we don't -- but I don't --

JUDGE JONES: Oh, I am sorry, didn't even focus on that.

CHAIR HOLTZMAN: So I --

JUDGE JONES: Mr. Stone's recommendation to go to this is "not always sufficient"?

CHAIR HOLTZMAN: I would just say --

I would just say that this is just not sufficient time instead of this is "simply" not, just making it not as emphatic, that's all. It's a not very strong --

MR. STONE: I will just add that we don't have any statistical evidence that that is the case. Again, you are going on anecdotal evidence. It is not statistical. There has not been stuff presented to us that says two years is not -- that what is happening now, 12 to 24 months, is not sufficient, and as long as we're going on anecdotal evidence, I will throw in that I have known plenty of terrific lawyers as to
whom that is sufficient, and that's why
originally I said "not always" for "simply not."

    But I just don't think tour length, at
least the way the sentence reads -- if you want
to change it to say "not sufficient time to
enable non-lead defense counsel to gain the
necessary experience," maybe -- maybe that would
make more sense. But as it reads at the moment,
it doesn't make any sense to me, so I have to
recommend against the whole sentence.

    CHAIR HOLTZMAN:  Well, that proposal
was rejected. Well, did we vote on that? Wait,
I am just getting confused now. Did we vote on
Mr. Stone's proposal on that? Not yet?

    MS. SAUNDERS:  Not yet.

    CHAIR HOLTZMAN:  All right. So Mr.
Stone wants to remove the entire last sentence,
proposes that we remove the entire last sentence.
All in favor, say aye.

    MR. STONE:  Aye.

    CHAIR HOLTZMAN:  Opposed, say no.

    (Chorus of nays.)
CHAIR HOLTZMAN: The ayes have it --
I am sorry, the no's have it, so the sentence is
not -- is -- remains in. I just was -- I just
withdraw my proposal on that.

So are we finished now?

MS. SAUNDERS: Ma'am, can I clarify?
Do you not want the word "simply" to be struck,
or --

CHAIR HOLTZMAN: It's not worth --

MS. SAUNDERS: Okay.

CHAIR HOLTZMAN: -- discussing. Any
further -- so we're finished with --

MR. STONE: Well, don't we have to vote on the report as a whole --

CHAIR HOLTZMAN: Okay, yes.

MR. STONE: -- whether we're accepting --

CHAIR HOLTZMAN: Sure, let's vote on the whole report, right, you are exactly right.
So someone want to move the --

JUDGE JONES: Yes.

CHAIR HOLTZMAN: -- adoption of the
report?

CAPT TIDESWELL: Chairman Holtzman, or Chairwoman Holtzman, I would recommend that you allow us to make the required changes, and we could either send it out over the email for one last look before you all actually approve.

CHAIR HOLTZMAN: Why don't we adopt it, or whatever vote --

CAPT TIDESWELL: Yes ma'am.

CHAIR HOLTZMAN: -- subject to receiving so that if we vote to adopt it, it should be subject to receiving --

CAPT TIDESWELL: Yes ma'am.

CHAIR HOLTZMAN: -- your final comments and -- and having the opportunity to make those -- you know, to edit any of those comments that you --

CAPT TIDESWELL: Yes ma'am.

CHAIR HOLTZMAN: -- send us. Okay.

Was that --

JUDGE JONES: I would move to adopt the Subcommittee's report as the Judicial
Counsel Resources and Experience in Sexual
Assault Cases.

CHAIR HOLTZMAN: Subject to --

JUDGE JONES: Yes, subject to us seeing anything that has been changed that would change our minds about our vote this afternoon when we see the edits.

PROF. TAYLOR: Just a friendly amendment, excuse me, and that would be also subject to the changes we made in the JPP report today, which does adopt the report. I think is that implicit?

JUDGE JONES: Yes.

PROF. TAYLOR: Thank you.

JUDGE JONES: I think that is right.

CHAIR HOLTZMAN: Okay. All in favor, say aye.

(Chorus of ayes.)

CHAIR HOLTZMAN: Opposed?

MR. STONE: No, and I would just say that is based on the fact that I don't believe
that the report, which does take into account
material presented and recommendations of the
Response Systems Panel, takes into account all of
the testimony that the JPP has heard over the
last 24 months. Thank you.

CHAIR HOLTZMAN: Okay. I think we can
take a lunch break now.

CAPT TIDESWELL: Yes ma'am.

CHAIR HOLTZMAN: We will come back in
what, a half-hour?

MR. STONE: No, come on.

CHAIR HOLTZMAN: No, 45 minutes?

MR. STONE: At least, yes.

CHAIR HOLTZMAN: Okay, 45 minutes, and
then we still have the Victims' Appellate Rights
to review.

(Whereupon, the above-entitled matter
went off the record at 12:52 p.m. and resumed at
1:42 p.m.)

CHAIR HOLTZMAN: Okay. Captain
Tideswell, please begin.

CAPT TIDESWELL: Yes ma'am.
CHAIR HOLTZMAN: Thank you.

CAPT TIDESWELL: We're here during this block of time to deliberate as a Committee on the report on victim's appellate rights, but prior to doing so, if you don't mind, we have several subject matter experts standing by from the various Services that are at your disposal to answer questions if required. If you don't mind, I will introduce each one, starting from my right, and their bios are in your folder, ma'am.

CHAIR HOLTZMAN: Great, thank you.

CAPT TIDESWELL: I am going to review those.

But first we have Colonel Katherine Oler. She is the Chief, Government Trial and Appellate Counsel Division for the United States Air Force; Colonel Jeffrey Palomino, who is the Chief of the Appellate Division for the U.S. Air Force; Lieutenant Colonel Deanna Daly, who is the Senior Special Victims' Counsel for Appellate and Outreach at the Special Victims' Counsel Division, U.S. Air Force; Mr. Orr is not here.
He has testified before, Retired Colonel William Orr, he is the Chief, Strategic Military Justice Legislation and Policy for the United States Air Force Judiciary.

Immediately to my right is a Staff attorney, Ms. Nalini Gupta. On my left is Lieutenant Colonel Katherine Vergona. She is the Chief, Policy Branch with the Army Criminal Law Division. Captain Andrew House is the Director of the Navy and Marine Corps Appellate Defense Division, and Mr. Stephen McCleary is the Deputy Chief of Staff and Deputy Managing Counsel at the Department of Homeland Security, Office of the General Counsel.

CHAIR HOLTZMAN: Okay. Well, welcome. We appreciate your -- your willingness to be gluttons for punishment and try to help us figure this out, so thank you. We really appreciate that, that you -- that you are here with us today.

CAPT TIDESWELL: Yes ma'am. And I will defer now to Ms. Gupta to sort of take us
back through the history.

CHAIR HOLTZMAN: Okay.

MS. GUPTA: Good afternoon, Panel Members. In April --

CHAIR HOLTZMAN: Pull the mic closer to you, that would be better.

MS. GUPTA: In April of last year, the JPP heard from the SVC and VLC program managers, who identified issues related to the military appellate practice affecting victims. The SVCs and VLCs submitted a legislative proposal for the JPP to consider which would, among other things, allow victims to participate in appellate proceedings as a real party in interest. The proposal would also require that victims receive notice of all appellate matters.

Separately, a provision was included in the Senate version of last year's National Defense Authorization Act, and this was called Section 547, which would also permit victims to participate in appellate proceedings as a real party in interest. This provision was not
passed, and Congress's conference report noted it as waiting upon the JPP's analysis of appellate issues.

JPP heard testimony in September and October of last year from, among other groups, appellate defense counsel, appellate government counsel, appellate judges, and victim's counsel on the legislative proposals and generally on appellate issues. Based on the testimony, the JPP identified four main issues for its review and analysis: first, appellate counsel review of sealed materials not disclosed to counsel at trial. This is currently governed by Rule for Courts-Martial 1103A.

Two, notice to victims of appellate matters. Three, victim standing in post-conviction appellate proceedings. And four, whether victims should be able to appeal to the CAAF if a Service court of criminal appeals denies their petition for a writ of mandamus.

The JPP deliberated in November, and based on those deliberations, the Staff has put
together a list of draft recommendations. This is available in your blue folder on pages 5 to 7 of the report, and I have also passed out copies for all the subject matter experts to follow along.

JUDGE JONES: Do you have any others? I apologize. I don't know what I did with it.

MS. GUPTA: I would be happy to walk through the recommendations, and as I do that, I would like to point out some additional information that the Staff and the Panel has obtained since the Panel's last set of deliberations in November.

So starting on page 5, Recommendation 39, the -- the current recommendation states "The President amend Rule for Courts-Martial 1103A to establish uniform procedures for appellate counsel access to sealed materials without requiring prior in camera review by military appellate courts." This recommendation reflects the Panel's deliberations in a 4-1 vote in November.
I would like to draw your attention to four developments from the past couple of months. First, shortly after the Panel's public meeting in November, the Joint Service Committee, or JSC, proposed an amendment to R.C.M. 1103A. The JSC's proposal is available at Tab 9 of your booklet.

The JSC's proposal --

CHAIR HOLTZMAN: Oh, you mean this booklet?

MS. GUPTA: Of this booklet, yes, Tab 9.

CHAIR HOLTZMAN: All right.

MS. GUPTA: And just as a quick summary, the JSC's proposal would, among other things, prevent appellate counsel from examining sealed materials not released to counsel at trial unless a reviewing or appellate authority, which is defined to include judges of the Service courts of criminal appeals and the CAAF, first examines the materials and determines that there is good cause for appellate counsel examination.

Second, at the November meeting, Ms.
Holtzman asked the Staff to submit a Request for Information to the Services asking for feedback on the Air Force's practice, which requires that counsel submit a motion to the court requesting authorization to review sealed materials. The JPP had identified the Air Force practice as a potential best practice back in November.

The responses to the RFI are available at Tab 11 of the booklet. As a quick summary, the Army objected to the JPP's recommendation to modify R.C.M. 1103A to reflect the Air Force practice, highlighting that the Army courts' internal rules already impose sufficient access controls to ensure only attorneys of record have access to the sealed materials. The Air Force, Navy Marine Corps, and Coast Guard all deferred to the Joint Service Committee's proposed amendment to R.C.M. 1103A. Service representatives are here and are available to answer your questions about the Services' responses, if you have any.

Third, Mr. Taylor requested at the
JPP's January 6th meeting that the Panel review public comments submitted in response to the JSC's proposal. There are seven public comments which we received, and those are available again in your blue folder. These include comments received from defense counsel and from victim's counsel, and in general, both groups expressed opposition to the JSC's proposal. Some of the Servicemembers who submitted public comments are here today and can answer your questions, should you have any.

And finally, after we sent out the draft report a couple weeks ago, Mr. Stone submitted an alternate recommendation to the JPP's recommendation from November, and Mr. Stone's proposed recommendation is highlighted in yellow, and Panel Members' comments are also reflected in the bubble comments. So Ms. Holtzman, we recommend that the Panel begin by considering the proposed recommendation in blue as well as Mr. Stone's alternate recommendation in yellow, determine what the final
recommendation should be, and then look at the
bullets addressing the JPP's findings as well.

CHAIR HOLTZMAN: Excuse me, didn't we
vote on Recommendation 40 already? I am just
trying to understand what you are recommending we
do because I am not necessarily wedded to the
idea, or enamored of the idea, I should say -- I
am sorry, Recommendation 39 -- of redoing what we
have already done.

MS. GUPTA: Sure. The JPP did discuss
but has not approved the final language at this
time, so --

CHAIR HOLTZMAN: Well, what did it
vote on?

MS. GUPTA: It voted in general on
what the recommendation should be, but did not --
did not have final language, so the Staff drafted
language for the JPP's review and final approval.

CHAIR HOLTZMAN: So this is just -- so
we approved the concept, but we have not approved
the language, is that --

MS. GUPTA: I think that is --
CHAIR HOLTZMAN: -- what you're saying about 39?

MS. GUPTA: 39, that is right, and 39 has also been affected by a number of intervening events, including the JSC's proposal and a number of public comments that have been submitted, so I know the JPP during November deliberations did want to wait until it approved the final recommendation and wanted to review those -- the JSC's proposal and the public comments in response to the JSC's proposal.

CHAIR HOLTZMAN: Well, well, whether we -- I mean, it sounds like we are re-voting on the same thing. Did -- did Mr. Stone make this proposal the last time, in essence, or --

MS. GUPTA: I don't believe --

MR. STONE: There was no language circulated.

MS. GUPTA: There was no language circulated --

MR. STONE: As soon as --

MS. GUPTA: -- so this --
MR. STONE: -- the language was circulated, I made the proposal.

MS. GUPTA: Right, so this was received by the Staff after the November -- in the past couple weeks.

CHAIR HOLTZMAN: Okay. I am still not happy with this procedure because it sounds like we are redoing what we already did, but okay. Let's not worry about that, then.

So Mr. Stone, do you want to talk about -- do you want to explain your proposed recommendation?

MR. STONE: Sure.

CHAIR HOLTZMAN: Please.

MR. STONE: I don't know if everybody at the table and others who are observing read copies of my proposed dissent, which were out there on the table for you to receive, but in looking at the materials, I did not see a single person who read and commented on the M.R.E.s, including Military Rule of Evidence 513, which this Panel has strongly endorsed in the past, and
Military Rule of Evidence 1101B, which is entitled Privileges and says that Military Rule of Evidence 513 -- that actually it says all privileges in Chapter 3 and Chapter 5, which includes Military Rule of Evidence 513, apply at all stages of a criminal case.

Instead, I saw a lot of comment about Rule for Courts-Martial 1103A, the comment on it which in its text says it's involved with covering national security materials, and when you read the history of that in the Manual for Courts-Martial, it says it was enacted after the rape shield law was enacted, and it was done specifically to be able to seal those materials.

Those materials, whether they are national security materials in the case where a defendant is being prosecuted, or whether they are rape shield materials, are not privileged materials. They are typically known to the defendant. That is why he's being prosecuted, either for possessing or distributing national security materials or because he wants to
introduce a sexual assault victim's prior history, and they get sealed by a judge to preserve the status quo.

That is not the case when privileged materials which are specifically stated by M.R.E. 1101B are involved in a case because those are typically materials that the defense counsel has not seen. That's why we're having this whole discussion. And often they are materials the judge has decided there is no basis for him to see.

And when we reaffirmed Military Rule of Evidence 513, we put -- shined a light on the fact that military investigators were simply routinely going to military hospitals and demanding psychotherapists' records without any process at all, and that material was subsequently stopped because it didn't comply with M.R.E. 513.

And so it seemed to me that there are two different topics at issue, and I haven't heard or seen any of the comments, whether from
the Joint Service Committee or the prior testimony that we had, that distinguished between confidential materials where a judge seals them to maintain the status quo and the parties do know what's in them -- at least the defense counsel certainly does, or he may, and why the judge is sealing them is because he doesn't want everybody else to find out what, I don't know, Mr. Snowden or somebody like him in the military may already know about documents he is not supposed to know, and they don't want them to go out to the public and be part of the public record -- and privileged documents, which by name are required at all stages of the proceedings by M.R.E. 1101B and its history that says it was enacted to follow Federal Rule of Evidence 1101, and those are handled because they are privileged documents in a totally different way.

And no, the defense counsel is trying to get access. They haven't gotten access unless the judge has previously decided based on the trial-level hearing that they are not privileged,
so defense counsel does not have access. Often
the judge has decided not to review them because
there wasn't a sufficient proffer, and any
distribution of them at all stages of the
litigation by M.R.E. 110 -- I am sorry, 1101B, or
in a civil -- in a non-military case, non-
military setting, by Federal Rule of Evidence
1101, has nothing to do with sealing. It has to
do with following an adversarial proceeding like
Rule 513.

And so my proposed recommendation is
in here that makes it clear that whatever happens
to 1103A, which never says on its face that it
deals with privileged documents, has nothing to
do with counsel or the court complying with
M.R.E. 513 and 1101B that says 513 applies at all
stages of the proceeding. And that is why the
language is in there, and I actually would invite
members of our military legal community who are
sitting around the table to please comment and
tell me.

I couldn't find any decisions, and I
didn't see anything cited to me that suggests
that Military Rule of Evidence 1101B, which is
pretty explicit on its face, on its history, is
irrelevant to this discussion, and so I am trying
to avoid us mixing up apples and oranges here.
And maybe can tell me.

CHAIR HOLTZMAN: Can I just
understand, before we go to anybody else, can I
just understand what you're trying to do here?
Basically, what -- as I understand it, and I
don't mean to -- to misstate this, I am just
trying to understand it, you have not changed the
basic Recommendation 39. What you have done is
say that 39, whatever we have done, does not
apply to M.R.E. 513 and M.R.E. --

MR. STONE: 1101B.

CHAIR HOLTZMAN: -- 513. And what
does 1101B say?

MR. STONE: 1101B is the -- is the
document, and if you like, I can read it verbatim
--

CHAIR HOLTZMAN: No --
MR. STONE: -- it's in the proposed dissent that I circulated to you, that says --
1101B is entitled "Privileges."

CHAIR HOLTZMAN: Okay. So what --

MR. STONE: And it says privileges at all stages shall be governed, all stages of the case, shall be governed by M.R.E. 513, which is what happens in federal court.

CHAIR HOLTZMAN: Okay. Well --

MR. STONE: And it --

CHAIR HOLTZMAN: Was there any -- let me just ask you this question. Was there any reason to believe that what we were doing would affect 513, or is this just --

MR. STONE: Sure.

CHAIR HOLTZMAN: -- an abundance of caution on your part?

MR. STONE: No, no, no. As I understood it, the informal discussion was oh, 513 materials will also be subject to the 1103A rules. That is what everybody has been informally telling us, and formally telling us
that when it got up to appeal, the reason they were changing this is because they wanted access to the privileged documents they had not previously seen, defense counsel did, and that is not necessarily true in a confidential setting. But if everybody is comfortable that the 1103A rules have nothing to do with privileged documents and don't try and -- and are not intended to overrule presidentially-approved M.R.E. 513 or 1101B, then we have no problem. So I just wanted to make that explicit because I see this confusion permeating all the prior discussions that we have had about this Rule, and again, I would like to hear the discussion, the comments from the people sitting around this table. I invite them.

COL ORR: Well, if I may, sir? Part of the reason for the 1103A change was to limit the access to defense counsel to those records. Right now, the Rule reads that defense counsel are appellate reviewing authorities, so if it is in the appellate court and it is attached to the
record, they have access to it.

MR. STONE: Excuse me: what records?

Are we talking --

COL ORR: The record for --

MR. STONE: -- confidential records

that have been sealed or are you including -- you

are including, right, you are including

privileged records --

COL ORR: Anything.

MR. STONE: -- that have been sealed?

COL ORR: Anything that is attached --

MR. STONE: Okay.

COL ORR: -- to the record --

MR. STONE: Right.

COL ORR: -- they are reviewing --

MR. STONE: So you don't understand

the sealing process as a housekeeping status quo

process that judges use to maintain the status

quo of documents during an appeal?

COL ORR: I understand both. Some

records are sealed, some portions of the record

or evidence is sealed just to maintain the status
quo and to keep it from being released through
the Freedom of Information Act. That is one
aspect.

The other aspect is -- is sealed
because someone, either at the trial level has
recommended or has requested that it not be
disclosed. So there's two avenues for being
there.

MR. STONE: But you include privileged
records in your discussion, am I correct?

COL ORR: All records --

MR. STONE: That is --

COL ORR: -- so yes.

MR. STONE: The answer is yes, right?

COL ORR: Yes, the answer is yes.

MR. STONE: Okay. So tell me, if you
would please for my edification, what weight you
are giving to Rule 1101B, which has been on the
books long before the 1103A even came into being,
even before rape shield laws.

CHAIR HOLTZMAN: Wait, 11 --

MR. STONE: 1101B --
CHAIR HOLTZMAN: -- 1101B came into effect before 1101A?

MR. STONE: Long, long before.

PARTICIPANT: 1103A.

CHAIR HOLTZMAN: I am sorry --

MR. STONE: 1103A.

CHAIR HOLTZMAN: -- 1103A, okay.

COL ORR: Well, the truth of the matter is for the last 10, 12 years, our superior court, the Court of Appeals of the Armed Forces, has said they are reviewing authorities. The law is very clear. If they are a defense counsel seeking those records, we as an appellate court are to release them.

MR. STONE: That -- I don't think you answered my question. Has anybody addressed, to your knowledge, why they are ignoring the terms of M.R.E. 1101B? I haven't seen it.

COL ORR: I don't think it mattered. It was very clear that -- and advocates have actually challenged this in court, but the rule is if it is attached to the record, appellate
defense counsel are reviewing authorities, give
it to them.

MR. STONE: And do prosecution
authorities get it too?

COL ORR: Everyone gets it.

MR. STONE: Okay. So if, in a case
where --

COL ORR: Everyone that's a reviewing
authority.

MR. STONE: So I guess what you're
telling me is, just to make it into a context
that shows how privileged documents are different
from simply national security or rape shield
documents, so if the prosecution comes in and
says, Your Honor, I think that we have a
violation of the defendant's attorney-client
privilege due to the crime-fraud exception, and
the judge hears them at the trial court and says
no, no, no, no, and I am not even going to look
at those records, I am just going to seal them,
as soon as they get to the courts of appeals,
under your interpretation, the prosecution at the
appellate level, the judges at the appellate level, and the defense counsel get to see those attorney-client records which the judge decided below he wasn't going to look at and nobody should get. Is that what you're telling me?

COL ORR: If they are attached to the record, they will --

MR. STONE: Okay. I don't think that that is possible. I don't think you have a case like that to show me, and I have searched the records of the case law myself to see a discussion of 1101B, and it isn't anywhere that I can find, so I guess I ask anybody else here if there is a discussion in a case that is published by CAAF that draws the distinction, doesn't just assume that there is no distinction between confidential records or national security classified records or rape shield records and privileged records, which are specifically dealt with in 1101B. It is called "Privileges."

Does anybody else have something to add? Because that is what I am looking for.
Col OLER: Well, one thing I would add is that at the end of M.R.E. 513, at the very end of the rule, it references back to R.C.M. 1103A --

MR. STONE: Yes.

Col OLER: -- and so that kind of by its nature almost loops us back into the 1103A analysis.

MR. STONE: Well, well, it does mention it, but it does not mention the privileged documents. It talks about the pleadings and the exhibits in that part of 513, and yes, the pleadings and exhibits, which would otherwise be public documents, may well throw a suspicion on a person who had psychological counseling records, and if you just say there are psychological counseling records we want access to, that in itself may harm the person, but it does not talk about the actual privileged records.

If it said the word "and the privileged records may be sealed," that would be
a different story. But are you aware of any case
law that interprets even that language in 1103A
to cover the actual privileged material versus
the pleadings that the court and the exhibits the
court may have had on it?

Col OLER: I am -- I am not aware of
a case that addresses that specific --

MR. STONE: Okay.

Col OLER: -- issue that you're --

MR. STONE: Okay.

Col OLER: -- asking about, but just
the way I read the plain language of the Rule 6,
it says "The motion-related papers and the record
of the hearing must be sealed in accordance with
R.C.M. 1103A and must remain under seal unless
the military judge or an appellate court orders
otherwise."

MR. STONE: Right.

Col OLER: And my interpretation of
that was just bringing us from 513 back into
1103A.

MR. STONE: Well, except that in many
of the cases which are reported, the judge has
decided not to look at the 513 documents, so what
he is sealing are not documents that he has ever
looked at, and so the actual privileged documents
are different from the pleadings.

JUDGE JONES: I thought that what's
happening now, and it's a good thing, is a lot of
defense arguments being made, we need these
documents, and judges are deciding I am not even
going to bring them in for in camera review.
You're not talking about documents that have
never come in.

MR. STONE: Yes, I am talking about
those too. If they are privileged, that the
judge does not always order them in, and there
are appellate decisions --

JUDGE JONES: So there are documents
out there that he has said you don't have any
right to, and they're not even in the court? Is
that what --

MR. STONE: Sure.

JUDGE JONES: -- you're talking about?
MR. STONE: And they may be attorney-client privilege, and they may be psychological
---

CHAIR HOLTZMAN: Wait a minute.

JUDGE JONES: But what is --

MR. STONE: -- psychotherapist privilege.

JUDGE JONES: How is that relevant to what we're talking about now? If they are not
even there, there is -- the judge has not done any review, they don't go up on appeal.

MR. STONE: Oh yes, no, they certainly do, and the appellate court --

CHAIR HOLTZMAN: You mean --

MR. STONE: -- has --

CHAIR HOLTZMAN: -- the hospital records in the hospital are going to go up to the appellate courts?

MR. STONE: Absolutely.

JUDGE JONES: Just to be clear, the judge says no --

CHAIR HOLTZMAN: No, I don't think
that happens, Mr. Stone.

MR. STONE: There are -- I just read one of the recent Air Force decisions where in the course of it, when the appellate court did not have the record, they ordered the prosecution to go get the record and lodge it with the military court, but right, you may even know the name of the decision. But -- but --

CHAIR HOLTZMAN: That is not sealed under 1101A because that is coming in --

MR. STONE: 1103A.

CHAIR HOLTZMAN: -- under the appellate -- or 1103A, because that is coming in directly to the appellate division. This is not being sealed by the trial judge or not sealed by the trial judge, so it is an entirely different procedure. So --

MR. STONE: That is right --

CHAIR HOLTZMAN: -- I think what Judge Jones --

MR. STONE: -- that is right, and it reflects that --
CHAIR HOLTZMAN: -- is asking you --

MR. STONE: Yes.

CHAIR HOLTZMAN: -- is M.R. -- this --

how much of an issue, I don't mean to take words
out of your mouth --

JUDGE JONES: No, go ahead.

CHAIR HOLTZMAN: -- but how much of an
issue is this with regard to 513 right now? I
mean, this may be basically a theoretical problem
because the judges are not ordering 513
materials, and they are not part of the record.

MR. STONE: In the --

CHAIR HOLTZMAN: Am I -- am I
incorrect in that statement?

COL ORR: You are correct.

CHAIR HOLTZMAN: I am --

MR. STONE: In the --

CHAIR HOLTZMAN: -- correct or --

COL ORR: You --

CHAIR HOLTZMAN: -- incorrect?

COL ORR: -- are correct.

MR. STONE: In the vast majority of
the --

COL ORR: You are correct.

MR. STONE: -- cases which have been presented for us, the judges take the records, seal them, even when they haven't --

CHAIR HOLTZMAN: No, that is --

MR. STONE: -- looked at them --

CHAIR HOLTZMAN: -- before the -- that is before the law was changed.

COL ORR: The law was changed, though.

CHAIR HOLTZMAN: The law has changed on 513.

MR. STONE: Right.

CHAIR HOLTZMAN: And you have to make a threshold ruling before the judge even gets them from the hospital or from the doctor into the courtroom.

MR. STONE: But that is not the same ruling that he makes when you come into his --

CHAIR HOLTZMAN: He or she.

MR. STONE: -- court and you litigate.

CHAIR HOLTZMAN: He or she.
MR. STONE: When -- he or she makes --

CHAIR HOLTZMAN: Yes.

MR. STONE: -- when you litigate it --

CHAIR HOLTZMAN: No, but that --

MR. STONE: -- when you litigate it,

it's --

CHAIR HOLTZMAN: -- is exactly --

MR. STONE: -- a different -- it's a different --

CHAIR HOLTZMAN: No.

MR. STONE: -- burden.

CHAIR HOLTZMAN: The records still are not there. The point is -- I am sorry.

Lt Col DALY: I think there -- I think there might be some confusion because there's three -- there's three situations where you have -- when you're dealing with 513 records now.

They file a motion, and if the judge -- they argue the motion to see if they have satisfied the four requirements. If they have not, those records are never entered into evidence, so there is no in camera review. If
they have, then the judge issues an order saying
I want the records, I am going to do an in camera
review.

   At that point, those become appellate
exhibits. He may not release them, and that is
what I think the issue at 1103A is, is those
records are not released, but then they are
attached because the military judge has done an
in camera review.

   And then you have the third part,
where of course they are released to the parties,
or limited release, narrowly tailored. So the
issue is when a military judge does perform an
1103 -- I mean, an in camera review under 513 and
then does not release those records, when it gets
up to the appellate court, that is when in the
Air Force the defense is filing -- appellate
defense is filing a motion, and once they file
the motion, under 1103A, they are granted access
as well as appellate government.

   JUDGE JONES: That is what we have
understood.
LT COL DALY: Right. So that is the issue, are those records that are not released at the trial level, but then they are getting access and violating victims' privacy rights without notice or the right to be heard, or satisfying any of those requirements that were required at the trial level under M.R.E. 513.

CHAIR HOLTZMAN: But the point I was making is that that is not the common occurrence now, that that was the -- might have been the practice before, but now in general -- I could be wrong -- judges are not -- find that the threshold showing is not made, and so the M.R.E. 513 materials are not even coming into the court. Is that correct? I mean --

LT COL DALY: We --

CHAIR HOLTZMAN: -- there will be some instances, I got that, but we're talking about now a relatively smaller number of cases.

LT COL DALY: It has decreased, but the issue is those clients that the judge does perform that in camera review, they are still
getting their privacy rights violated at the appellate level without any notice or right to be heard or satisfaction -- you know, satisfying the requirements or similar requirements that were necessitated at the trial level. So therefore, their privacy rights are violated at the appellate level.

MR. STONE: And I should think that the trial judges -- the defense counsel want the trial judges, in any case that is even close, to review those records in camera. But once the judge has reviewed those, he has made a determination at that point which has not been overruled that they are privileged, so they remain privileged as well as sealed when they go up to the court.

And if nobody thinks that that is a problem that they have to stay sealed under 1101B at all stages absent this adversarial-type hearing that is required under 513, which is specifically covered by 1101B, then nobody should object to my language, which frankly I don't
understand why it hasn't been further discussed before this time, but I am certainly happy as long as any recommendation that we make does not ignore Rule 1101B, which, as I say, says in its history it was drafted to be parallel with the Federal Rule of Evidence, and under the Federal Rule of Evidence, you would not automatically get access to privileged documents. That will in no way change what happens to merely classified, unprivileged documents under any changes to Rule 1103A.

JUDGE JONES: Well I guess I was imagining the scenario where defense counsel wants to challenge the rule of the trial court that these documents should have remained privileged, and therefore, that ticks off appellate review --

MR. STONE: Right.

JUDGE JONES: -- by the appellate judges.

MR. STONE: Right.

JUDGE JONES: Are you objecting to
MR. STONE: I am saying that they have
to meet the same burden the trial judge did
before the documents are distributed, and yes, if
it has to do with documents that for example were
attorney-client privilege --

JUDGE JONES: No, I -- all I am saying
is --

MR. STONE: -- you wouldn't allow the
appellate judges to look at them either until
there was a little adversarial proceeding where
the person who said everybody should look at
these, we should get them had made their case and
the defense counsel had gotten a chance to say,
whoa, that was -- that was a crazy suggestion,
obody gets to see this.

And I am well aware that it may be
that we would have more justice in terms of more
proper outcomes in sexual assault cases if you
did look at the attorney-client privilege
documents, but we have decided as a society that
defense counsel has to have absolute rights to
privacy with their counsel and that people who
have been to see a psychotherapist have rights to
discuss with them, and -- and other privileges
like that, husband-wife and priest-penitent, and
we have been doing that for 200 years because we
decided we don't want those people jumping off
bridges, we want them to have somebody they can
talk to, and we don't allow any of those in
without some determination first that they are
not privileged or not presumptively privileged,
and that is something that the judicial system,
whether it is civil or military, has recognized
for an awful lot of years.

And the -- if you extend 1103A, as has
been suggested here, to anything that has been
sealed, anything, then you override the specific
language of M.R.E. 1101B, and also this general
privilege that people have, which is enshrined in
the Privileges and Immunities Clause of the
Constitution, that even the privilege against
self-incrimination, that privileges are on a
different standing than documents that are not
privilege. There are not too many categories of
them, but 1101B makes clear that they are
covering anything that is in Chapter 5 of the
Rules.

JUDGE JONES: Are you saying a
judge's, trial court judge's decision that these
documents are privileged makes them immune from
appellate review?

MR. STONE: No, no --

JUDGE JONES: I just want to figure
out --

MR. STONE: -- no, no --

JUDGE JONES: -- where we're going
here.

MR. STONE: No, it does not make them
immune from appellate review, it just requires --
they can be challenged either the exact same way
they were below, but now with the advantage of
the whole record to say --

JUDGE JONES: Right.

MR. STONE: -- I didn't get these
documents below, but I should have gotten them
because look how the trial played out. They are relevant. Or they can say, we would like to be able to review them before we make our arguments, and here is the -- the showing we made below, and that showing is -- is amplified by what --

JUDGE JONES: Right --

MR. STONE: -- happened later --

JUDGE JONES: -- so that's --

MR. STONE: -- we would like you to --

JUDGE JONES: -- what a -- that's what a defense counsel, appellate defense counsel would like to do --

MR. STONE: Exactly right.

JUDGE JONES: -- we are agreed. Okay, I am just --

MR. STONE: That is exactly right.

JUDGE JONES: -- trying to make sure I --

MR. STONE: And but what it does is it gives the person whose psychological counseling record it was --

JUDGE JONES: Yes.
MR. STONE: -- a chance to respond, and that person may not be a victim, sexual assault victim. It may be somebody -- it may be the sexual assault victim's friend. It could be -- it is any witness whose psychological counseling records or attorney-client records or husband-wife privilege records, any person who has a privilege is covered by 1101B. It specifically says privileges. These are a separate category of documents.

And so I just wanted to show that there is a carve-out because people, at least to me here, have been confused and lumping together under 1103A that procedure to cover this very narrow category of privileged --

CHAIR HOLTZMAN: Okay.

MR. STONE: -- documents.

CHAIR HOLTZMAN: So I am just trying to understand something. So what you're telling me is that for all of these years, litigation and procedure under 1103A, courts, counsel, tout le monde has been ignoring 1103B, is that what
you're telling me?

MR. STONE: No, what I am --

CHAIR HOLTZMAN: 1101B.

MR. STONE: -- telling --

CHAIR HOLTZMAN: Well, that is what you're saying.

MR. STONE: No, it --

CHAIR HOLTZMAN: What you are saying --

MR. STONE: -- no, no --

CHAIR HOLTZMAN: -- is that this whole -- that 1101B has not been followed in the proceedings under 1101A.

MR. STONE: And the --

CHAIR HOLTZMAN: And how long -- well, let me finish.

MR. STONE: Go ahead.

CHAIR HOLTZMAN: How long has 1101B been there?

MR. STONE: A long time.

CHAIR HOLTZMAN: A long time. How could it be that nobody ever saw this? So what
you're doing, it seems to me, is you are changing
the practice. We haven't -- what we said here,
what the -- what the suggestion was here is that
the practice be maintained, okay, as it is now,
with a small change, which is establishing
uniform procedures under 1101A. That is all we
have done. We have said whatever the procedures
are now, whatever the practice is now, that is
fine, keep it, but make this small change by
making those practices uniform.

What you are doing, and maybe it is
right, and maybe it is not right, I don't know
because we have never really studied the impact
and the practice under 1101B, is to say all of a
sudden, we are going to take the existing
practice, and we're going to make it subject to
1101B, which it may be now. But we have not
looked at that whole issue.

MR. STONE: That is correct.

CHAIR HOLTZMAN: So I think that
really, before we make such a change, we really
ought to understand what we're doing, that is
all.

MR. STONE: That is correct.

CHAIR HOLTZMAN: Okay.

MR. STONE: And let me --

CHAIR HOLTZMAN: No, I mean so --

MR. STONE: -- explain -- let me answer your --

CHAIR HOLTZMAN: -- so then I don't understand why -- so that may be something that we could decide that we want to do in the remaining time with the Panel, but I think to bring in the implications of 1101B, which, as you say, has been there for a long time, so I don't know why people have not figured out that there may be a relationship between 1101A and 1101B, but if they haven't, why are we trying to change that at this point without having studied the implications of it?

MR. STONE: Okay --

CHAIR HOLTZMAN: That is my concern.

MR. STONE: -- great. Now let me answer what I think -- give you what I think the
answer to that is.

As we know in one of these other recommendations, until now, victims were not told of the status of the case on appeal. They could not get it. There was no public docket. They were not advised what was happening with the records. If there was an 1103A disclosure, by the time they found out, it was probably long after the appeal was decided. So number one, they had absolutely no knowledge, and number two, they didn't have, as we still know, any standing or any rights, and it is only after Article 6B came in, which gave them certain rights and certain standing on 513 proceedings, and then we have the fact that now we're going to require that they have knowledge of what is going on in the court of appeals, that this issue was not moot, that the documents were not distributed long before they had any idea of what was going on.

Which, by the way, the fact that this did continue so long only confirms my own
personal experience that I had just this week in
state court where a prosecutor, when confronted
with a situation where the victim is going to
lose some rights, said, well, I want to get this
case underway, and I think we can live with it,
Your Honor. That is okay.

And I had to stand up in civil court
on behalf of the victim and say, Your Honor, the
defense wants certain things, the prosecution is
saying this doesn't really affect them one way or
the other. You want to do it, it's not going to
change their life any. They want to go ahead
with the case. But it does change the privacy
interests and the life of the person who is the
victim here, and therefore, I have to disagree
with both of them and say you need to uphold
these rights.

And that is exactly what is going on
here. There has been no victim's counsel on
appeal. There has been no notice to victim's
counsel below. There was no standing that was
clear before 513 and UCMJ 6B that victims had
something to raise, and so people were assuming
government counsel's interest was always
completely aligned with the victim's, and that is
not true. If they had the trial already, they
want to see an affirmance and move on to the next trial, and the victim is not necessarily going to say just because you got a conviction and now it's on appeal, I am happy to have my privileged psychotherapy records, or, if it was a defendant, my attorney-client records, distributed to other people here.

I don't think that is proper, and that is doubly the case because in the military, unlike the civilian sector, there is a much broader scope and availability to bring up issues that were not previously litigated, so the result is new arguments can be made which, if you don't follow 513 procedures, the -- the victim's counsel has had no opportunity to consider and explain or rebut at the trial-level 513 hearing because he is not a counsel or in any way involved in the appellate unsealing of the
privileged materials, which 1101B says has to be followed.

So why hasn't it happened? Because only now, we gave, and this is mostly sexual assault victims, until they had counsel, right to a counsel, which they didn't have for a long time, they had a right to find out about the appellate proceedings, which they have not even gotten yet, and they had rights established under Article 6B, statutory rights, by the time they found out, it had already been done.

So what was the conclusion? The conclusion was -- and I think this is one of the practical issues that we're trying to help -- is that when victims find out that their psychological counseling records, even if protected by the judge after a review, are going to be disclosed on appeal, they are not going to come forward if they find those records, like that says they are gay or whatever it is, is going to harm they think their career or their social friendships, maybe even their marriage,
they are not going to come forward, which is one thing we don't like.

And the second thing that it's going to do, as I mentioned in my proposed dissent, is you are going to cause them to go outside of the military for counseling, and there will be sexual assault organizations that will direct them to private psychotherapists who are not in the military, which number one is bad because it means that our discussions about how the military cares for its people and has resources out there to care for them are not used and will have fake numbers, and they're going to go to private doctors who are going to have been vetted to protest and refuse military subpoenas for their records, which makes the military have to go to the local U.S. Marshals Service and U.S. Attorney's Office to ask them to enforce them, and they're going to be enforced in state, civilian court under state rules of what is privileged, not military rules.

So what you're going to do is you're
going to deny the victims of the feeling that they should freely go seek psychotherapy help at the military hospitals and you're going to wind up pushing these disclosures and the -- and the requests for them into civilian court, which I don't think the military really wants when they try and hold non-military doctors in contempt for not turning over those records.

So, I mean, I don't see how there is a good outcome to ignoring Military Rule of Evidence 1101B now that there's some sunshine on it, now that we have counsel for victims, victims have rights, and victims are going to know what is going on at the appellate level. It just does not make, frankly, any sense to continue down that road, especially when everybody is considering this right now and focusing on it, so they need to focus on what's out there.

Now, if they want to get the President to change the Rule, 1101B, on privilege, and be different from the Federal Rules of Evidence 1101B, which it says it was drafted for the same
exact purpose, then I think that they have to
come back and tell us that and explain why they
want to diverge, what some military justification
is for treating it differently, but I would feel
just as strongly if I was defense counsel and
they wanted my attorney-client privilege records,
and I was not going to give them those records
because my defendant was telling me things which
I don't think they would otherwise hear, and I
don't think they should be entitled to,
especially if it turns out later there is a
remand and the case goes back for a retrial.

So for all of those reasons, I can't
understand how at this day and age -- maybe
previously, when there were not victims' counsel
and they didn't get notice of what was going on
-- how you could endorse any proposal, either to
keep the system the same, make the Air Force
procedure uniform across the various Services --
which by the way the Air Force itself seems to --

CHAIR HOLTZMAN: Mr. Stone --

MR. STONE: -- not be maintaining --
CHAIR HOLTZMAN: -- could you begin to wrap up now, please? We've had a --

MR. STONE: Well --

CHAIR HOLTZMAN: -- substantial --

MR. STONE: -- you asked me the question, and I am explaining what the answer --

CHAIR HOLTZMAN: Well --

MR. STONE: -- is.

CHAIR HOLTZMAN: -- I understand --

MR. STONE: That --

CHAIR HOLTZMAN: -- that.

MR. STONE: -- is the answer, and it is outlined in my dissent, which I note is now attached to these materials and on the public record.

PARTICIPANT: Madam Chair?

CHAIR HOLTZMAN: Is there any other comment anybody wants to make?

JUDGE JONES: I'd just like to hear someone go through the JSC proposal, which is different from our recommendation.

LTC VERGONA: Yes ma'am. I'm a
working group member of the JSC, and what was put out for public comment. If for sealed -- so I'm just going to focus on the sealed materials that were released at trial to both trial counsel and to defense counsel, that the judge is going to do a sealing order at the trial level.

It will come on appeal at the appellate level. Before an appellate counsel can view, they must upon a colorable showing to the reviewing appellate authority, so to the service court, that examination is reasonably necessary to the proper fulfillment of their responsibilities.

So even for materials that were released at trial, appellate level, you must show a colorable showing. That's not defined. That's going to be each Service determines what that is.

JUDGE JONES: So even materials that arguably are on the public record?

LTC VERGONA: They were released to the counsel and they would have been -- and they may or may not have been used at trial.
MR. STONE: They're sealed. They're not on the record.

LTC VERGONA: Well they're -- but there are hearings where the hearing is sealed. So it's in the record, but it would not have been a part of hearing. Then for the materials that the Judge does order, does an in camera review and determines that it's not proper to release to any party.

At the appellate level, the appellate authorities. So that appellate service court is going to review those materials. They don't ask the defense or government counsel. They don't file a motion to look at that.

It's the appellate authorities, the reviewing authority. After examination of the materials, the reviewing or appellate authority may permit examination by the appellate counsel for good cause.

So the intent is that the appellate court is going to take a look at it and see if there's any possibility of an issue, and then
that appellate authority will permit the
appellate counsel to review that for good cause.

JUDGE JONES: So they'll look at the
arguments of counsel about why it shouldn't be
disclosed.

LTC VERGONA: Yes ma'am.

JUDGE JONES: Then they'll read the
trial record to see how the evidence played out,
and then they'll review the undisclosed records.
And then if they decide there might be an
argument an appellate counsel could make, they
will reveal it to the defense appellate counsel.
Is that basically it?

LTC VERGONA: Yes ma'am. I can't say
for sure how each Service is going to, the
process. But yes ma'am.

MR. STONE: And has JSC addressed
1101B or not addressed it?

LTC VERGONA: Well unfortunately Mr.
Stone, what's discussed at the JSC, I can't
discuss that.

MR. STONE: Okay. But on their record
comments, in the stuff they published, they haven't discussed it?

LTC VERGONA: It is not part of the Federal Register notice.

MR. STONE: Okay.

CHAIR HOLTZMAN: Okay. Any other comments anybody wants to make because I just want to make one. I just -- I said this before and I'll just repeat myself. You may be 100 percent right Mr. Stone, that MRE 1101B is essential to an analysis and understanding of the operation of 1103A. But we have not had an opportunity to review that, to understand that, have experts talk to us about it.

I think personally I've been privileged to be part of this Panel for -- since its inception, as you have as well, and I think one of the reasons that Congress and the Defense Department have respected the decisions we've come up with has been because they've been based on solid homework.

I appreciate that you've done the
homework on 1101B. I haven't, and I feel very
uncomfortable voting in favor of something that
we haven't had expert testimony on and had a
chance to deliberate on. You may be right. I
just don't know that you're right, and so I find
myself reluctantly but having to oppose your
proposal, because it brings in another element
that hasn't --

That we haven't studied, discussed,
understood, chewed on, had other people help us
with it, and so I mean I just have to oppose it
on that ground.

Col PALOMINO: Madam Chair, if I could
address what you just said. I'm Colonel Jeff
Palomino and I've been on record with the JPP
before, but I'm in charge of the Air Force --

CHAIR HOLTZMAN: You're forgiven.

(Laughter.)

Col PALOMINO: I'm in charge of the
Air Force Appellate Defense Division.

CHAIR HOLTZMAN: Thank you for being
here sir.
Col PALOMINO: Thank you, Madam Chair.

What I will say is I have to confess I don't have the entire manual memorized, so I don't --

CHAIR HOLTZMAN: Is that so?

Col PALOMINO: Maybe I should know one of these military justice tracks so --

CHAIR HOLTZMAN: You need counsel at this point.

Col PALOMINO: But I'm just not -- I'm not familiar with the legislative history, any case law, progeny of case law related to 1101B.

Nor did I read Mr. Stone's dissent in advance to address 1101B. It sounds very important, but I'm not prepared to really look at that.

What I will say is there was a body out there that did look at the competing interests involved, and that was the body that created 1103 Alpha in the first place. If you actually look at the discussion section for 1103 Alpha, it addresses the tension. Do we need to go get court orders for everything, or are there going to be certain cases where we'll allow
trusted people in the appellate arena to review them.

What it says is the rule is designed to respect the privacy and other interests that justified sealing in the material in the first place, while recognizing the need for certain military justice functions to review that same information. So our opinion, along with the Army and the Navy, I don't want to speak for my colleague Captain House, but he's been on record too with the JSC and the JPP, to say that the current rule does strike that balance.

And I'll say that while it doesn't mean 1101B, I think the drafters of this did try to strike a balance between privacy interests and allowing the rule to rely on the integrity and professional responsibility of those involved in the process. So thank you, Madam Chair.

Col OLER: Madam Chair, if I may?

CHAIR HOLTZMAN: Yes, please.

Col OLER: Colonel Kate Oler from Air Force Appellate Government. I also own the
senior trial counsel as well.

CHAIR HOLTZMAN: But do you know the whole manual?

Col OLER: I don't, no. So just to come on record from Air Force Appellate Government, I believe that the JSC's proposed change to RCM 1103A draws an appropriate distinction between records reviewed and released to the parties at trial, and those not released by the military judge.

So in the case of the former, where you have a military judge who reviews record in camera and releases them to trial defense counsel, it is in our view wholly appropriate that appellate defense counsel review those materials in order to adequately and sufficiently represent their client on appeal.

But in the converse situation, in the situation where the military judge finds the records to be irrelevant, and refuses to release them to the trial participants, in my view there needs to be some mechanism in place that
appropriately balances the right of the appellant
against those of the victim.

The JSC proposal that the CCAs conduct
what is in effect an in camera review in this
specific situation seems to be the logical and
appropriate solution to this balance that needs
to be struck.

I would just add that from my
perspective, one improvement to this otherwise
apt recommendation by the JSC would be to include
a requirement to notify the victim and to provide
for an opportunity to be heard before the release
of records. Thank you.

CHAIR HOLTZMAN: Thank you very much.

CAPT HOUSE: And if I could just make
one more comment. From my perspective, any -- no
matter whether you placed the vetting of these
records at the Courts of Criminal Appeals for the
military or you place them at CAF or you place
them in the United States Supreme Court, if
defense counsel have to go through --

If defense counsel are not allowed, if
there is a path wherein defense counsel will
never get to see records that a military judge or
an appellate judge felt the defense shouldn't
see, there is no appellate defense, and there's
no --

The people who do appellate work in
the Navy, Air Force, Marine Corps or the Army,
these are military officers. They have to --
they have to live by all the professional
responsibility, ethics regulations that every
other attorney in the United States has to do.

They're expected to do their jobs.
They're expected to be responsible. They're
expected to follow the rules. So this great fear
these records are going to get out, I have never
heard -- I mean I don't see that happening. I
haven't seen it happen anywhere in the Navy or
Marine Corps appellate defense.

I mean the people, the government
defense counsel look at these records. They
determine whether or not they want to file a
motion as to whether or not either there was some
mistake in the trial court that they should have
gotten some records they didn't, or that they
want to use those records that were released to
make some type of appeal before the Courts of
Criminal Appeal for the Navy.

So if we strip the ability of defense
counsel to be able to do that, what are we to do?

CHAIR HOLTZMAN: Well, I appreciate
your contribution. I appreciate the contribution
of the other experts here. I go back to the
point I raised earlier, Captain. I thought we
had voted on this issue.

CAPT TIDESWELL: We did, yes ma'am.

It's a matter of improving the language.

MR. STONE: I'd like to respond to the
last comment. We've already stripped the ability
of the investigating officer to just go to the
hospital and say I want the records, and he is
also a career officer who doesn't randomly
divulge those records and understand if he gets
them, he has to hold them private.

So it isn't a question of do we or
don't we trust various military officers to do
their job. We do. It's a question of privilege,
which goes back 200 years and the Constitution of
the United States and a Presidential order, and
people are going to have to recognize that.

You would understand that a gut level
if I wanted your client's attorney-client records
and you didn't want them distributed, because you
knew they were inculpatory, but it was nobody's
business because he didn't take the stand.

CHAIR HOLTZMAN: Okay. I'm just going
to ask my question again. I thought we had voted
on this very point before. I don't understand
why we're revoting it.

CAPT TIDESWELL: We are recommending
that the language which adopted in concept, which
you all voted on at the last meeting, be approved
by the committee. We're asking you to vote on
the language. Mr. Stone has put in additional
verbiage that he would like, which in some sense
changes sort of the substance of the
recommendation.
But you are correct, chair. You all voted in concept on what you see in Recommendation 39. We're asking you to approve the language.

MR. STONE: We can vote again. That's not a big deal.

CHAIR HOLTZMAN: Well it's --

PROF. TAYLOR: Madam Chair, I think I -- I think I understand what's happening here, but I may be wrong. When we discussed this back in November, the staff had prepared for us several issue sheets, and we were going through issues, talking about issues. And on this particular issue we had four options.

One of the options that I supported at the time was to take the best practices from the current Criminal Courts of Appeal, which at that time, relying upon things that the judge said, we thought was the Air Force best practice. At the conclusion, we said well, maybe we should find out if they're still doing that, or if the best practice that we understood is the one that we're
recommending.

In the meantime, we had the Joint Service Committee come out with a rule, which now the Air Force has I guess officially said they prefer to the practice that they had before. So I think that is why we are now at the point where we are perhaps at a position where we say we're either at the -- I'm sorry.

Col ORR: Those are different things.

PROF. TAYLOR: Okay. Go ahead.

Col ORR: The discussion from last time was we have a practice that we, Air Force, that we currently use and we like it. The proposal was what do the other Services think about what we're doing. So that's where we are.

PROF. TAYLOR: Right, except so but part of that of course now is 1103.

COL. ORR: Right. I mean that's different.

PROF. TAYLOR: Well, how is it different?

Col ORR: Okay. You can go ahead.
LT COL DALY: Mr. Taylor it's different because what I think the SBC appellate program and Appellate Government have supported is that there should be similar practice as the JSC has recommended, and also allowing the victim to receive notice of when there's a request.

PROF. TAYLOR: Okay.

LT COL DALY: To view the records, as part of the due process of victims' rights.

PROF. TAYLOR: Okay. I was actually -- go ahead.

LT COL DALY: And then also we have a right to be heard on the issue before that Court ultimately makes a decision or a colorable showing determination to release the records to the appellate counsel.

PROF. TAYLOR: Okay, the point being that that is different from the way it was back when. It is different.

LT COL DALY: Yes, it is different.

PROF. TAYLOR: You stated, and I think that you, if I understood what you said Colonel,
you're saying the same thing that Colonel Oler just said; is that correct?

LT COL DALY: I support the JSC proposal.

PROF. TAYLOR: Yeah, but you also said --

Col ORR: With an amendment.

LT COL DALY: Yes, with the amendment.

PROF. TAYLOR: --with the amendment.

If I understood you correctly, that would provide for a notice to the victim.

LT COL DALY: Yes.

PROF. TAYLOR: What I'm proposing is that that might make sense for us as a position for us to take, because unless we're not prepared to take a position on the Joint Service Committee's proposal, that position just makes a lot of sense because it seems to pull together a lot of the elements we're struggling with.

JUDGE JONES: I just want to make sure I'm understanding. Right now, you don't require the appellate judges to review without any motion
or explanation or anything else from defense, right? But whereas the JSC says they get to review with no submissions and just decide whether or not they're going to --

CAPT HOUSE: The defense would have to make a motion.

JUDGE JONES: Well I thought it was something different. That's where I'm confused.

CAPT HOUSE: In the Navy and Marine Corps practice currently was we do not have to make a motion to see those records.

JUDGE JONES: Right. You can get --

CAPT HOUSE: We simply --

(Simultaneous speaking.)

JUDGE JONES: Right. Under the JSC doctrine, you don't get them and you don't get to argue about them. They just decide; is that right? You don't get them unsealed.

CAPT HOUSE: My understanding of the proposal is depending on whether or not they -- there's two sets of records. There is records that weren't released to the defense and others
that were. The records that were released to the
defense, we'd have to show good cause, that's
reasonable necessity to get to see them. If they
were never released to the defense, we'd have to
show good cause --

JUDGE JONES: Even records that the
defense counsel at trial had, you would have to
show good cause?

CAPT HOUSE: We have to show
reasonable necessity.

LTC VERGONA: Colorable showing.

CAPT HOUSE: Colorable showing is what
the words are.

JUDGE JONES: Okay.

LTC VERGONA: Colorable showing that
the examination is reasonably necessary for the
proper fulfillment of your duties. It's a very,
very low threshold.

JUDGE JONES: Okay.

LTC VERGONA: But that will require
counsel to file that motion.

JUDGE JONES: Right.
LTC VERGONA: So that will, you know, more protections that the Panel was concerned about before, having too many people --

JUDGE JONES: Seeing them.

LTC VERGONA: Seeing them, yes ma'am.

JUDGE JONES: And have never seen them once they were --

(Simultaneous speaking.)

LTC VERGONA: So the proposal is that at the appellate level -- yes ma'am. The proposal is that the appellate judge, we don't know how it's going to work. The JSC isn't directing how to do this, but the appellate court would do a review of the record and they could permit the defense counsel then to look at it for good cause.

That's also not going to preclude again, each Service may interpret this differently, but certainly defense appellate counsel don't have to wait for the appellate counsel to their appellate court to grant them. They could certainly raise that motion as well,
and highlight some issues that they may know from the trial level.

Hey, I need to see those materials that were sealed for these reasons, and then when the appellate courts are looking at that, the appellate court will have them in their mind.

JUDGE JONES:  But they're not allowed under the JSC to just get the records to inform their motion?

LTC VERGONA:  Correct ma'am.

CHAIR HOLTZMAN:  So they changed the present -- just to follow up --

LTC VERGONA:  Yes ma'am.

CHAIR HOLTZMAN:  Changed the present procedure, which is appellate counsel, no matter what, no matter what happened below on that disclosure.

LTC VERGONA:  Yes ma'am.

CHAIR HOLTZMAN:  But no matter what happened below, appellate counsel, defense counsel has the right to examine the records?

LTC VERGONA:  Yes ma'am.
CHAIR HOLTZMAN: The sealed records?

LTC VERGONA: Yes ma'am.

CHAIR HOLTZMAN: Okay, and that would change that practice so that in one case it would be a lesser standard and in another case it would be a higher standard. But you'd still need the appellate court to release those documents?

LTC VERGONA: Yes ma'am.

CHAIR HOLTZMAN: Okay. Why does that -- I'm sorry.

CAPT HOUSE: Should have gone to law school.

(Simultaneous speaking.)

VADM TRACEY: Is a judge's determination that the 513 evidence is not even going to be called for at the trial level, is that decision able to be overturned on that appeal?

LT COL DALY: Yes, yes, and it has been. I think the analysis of the military judge has been in previous cases, I think Mr. Orr will agree with me, that has been the basis to which
these cases have been overturned, not the actual content of those records.

It's usually based on the judge's analysis that is incorrect on the first place, that --

JUDGE JONES: And they review the records to determine that or --

(Simultaneous speaking.)

CHAIR HOLTZMAN: If the records have never been brought in, then they can't review the records. They would just --

VADM TRACEY: Oh no. We're talking about ones that were not disclosed.

LT COL DALY: Right.

(Simultaneous speaking.)

VADM TRACEY: But I'm asking about the records that never get to the court, and that decision you review at the appellate level?

Col ORR: The answer to that is yes.

LT COL DALY: Yes.

Col ORR: And just to make clear, in the Air Force system, it doesn't matter what
1103A says right now. If you want a sealed
document, you must file a motion. So it's not
you just walk in. They actually file a motion --

VADM TRACEY: That's the system that
Mr. Keller was referring to, that we've got --

(Simultaneous speaking.)

Col ORR: Correct.

VADM TRACEY: That's not been
something -- they could repudiate it but maybe
not.

MR. STONE: But it's an ex parte
procedure. The defense doesn't have an automatic
right to say why they want them; the prosecution
doesn't get to file a pleading about whether they
should or shouldn't be disclosed, and the owner
of the records doesn't get to do that either
before the judge rules, right?

Col ORR: That's correct.

MR. STONE: Now it seems to me, here's
a question for the JSC again, the appellate
records. I don't understand again these two.
Maybe we're not mixing apples and oranges here,
but there's two varieties of apples. In a case
where the trial judge has ruled that the
documents should be distributed, obviously the
trial judge has decided they aren't privileged,
because if they were privileged, he wouldn't have
distributed them.

So their status at that point is as
non-privileged documents, and therefore the only
thing, the only status quo he's maintaining by
sealing them is that just the participants to the
trial see them. But there's no reason they
shouldn't be handed freely to other appeal on a
sealing motion that's basically pro forma.

The question that's troubling us is
when they're not distributed and they are still
privileged, no judge has ever said they're not
privileged, you're using exactly the same, pretty
much the same procedure without letting the
holder of the records get it.

VADM TRACEY: The JSC is adding a
level of scrutiny that is the -- at the appellate
judge's level.
LTC VERGONA: A significant change.

MR. STONE: It's an ex parte, right.

It's an ex parte review.

(Simultaneous speaking.)

LTC VERGONA: But the ex parte review

is by the service court. It's another judge

that's --

MR. STONE: I understand.

CHAIR HOLTZMAN: But I wouldn't get

too caught up, by the way, in the privilege issue

because this is -- it can be privilege that's is

granted by statute and can be removed by statute.

So I don't think it's a Constitutional issue

here. So if in essence the military wants to say

we release these, we can release them. They

could say there's no privilege with regard to

medical records too if they want.

So I'm not saying they shouldn't do

that, but I just don't think there's a

Constitutional issue. I think it's a statutory

interpretation. If the statute allows the courts

to make these records public, then they don't
have to make a privilege finding or not a privilege finding. Whether they're privileged or not doesn't really -- it's not as relevant it seems to me.

But I haven't studied this issue, and that's what bothers me about it. I'd like to see if we can kind of finish this conversation for a moment, and deal with the proposed Recommendation 39 by Mr. Stone, and then focus on what we want to do with the proposed --

JUDGE JONES: I'm just worried that our proposed, what is it 49?

CHAIR HOLTZMAN: 39.

JUDGE JONES: 39 is sort of irrelevant at this point, without basically taking a position on JSC procedures.

PROF. TAYLOR: And it's been overtaken by --

JUDGE JONES: They've gotten way past us.

PROF. TAYLOR: Right.

JUDGE JONES: So we should -- I think
I would withdraw it, this topic or recommendation at this point in time.

CHAIR HOLTZMAN: Well what do we do with Mr. Stone's recommendation?

JUDGE JONES: So for all the reasons you've stated, I wouldn't vote for that.

CHAIR HOLTZMAN: So that's what my -- that's why I wanted to split these into two, so we can first deal with Mr. Stone's recommendation.

JUDGE JONES: Okay.

CHAIR HOLTZMAN: And then go to 39 and see whether we want to drop it, amend it in some other way or support it.

JUDGE JONES: Okay. That's acceptable. Are you following me Admiral? So we're going to vote on --

VADM TRACEY: I am concerned that because we have not studied 1101B and because there's currently no evidence in the record that people can tie 1101B and 1103A together the way that Mr. Stone has, that we're never going to ask
a question about whether 1101B trumps 1103A with regard to privileged records, and that --

MR. McCLEARY: I just don't think that they're inconsistent with that.

MR. STONE: I'm sorry, could you say that louder?

MR. McCLEARY: I don't think that they're inconsistent. If the reason why something was sealed is actually in the record of trial, was that a judge determined that it was privileged, then when someone at the appellate level wishes to seek access via 1103 Alpha, the analysis is, is this privileged or not, and is there a reason for breaking or getting around the privilege? So I don't think 1101B and 1103 Alpha are inconsistent.

MR. STONE: But under the new JSC proposal unless you accept Colonel Oler and Colonel Daly's suggestions that the owner of the records get some notice and a chance to say something, and I would even think the prosecution or the defense too to file a document, then
they're inconsistent with the JSC recommendations. That's the problem.

VADM TRACEY: Mr. Stone's real issue is that we're separating the victims' ability to be heard on the decision to open records that had been previously been privileged. That's what your real issue is.

MR. STONE: Well, it's even a little more than that. If the record is held to be not privileged by the trial judge, there's an immediate interlocutory appeal that the statute 6(b) now gives to the defendant to go up to the appellate court and say whoa, whoa. They don't get this. I can appeal it now.

But if they win and then it's attacked, all of the sudden it's going to be it's still privileged. The judge says you're right. I looked at it; it's still privileged. Whether that's defense attorney-client or a victim's medical record.

Now I don't have to ask you, although if it was unprivileged according to the trial
judge, you got an appeal and you got to say
something before we did something with it. Now
you get to say nothing. That's inconsistent
right there.

CHAIR HOLTZMAN: Not necessarily. If
the statutory scheme calls for that, then that's
the statutory scheme.

MR. STONE: Well, the statutory
scheme. The only statute we're talking about
6(b). The rest are rules, and 6(b) gives right
to appeal 513 matters, and this is a 513 matters.

CHAIR HOLTZMAN: But these are rules
adopted pursuant to statute.

MR. STONE: Before 6(b) was enacted.

Panel Members

CHAIR HOLTZMAN: So the way I'd like
to proceed now is to, unless anyone has an
objection to it, is to vote on whether we go with
Recommendation 39 by Mr. Stone. And then we'll
address Recommendation 39 by the Panel. So
everyone, let's take up Mr. Stone's --

MR. STONE: Well, I'm going to amend
it right here and say based on the chair's comments, I don't believe we should be voting on Recommendation 39.

I think we should be hearing more experts, more consideration and frankly a statement by the JSC what they think about it, particularly since Air Force counsel here, who had the procedure that the JPP initial recommendation was designed to adopt, goes along with the procedure that I find would be in compliance with 513 by Colonel Oler and Colonel Daly.

I realize they're individuals. They may not be speaking for their service, but and I wouldn't want to say that. But I'd like to call representatives of their service and the others and have further deliberations before we jump on a bandwagon that has no engine.

CHAIR HOLTZMAN: Well Mr. Stone, with all due respect, you submitted this recommendation.

MR. STONE: I didn't say that it could
be considered today.

(Simultaneous speaking.)

CHAIR HOLTZMAN: Excuse me, and you want -- and you are the one who now wants to have hearings and more expert elaboration of it. I think it was --

MR. STONE: Okay. I stand by my Recommendation 39 as 39A, and my recommendation which is not in here that I'm making now, 39B, is that we propose that we put off all consideration of this until we've heard and asked for experts on this topic. Those are my two recommendations, and you can vote on both of them.

CHAIR HOLTZMAN: Okay. So you want -- so your second recommendation is that we hear experts on the connection between 1103A and 1101B, MRE 1101B?

MR. STONE: Yes.

CHAIR HOLTZMAN: Before we vote on anything. Well, okay. Let's take that up. All in favor say aye?

MR. STONE: Aye.
CHAIR HOLTZMAN: Opposed?

(Chorus of no.)

CHAIR HOLTZMAN: Okay, not accepted.

The second recommendation, the second item is to adopt or not adopt Recommendation 39 by Mr. Stone. All in favor say aye?

MR. STONE: Aye.

CHAIR HOLTZMAN: Opposed?

(Chorus of no.)

CHAIR HOLTZMAN: The no's have it.

Not accepted. All right. Let's go to Recommendation 39 as originally proposed by the JSC, I mean by JPP staff. Mr. Taylor, did you have a --

PROF. TAYLOR: Well, I have a friendly amendment I think, and the friendly amendment would be that the JPP recommend that the JSC consider affording victims the right to be heard before making a final determination on the issue of releasing sealed materials that had not been released for basically the second part of the proposal.
I think that is the spirit of what Colonel Oler said, which sounded like to me and Colonel Daly as well, that I'm not asking them to chime in.

MR. STONE: I'll second that amendment.

VADM TRACEY: Isn't that Recommendation No. 40?

Isn't just -- well, the meat of 39 is the established uniform procedures?

CHAIR HOLTZMAN: Correct. That's all it says.

VADM TRACEY: Right, right.

MR. STONE: I don't think it is covered by 40 because 40 doesn't deal with -- this is a preliminary matter before the actual appeal is heard, what materials are available to the parties in order for them to write their briefs, and I think 40 deals with what happens when they are writing their briefs.

CHAIR HOLTZMAN: Okay, you're right.

Is that --
MS. GUPTA: 40 deals with notice -- are you talking about 41 on standing?

CHAIR HOLTZMAN: Well, you've got --

MS. GUPTA: So 40 doesn't, I think, address Mr. Taylor's comment about the right to be heard. It is only about providing victims with notice of significant appellate matters.

CHAIR HOLTZMAN: Yeah. You don't think the release of sealed documents is a significant appellate matter?

MS. GUPTA: No. I think the notice would be covered. I think Mr. Taylor proposed the right to be heard.

VADM TRACEY: Which is different.

MS. GUPTA: Which is different.

CHAIR HOLTZMAN: Oh, I'm sorry, okay.

VADM TRACEY: Chair, if I might propose an amendment to Mr. Taylor's amendment. I think that the language in 39, present in the Manual for Courts-martial 1103A, establishing procedures for appellate counsel access to sealed material and to provide opportunity for a victim
to be heard in the case of previously sealed
privileged information. I'm sorry Mr. Taylor,
I've lost the words that you had.

An important part of 39 is that we're
looking for standard procedures across all of the
service corps.

JUDGE JONES: And may I just say that
I think we have to look at Recommendation 41 if
we're going to start talking about giving victims
the right to be heard at the pre-argument, let's
say, stage, because there our prior
recommendation was that Congress not enact
statutory provisions granting victims standing to
file briefs or pleadings in post-conviction
appellate procedures, which would be different.
I'm just saying we have to look at all these
recommendations together.

CHAIR HOLTZMAN: Well, I would say
that there were two aspects, with all due respect
Admiral, in Recommendation 39. One is to
establish uniform procedures for receiving sealed
materials. You're absolutely correct about that.
The other aspect was not to change the present system with regard to access by appellate defense counsel, and that's what I thought we had voted on before.

But so there were two aspects to that, and I agree that we've probably been overtaken by events. The JSC proposals become -- they've been issued. They become, or are they subject to public comment? Do they become automatically the rules or what?

LTC VERGONA: No ma'am. So they have gone out, this one has gone out for public comment and service comments. The JSC needs to get back together and they'll vote after reviewing the comments.

CHAIR HOLTZMAN: Okay. So in other words, I'm not 100 percent sure that that's, correct me if I'm wrong, that it's accurate that we've been overtaken, because if our view is that those changes shouldn't be made, then that's something that the JSC could consider; is that correct?
LTC VERGONA: Yes ma'am.

CHAIR HOLTZMAN: Okay.

JUDGE JONES: And I guess I would like to consider the JSC. I assume the JSC proposal would become the Uniform procedure; correct?

LTC VERGONA: Yes ma'am.

JUDGE JONES: Okay.

PROF. TAYLOR: And that was my assumption --

(Simultaneous speaking.)

JUDGE JONES: And we will or would or whatever. So if we're uncomfortable with the JSC procedure, which I'm not sure this actually speaks to; I'm don't know at this point, I don't know, but then we should be talking about the JSC procedure. I guess to the extent I understand it, I still believe that appellate counsel should be able to look at the materials that no one has even seen at the trial level, in order to make an appellate argument with respect to the withholding of those based on privilege.

But so to the extent I understand, I
probably don't agree with JSC. But that doesn't mean that I think we can vote on the first one, because we don't really have the procedure yet. There is no Uniform procedure. I think we have to examine JSC, not talk about Uniform procedures.

MR. STONE: But we have examined JSC. That was presented in the materials, and I'd like to see a vote on Vice Admiral Tracey's proposal even orally, and it can be circulated in written form later to us, because I think that it's an important point that we have finally gotten to.

I might add giving victims a chance to say something before materials are distributed complies with most of my concerns in my proposed dissent, which would probably turn into a concurrence, assuming that Admiral Tracey's language is adopted by a majority of the Panel.

LTC VERGONA: Ma'am, if I may interject. The JSC has not voted on this yet.

JUDGE JONES: Oh.

LTC VERGONA: We do have some time, so
if the -- even though it's past the public
comment period, if the JPP would like to provide
a public comment I would say you have about two
months to provide that to us, so that they could
consider it.

        CHAIR HOLTZMAN:  Well, let me throw
something out.  I mean this is too radical, that
we get the JSC proposal in writing in front of
us, and that we schedule another session just on
those proposals, maybe circulate our own comments
before the next meeting that we have.

        Whether it's your view, Mr. Stone,
that we should have -- and your view, I don't
know if that is your view, Admiral Tracey, about
notice and an opportunity to be heard or any
other proposals in connection with that, and then
we can discuss them at the next meeting.  Does
that make sense or not?

        JUDGE JONES:  I think so, because I
think --

        PROF. TAYLOR:  No, I agree with that.

        CHAIR HOLTZMAN:  And I think our next
meeting is --

(Simultaneous speaking.)

CHAIR HOLTZMAN: I think our next meeting is early March, right.

MR. STONE: No, it's late March.

CAPT TIDESWELL: March 10th. It's March 10th.

MR. STONE: March 10th, okay.

CHAIR HOLTZMAN: Do we have a concurrence and agreement? Wow. I mean consensus. Okay. Mr. Stone, is that procedure okay with you?

MR. STONE: As long as we're not going to be untimely, it's okay with me and I gather with the nodding of heads I'll say --

LTC VERGONA: Yes sir. I can say that --

MR. STONE: It will not be untimely.

LTC VERGONA: --I will make sure that there will not be a JSC vote until we've received your proposal.

CHAIR HOLTZMAN: Wow.
MR. STONE: And I would just like to add to that, if we can get anybody in the Services to provide us background on 110(b) in the meantime, 1101(b) that they ought to be put on the speaker list too, if somebody wants to confer with them.

CHAIR HOLTZMAN: Okay. But I think that that's really a -- that's a big issue to chew off on. I'm not saying that it's not important, but I'm not sure that we start dealing with both issues will get either one of them solved probably. I'd like to really focus on this whole issue, because there are very important issues raised with regard to the notice, the hearing and the basic issue that Judge Jones raised.

So and that's not to say that maybe we won't consider that at a future date. So if anybody's got these materials on 1101(b), is that right?

CAPT TIDESWELL: Yes.

CHAIR HOLTZMAN: Okay, we'd probably
welcome them and share them with the staff, and
maybe there's some opportunity for us to review
that. Do we have anything else on our agenda?

            CAPT TIDESWELL: No ma'am.

            CHAIR HOLTZMAN: Wow. Okay everybody,
then the meeting will stand adjourned, and thank
you to all of your for your participation in
helping us. This is a thorny problem as you can
see, and we really appreciate your guidance.
Thank you so much for coming back and helping us.
Thanks to all the Panel members.

            MR. SPRANCE: The meeting's closed.

            (Whereupon, the above-entitled matter
went off the record at 3:07 p.m.)
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