**UNITED STATES DEPARTMENT OF DEFENSE**

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**JUDICIAL PROCEEDINGS PANEL**

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**PUBLIC MEETING**

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**FRIDAY,**
**MARCH 10, 2017**

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**The Panel met in Suite 1432, One Liberty Center, 875 North Randolph Street, 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:**

**COLONEL(R) DON CHRISTENSEN - Former Air Force Chief Prosecutor; President, Protect Our Defenders**
**MS. LAURIE KEPROS - JPP Subcommittee Member**
**MR. JAMES MARTINSON - Highly Qualified Expert, Criminal Division (Code 20), Navy Office of the Judge Advocate General**

**COLONEL(R) WILLIAM ORR, JR., U.S. Air Force - Chief, Strategic Military Justice Legislation and Policy, United States Air Force Judiciary**
**BRIGADIER GENERAL(R) JAMES SCHWENK, U.S. Marine Corps - 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:**

**CAPTAIN TAMMY P. TIDESWELL, U.S. Navy - Staff Director**
**MS. THERESA GALLAGHER - Attorney Advisor**
**MS. NALINI GUPTA - Attorney Advisor**

**DESIGNATED FEDERAL OFFICIAL:**

**MS. MARIA FRIED**

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

9:31 a.m.

MS. FRIED: Good morning, everyone. Panel Members, thanks for being here this morning. Welcome to the Judicial Proceedings Fiscal Year 2012 Amendments Panel. I am Maria Fried, the Designated Federal Official for the JPP today.

Captain Tammy Tideswell, United States Navy, is the Staff Director. This Panel was established by Congress in Section 541 of the National Defense Authorization Act for Fiscal Year 2013, as amended. The JPP was tasked to, among other things, conduct an assessment of judicial proceedings conducted under UCMJ involving adult sexual assault and related offenses since the amendments were passed and to make recommendations to the Secretary of Defense and Congress.

As with past meetings, today's meeting and agenda were published in the Federal Register. The agenda has been subsequently

modified and revised and was posted on the website. The changes are as follows: Panel deliberations previously scheduled for this afternoon will now occur this morning. The other change to the agenda is that the Subcommittee presentation regarding DoD Withholding Policy, Military Rules of Evidence 412 and 513, previously scheduled for the morning session, has been moved to this afternoon.

Additionally, since the Panel deliberated on the JPP Draft Report on Military Defense Counsel Resources and Experience in Sexual Assault Cases at the last meeting, that has been removed from the agenda today. Additionally, we received one request for oral comment, and that was from Mr. Don Christensen from Protect Our Defenders. Mr. Christensen will provide his oral statement prior to this morning's deliberations. POD indicated the comment relates to victim appellate rights, a topic that the Panel will deliberate on this morning. Therefore, the Chair and I determined

it was best to receive that comment prior to those deliberations this morning.

We also received one written comment from Colonel Palomino and Mr. Mizer, and that has been provided to the Members. The Department has appointed the following distinguished Members to the Panel: the Honorable Elizabeth Holtzman, who serves as Chair to the JPP; the Honorable Barbara S. Jones; Vice Admiral Patricia Tracey; Professor Tom Taylor; and Mr. Victor Stone. Members' biographies are available at the JPP website at http:\\www.jpp.whs.mil.

Finally, this Panel is a federal advisory committee and must comply with the Federal Advisory Committee Act and the Sunshine Act. Publicly available information provided to the JPP is posted on the website, to include transcripts of the meetings. Any information provided by the public to Panel Members must be made available to the public. Madam Chair, thank you.

CHAIR HOLTZMAN: Thank you very much,

Ms. Fried, and good morning, everyone. 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 for FY 213 -- 2013, sorry, as amended by the National Defense Authorization Act for FY 2014 and 2015. Our mandate is to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the most recent amendment to Article 120 of the UCMJ in 2012.

Today's meeting will begin with a public comment from Mr. Don Christensen of Protect Our Defenders, followed by Panel deliberations on the Joint Service Committee on

Military Justice's proposed amendments to Rule for Court-Martial 1103A and the Victims' Appellate Rights Report. After a break for lunch, the Panel will receive the presentation from JPP Subcommittee member Retired Brigadier General James Schwenk, U.S. Marine Corps, on the Subcommittee's site visit observations regarding the DoD withholding policy, attorney training, and Military Rules of Evidence 412 and 513.

Finally, the Panel will deliberate on the strategy for the review of Military Rule of Evidence -- Military Rule of Evidence 412 regarding evidence of a victim's prior sexual history and Military Rule of Evidence 513, the psychotherapist-patient privilege.

Each public meeting of the Judicial Proceedings Panel includes time to receive input from the public. The JPP received no requests other than Mr. Christensen's for public comment at today's meeting. Thank you very much for joining us today. We are ready to begin -- we are ready to hear Mr. Christensen and then begin

deliberations on victims' appellate rights. Mr. Christensen? Very glad we could work it out. Thank you for your patience.

(Pause.)

COL CHRISTENSEN: Thank you, Madam Chair, and Members of this Panel. I am glad you could work it out as well. Thank you for taking the time to do that.

I just want to briefly talk about 513. After listening to the discussions concerning the mental health privilege by this Panel and the witnesses who have presented --

CHAIR HOLTZMAN: Excuse me. Maybe your mic is not on, so just wait one second.

(Pause.)

COL CHRISTENSEN: I will start over. After listening to the discussions concerning the mental health privilege by this Panel and the witnesses that testified before it, I feel compelled to make these comments concerning M.R.E. 513 and whether R.C.M. 1103A should be modified in a way that protects the privilege.

It is time to treat M.R.E. 513 as a real privilege because it is in fact a real privilege. It is contained in Section 5 of the Military Rules of Evidence, which is entitled Privileges. The rule's own title is Psychotherapist-Patient Privilege. The rule itself starts with these words: "A patient has a privilege." There can be no doubt the rule is intended to be and is a privilege.

This privilege is not a mere speed bump to disclosure. However, most of the testimony before this Panel have tended to treat the rule exactly that way. The fact that the debate around 513 seems to argue the privilege is lesser privilege than others contained in Section 5 -- "And in fact," that is what I meant to say.

M.R.E. 513 is contained in the same section of Privileges as the lawyer-client privilege, the communications with the clergy privilege, and the husband and wife privilege. It is hard to imagine that these privileges would ever be pierced in the same manner that M.R.E.

513 is today.

I do not blame this Panel for viewing or maybe viewing 513 as more of a quasi-privilege than an actual privilege. Instead, I blame the past practice of the military and the dearth of opinions from the Court of Appeals of the Armed Forces. In fact, the Court of Appeals of the Armed Forces really has never addressed this issue.

As someone who has practiced in the military before and after the adoption of M.R.E. 513 and this addition to Section 5, I can assure you the military did not fully understand the rule at its inception and was not comfortable being told they could not access mental health records. Prior to 513's adoption, mental health records were routinely reviewed by investigators and routinely turned over to the prosecutor, who routinely turned them over to defense counsel.

Even after the creation of the privilege, the defense has continued to demand mental health records of a victim, and the

judicial practice was to always order production of the records and to always review them in camera and almost always turn over the records to the defense. This practice was so pervasive that few, if any, gave any thought to whether it violated the actual privilege, and prior to the creation of the SVC program, there was no way for a victim to challenge the fact that their records were being turned over to the defense.

Simply put, this custom is deeply rooted in military jurisprudence even though it is blatantly improper. It has permeated the thinking of the defense community and the bench, and despite several efforts by Congress and the President to make it clear that M.R.E. 513 is a real privilege, the message simply is not sinking in.

Many may believe the notion that military -- excuse me, that mental health records could reveal evidence that could raise reasonable doubt or actually prove the innocence of an -- of an accused, and that alone is enough of a reason

to pierce the privilege. This, however, is a misunderstanding of the purpose of privileges. The Supreme Court has repeatedly addressed privileges. In United States v. Nixon, it noted that privileges in fact may inherently be in derogation of the search for truth, but yet we still have privileges.

In other words, privileges are the exception to the rule the public has a right to every man's evidence, and that was United States v. Bryan, another Supreme Court decision. The Fourth Circuit said that privileges are appropriate to the very limited extent the permitting and refusal to testify are excluding relevant evidence as a public good transcending the normally predominant principle of utilizing all rational means for the ascertaining of the truth.

In other words, privileges are the one time -- are one of the few times the law says the truth gives way to someone's right. The Supreme Court came to that exact conclusion when it found

that the mental health privilege promotes sufficiently important interests to outweigh the need for probative evidence. I am certain you are all familiar that United States v. Jaffee is the foundation for M.R.E. 513. The Supreme Court pulled no punches to justify why mental health privilege is a public good. The Court also made it perfectly clear why confidentiality is vital to the success of mental health treatment.

The psychotherapist privilege serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of mental or emotional problems when the mental health of citizens -- of the citizens is a public good of transcendent importance. That is the holding in U.S. v. Jaffee. What I am trying to make clear is that the privileges we -- that the law recognizes that privileges rooted in the public good transcend the truth-seeking function of a trial, and the Supreme Court has recognized that this privilege serves a public good.

What I also hope is clear, that there is no basis under the law to treat 513 any different than 502, 503, and 504, yet that is exactly what happens. In the 25 years since I started practicing law in the military, I know of no serious attempt to pierce these other privileges. There may have been arguments that a privilege had been -- had been weighed, or that a marriage was a sham and therefore did not deserve protection, but I have never seen a ruling forcing an attorney to disclose client confidences because it may be helpful, or even provide exculpatory evidence.

I turn to the holding in United States v. Doyle, a federal court opinion, to still illustrate the absurdity of the military's treatment of M.R. 513 -- M.R.E. 513. Quote, "The victim's attorney or spouse had similarly privileged conversations with her that similarly might help a defendant's cause if revealed. The confidentiality of those communications does not surrender to the defendant's Sixth Amendment

rights. If such were the law, what privilege could survive the defendant's assertion of evidentiary needs? Lawyers, spouses, even priests could be presumably called to be ordered to cough up their notes or memories about the most private and confidential communications in the face of a subpoena from a defendant in a criminal case."

As Jaffee noted, an uncertain privilege is little better than no privilege at all, and that is what we have created in the military with 513. From my own experience as the head of the Air Force Appellate Division, and speaking to those who are currently practicing as appellate counsel, the mental health privilege is being pierced on at least a weekly basis by the Service courts. For witnesses and victims in a court-martial, it has become a given that your mental health records will be reviewed by the Service's courts and will be turned over to counsel.

For those patients who have disclosed

their innermost thoughts to their provider with an expectation their words would never be exposed, the professionalism of the court or of the counsel is of little comfort to them. The practice currently under use in the military ignores the law of 513 and eviscerates the privilege. It must be stopped. Thank you.

CHAIR HOLTZMAN: Thank you very much, Mr. Christensen. Judge Jones?

JUDGE JONES: So what is your position, then? There should never be any effort by the defense to obtain mental health records, no matter what their showing is --

COL CHRISTENSEN: Well, I think --

JUDGE JONES: -- with respect to relevance, like a particular, you know, medication that may cause physical manifestations? I mean, it is a very broad statement, Mr. Christensen.

COL CHRISTENSEN: Well, let me say I think my defense brethren should always try to get this. That is their ethical obligation, to

try.

JUDGE JONES: But if all medical -- mental health documents are privileged, and we may not pierce it, why bother?

COL CHRISTENSEN: Well, there are exceptions, as -- as every court is -- as the Supreme Court said in Jaffee, there are exceptions to every rule. Now, what Jaffee gave as an example is when a patient has made threats to the public safety, that that would be an exception.

If you look at federal law, which has much greater experience and a much greater amount of legal opinion on this, you see cases exactly what you're talking about where a patient has admitted that they are of different perception. They have admitted that they have psychological issues. They have admitted that they have perception issues. And the court has said, okay, you still don't get her records. She has admitted those things.

JUDGE JONES: I mean, I understand

cases like that myself, but where you have -- the defense has a theory of relevance, maybe you won't agree with it, that goes beyond just the statements that the witness is admitting to, you know, other decisions can and are made. I am just -- I am just reacting a little bit to the absoluteness of your remarks.

COL CHRISTENSEN: Yes. Well, I want to make it clear that the privilege is -- is an absolute privilege with the idea, as Jaffee said, that there is -- any privilege is open to exceptions. But instead of having real good discussions of what are the exceptions, and I would suggest from the case law in the federal courts, and that have been upheld by numerous circuit courts, that those exceptions are few and far between. If you have a practice in the military where the records are being turned over routinely, then there is not an effort in any way to -- to define what those exceptions could be.

JUDGE JONES: All right. And -- and the only other comment I was going to make, and I

-- we have heard that it is far less common now for the military judges to be ordering these documents. It sounds like the practice was pretty much you ask, they come in, and at least the judge reviewed them, but I think it is a very positive thing that we've heard that that is not happening anymore.

COL CHRISTENSEN: Yes. I would say at the trial level -- and again I believe we are talking about the appellate level now -- at the trial level, most judges are following the law that has been established by Congress that it's not a -- you know, even the production of records has a higher standard.

What my concern is, at the appellate level, following 1103A, where these records are viewed as a sealed document that anybody can look at that's in the appellate process, that is where it is being pierced routinely. Now, I still have issues with some of the judicial rulings at the lower level, but the good thing we have now is that a victim, thanks to LRM v. Kastenberg, can

challenge that at the appellate level.

So I would agree with you, Your Honor, that there is a better practice at the trial level. What I am really concerned about now is at the appellate level, and I have heard people say last -- two weeks ago, when we had the last hearing, one of the appellate defense counsel from the Navy says hey, we are professionals, no one should worry. The professionalism of the people viewing is not the issue. For a patient, they don't -- they probably trust their mother much more than they trust that Navy captain, and they still don't want their mother to be reading their records, and so that is not the issue. The issue is whether or not they even have met that standard to be looking at them.

And I have talked before to this Panel, is that -- and I also talked to the Joint Services Committee, what you need to do at the appellate level is create the same standard where the appellate court first has to review should these records even have been produced before they

open them up. Then, if they say okay, yes, they should have been produced, should we do an in camera, and -- should we the court do an in camera on our own, and then if we find something that we believe could have affected the trial, then we look -- turn it over to the appellate counsel.

But right now, the process I believe is you just say we want to see it, and you make a motion -- at least in the Air Force court, I don't even think you need to do that, in the other Service courts -- and you get it. And privilege is not a privilege if it is just turned over like that. So I do think there will be times that a privilege needs to be pierced, but it should not be pierced routinely.

JUDGE JONES: It should not be?

COL CHRISTENSEN: Pierced routinely.

JUDGE JONES: Routinely. I agree. Thanks.

CHAIR HOLTZMAN: Admiral?

VADM TRACEY: Does the JSC set of

recommendations as currently formulated meet the standard that you would like to see?

COL CHRISTENSEN: I don't believe so because the standard is very low. It is better than what we have because it does say -- I can't remember the exact words, but you do have to show a --

VADM TRACEY: Cause?

COL CHRISTENSEN: Yes, cause, but that is a pretty low standard.

VADM TRACEY: Okay.

COL CHRISTENSEN: But the other problem is that it doesn't start, and I think this is where the appellate courts need to start, is should these records even have been produced? Now the Air Force court, Service court, had a trial judge not produce records, and then the Air Force court ordered the government to produce the records. That is United States v. Chisum under the appellate process. And if they had looked at federal laws instead of their own law, they would have seen clearly that the standard was not met.

You know, in those cases, both witnesses were not victims, and I think that is one thing that gets lost, is that M.R.E. 513 applies to every witness, where non-victim witnesses had fully disclosed all their issues with drug abuse, mental health issues, everything you would possibly need to impeach them, and yet the Air Force court, citing a -- a case that had nothing to do with mental health privilege, ordered the production of the records.

And so I just don't think that at the Service court level, there is a sufficient hesitancy to order or review records, nor a sufficient hesitancy to understand this is really a privilege.

VADM TRACEY: Do you have recommended changes to the JSC proposal that would address your concerns?

COL CHRISTENSEN: Not in writing. I definitely can.

VADM TRACEY: Okay. Thank you.

CHAIR HOLTZMAN: Mr. Taylor?

PROF. TAYLOR: Yes. Again, thank you very much for your comments. Following up on Admiral Tracey's question, one issue that came up last time two weeks ago was whether if you took the Joint Service Committee's proposed amendment but also added a provision that would afford victims the right to be heard by motion or by an appropriate method prior to giving appellate counsel access, would that go a long way to satisfy some of the concerns that you have about access?

COL CHRISTENSEN: Well, I would say it is again a step in the right direction, but I guess what I am really trying to get across, and I am probably failing to do, is -- is every court that has addressed this issue has talked about that if judges are just looking at records, that pierces the privilege just as much as anybody else looking at the records.

So Mr. Taylor, what I want to stress is that one of the things that is needed is for the courts -- at the Service court level is to be

making the same evaluation that we expect from a trial court. Should -- should the records have been produced? If they are produced, can we do an in camera review? Should anything be turned over? Whereas right now, they are just going right in there and opening the records. That -- that initial step, should we be doing this, is not asked.

PROF. TAYLOR: I have no further questions.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Yes. I think it is -- well, I would like to ask you a question, because at our last meeting, and now again by you, this Chisum case was mentioned, which is an Air Force case, U.S. v. Ricky D. Chisum, decided 29 November 2016, and so I took a look at the case, and when I looked at it, I saw that it did embody the new practice which was mentioned at the last hearing that a judge, unless he sees the threshold is met, does not even order the records at the trial level, and then in footnote 3 --

well actually, the appendix says on page 3 "Appellant first argues that the military judge erred when he denied the defense request to compel a production and perform an in camera review of the mental health records."

And then there is a footnote, and it says "On 16 August 2016, this Court ordered that the Government produce the sealed mental health records for appellate review." And I guess I was confused, and maybe you can help me because you have mentioned it: those records were never sealed. The judge never had them. Has the -- have the military courts of appeals now decided that records they never had can be called sealed even though they were never sealed by the trial judge and used 1103A?

Is that what is -- I couldn't figure out how -- it seems to me this is a brand new production order which, you know, the -- the argument before was that all of the -- under the old military rules, all that an official was doing was unsealing some records that came up to

him sealed below, but all of a sudden, here now they are calling sealed mental health records, something that the court below never got them made for the first time, demands to have produced possibly even records that still resided in the psychotherapist's locked cabinets in his office.

And so I guess my questions are do you have any idea why they are calling those sealed records? And if they're doing that because they still are proceeding on -- and I presume the old rules, because the new rules are not in effect yet, and if that is the case, is this more than just one -- a one-case example, or is this what is happening now that the judges do not have to keep the rules and seal them, now that the appellate courts are just saying to the government produce those records for the first time?

COL CHRISTENSEN: Well, as far as I know, Mr. Stone, this was the first time and the only time this practice has been done, and I believe that opinion came out fairly recently.

It is interesting because I do not believe the appellate court would have any authority whatsoever to do this with mental health records held by a civilian practitioner. These are obviously records that were contained in the military treatment facility.

I would say that the seal order -- so we have two ways that the records are sealed. The first is by the judge. The second that precedes that, the records are delivered sealed, so typically the way it happens is the order for production is made. Prior to that practice that we currently have, trial counsel would just go up and get the records in a sealed fashion. But they are sealed by the military mental health facility, and -- and so that is a seal in a different I would say legal sense than the seal that we see under 1103A. I hope that clarifies it.

It -- the irony is of course after they reviewed the records, they found exactly what the judge ruled, that the defense had more

than enough to properly cross-examine these people. And I am certain I did not answer all your questions on that, so if you have any follow-ups?

MR. STONE: Just whether to some extent this new development that the courts themselves are ordering production, the appellate courts, when the trial courts didn't order production --

COL CHRISTENSEN: Yes.

MR. STONE: -- based on the -- the new steps that are taken under 513, whether that -- I guess what conclusions do you draw? Do you draw the conclusion that there's going to be less of these unsealed records to give to the various appellate counsels and the judges, or do you draw the conclusion that this shows that the Joint Services Committee is right, and they better examine the whole process and regularize it because it is spiraling out of control as to if -- if what the military courts of appeals are doing is demanding records that were not sealed

below?

COL CHRISTENSEN: Well, I would say I don't know that the appellate courts are spiraling out of control. I do believe there's different -- the Army Court of Appeals has a different view than the other Service courts. It is much more protective of victims. Unfortunately, CAAF has not addressed this issue. You know, the rule has been in place for quite some time, and CAAF has never addressed, you know, the issue of constitutionality, one that is required by 513.

So the Service courts, up until last year, had also never addressed the issue of constitutionality. This is why I say that has happened, is because trial judges prior to the -- to the emphasis that has been placed on this were almost always turning records over, so it just never became an issue on appeals, so now, as cases percolate their way up, I believe that will be more addressed, and eventually CAAF will have addressed, to get back to your question, what are

the standards? When do you pierce that privilege? I mean, I do think that is a judicial question, but that is a judicial question for when do you pierce it at trial, not at the appellate level.

So the Air Force court's ruling was troubling to me because their justification to pierce the privilege in this case was not a mental health issue, or even trying to now analyze mental health privilege by using guidance from federal or state courts. They used a -- a completely unrelated case that had nothing to do with mental health to say, well, we're going to pierce the privilege, so I would not say that -- Chisum was the high point of the Air Force court's career.

CHAIR HOLTZMAN: I know you didn't address this explicitly, but is it your view that -- that CAAF ought to be reviewing these cases?

COL CHRISTENSEN: Absolutely.

CHAIR HOLTZMAN: Okay. Just -- just for me to get a better sense of -- of what --

wait, I guess mine isn't on -- a better sense of what is -- of your concern, and to follow up on what Judge Jones said, it is my impression -- I could be wrong -- but it is my impression that only a tiny percentage of -- in only a tiny percentage of cases are judges requiring the production of the records into chambers, mental health records. Is that correct?

COL CHRISTENSEN: Well, I don't know if I could say tiny percentage, but it is much, much smaller than it used to be. Practice has changed at the trial level --

CHAIR HOLTZMAN: Right.

COL CHRISTENSEN: -- but we do still see it, and we do see production. I was --

CHAIR HOLTZMAN: Right. So in the cases -- but it's a smaller proportion. We don't know the number, but my impression is that they are very rarely, from the testimony we have heard, anyway -- maybe my colleagues want to correct me -- but my impression is they almost -- almost never call for the production of these

records. So just to make the record for me clear, if the records have not been turned over to the trial judge, there's nobody going to be reviewing them on appeal?

COL CHRISTENSEN: No. That -- that goes right back to Mr. Stone's point about U.S. v. Chisum. The records were not produced, but the appellate court ordered them produced, and then they were reviewed and they were turned over to the appellate counsel.

CHAIR HOLTZMAN: Okay. But absent a decision by a court, a specific decision on production and piercing the privilege, those records in the ordinary courts, if they have not been produced below, mental health records, they are not going to be produced in the -- in the appellate courts?

COL CHRISTENSEN: Well, I don't know because Chisum is a new case, and so I don't --

CHAIR HOLTZMAN: I said absent a court decision requiring the production of those records, there will be no production of those

records --

COL CHRISTENSEN: I am sorry --

CHAIR HOLTZMAN: -- on appeal if they have not been produced below?

COL CHRISTENSEN: I am sorry, Miss. I understand your question. Yes, absent an appellate court's decision to order production, then yes, they will not be reviewed.

CHAIR HOLTZMAN: Okay. And so your concern is with respect to the smaller number of cases, whatever that percentage is, where the court below has -- has ordered the records turned over. So there are two situations, and the Joint Services Committee deals with two examples. I want your view of both.

If the -- if the records have been produced below, unsealed by the judge and produced to defense counsel below, the Joint Services Committee now requires a showing before they can produce, be produced and seen by defense appellate counsel. Do you agree with that? And if so, why?

COL CHRISTENSEN: Yes. I do agree with that. My concern is that I believe it should be more detailed to the --

CHAIR HOLTZMAN: It should be what?

COL CHRISTENSEN: More detailed as to what standard. Right now it is cause. I think -- I think there should be greater detail between when those are produced to appellate counsel, and I think appellate counsel -- that is almost always going to be defense appellate counsel -- should be held to a higher burden to get -- get the --

CHAIR HOLTZMAN: And --

COL CHRISTENSEN: -- records.

CHAIR HOLTZMAN: -- and what would your objection be if there were no such requirement when the records have been turned over below to defense counsel at the trial?

COL CHRISTENSEN: Well --

CHAIR HOLTZMAN: Please explain your objection --

COL CHRISTENSEN: Sure.

CHAIR HOLTZMAN: -- to turning them over on appeal.

COL CHRISTENSEN: Sure. I -- I think it is pretty rare that the records are turned over in their entirety below. We do have judges still going at it, and -- and we do still have judges who believe the defense is entitled to this and will -- and will order production, will turn them over. But I do agree with you that it is becoming less of a problem.

I would say as -- I -- I know some people on this Panel may have reviewed mental health records, but most people have not reviewed mental health records. I have reviewed mental health records as a judge. It is often, okay, you know, it's a lot of psychological talk, a lot of doctor talk, and you know what, to turn over, not to turn over, becomes a judgment call.

But once you have made that judgment, and you have ordered the rest of it not disclosed, I don't believe you should just automatically get what was not disclosed. I

mean, if you have decided, you made that determination to pierce the records, and you, for whatever reason, you have made that determination, you review the records, and you would see -- this is an extreme example -- you would see in the records that the victim says I lied, this isn't true, I made it all up. Okay, and you have made that decision to pierce them, that is something you're going to turn over to the defense.

But within that mental health records, you see something where the patient is talking about an incestuous relationship with her father, and you don't turn that over, I mean, that has nothing to do -- they have admitted they lied. That relationship, that incestuous relationship with the father should not just be automatically turned over to the defense on appeal.

And so I think that there has to be -- I mean, I know it takes a little bit of time, but there were only 255 sexual assault convictions last year, so -- and there's four Service courts,

so they can put the time into it, and of those 255, not all of them are going to have mental health records. So they can put the time into it to make sure that -- that evidence and records and innermost personal thoughts are not just routinely turned over.

CHAIR HOLTZMAN: Well, maybe I was misreading the Joint Services Committee's proposal, but I thought that even with regard to records that were unsealed below, they couldn't be accessed by appellate defense counsel without a showing.

COL CHRISTENSEN: Yes, and I would say --

CHAIR HOLTZMAN: And what is the reason for that?

COL CHRISTENSEN: Well, I would say that is very similar to -- when I talked about four privileges under Section 5, I talked about four privileges that relate to an individual, but it is also privilege that relate to the government such as secrets, and I would say that

is exactly the same way they do that.

So if you have evidence dealing with secrets that were handed over to defense trial counsel, those would be sealed, and then once it got up to the appellate counsel, appellate process, the same process would occur. Even though a defense counsel had seen it at trial, you would still have to show -- make a showing of some cause to see those records. And so it may not make sense, but it is -- it has to do with the protection of the records.

CHAIR HOLTZMAN: I was asking you how it made sense.

(Laughter.)

CHAIR HOLTZMAN: Okay. All right. I guess that is really the only question that I have.

VADM TRACEY: May I ask --

CHAIR HOLTZMAN: Yes, please.

VADM TRACEY: -- a couple follow-ups? Help me be clearer on what you're saying. I thought the example that the chart gave was an

instance in which a trial judge has opened records, reviewed them, and determined that some of the material can be turned over to the defense, and the rest may not be, and I thought the JSC proposal would treat the material that was turned over to defense at one standard. The material that was not turned over to defense remained in a separate category to be dealt with at a higher standard, maybe not as high as you think it should be, but they are not treated the same way in the JSC recommendation. Am I incorrect?

COL CHRISTENSEN: I believe you are correct. And again, I must not be doing a good job answering. So all I am saying is -- is that with -- when I am using the secret information as an analogy, I am saying they will probably still get it, but they have to ask for it. They are not just going to get it automatically. And so by analogy, I would imagine that they would still get the -- they would have to ask for the unsealed -- or the sealed portion of records that

were turned over to defense counsel, but they are sealed documents, so they have to ask for it. But it would be at a lesser standard than stuff that --

VADM TRACEY: Section 12. Second follow-up, is it likely that there are cases that have not been through the appellate court yet that were handled under the previous M.R.E. 513 practices?

COL CHRISTENSEN: Yes. I've been retired for three years, and one of the cases they prosecuted is getting argued before CAAF next week, and I practiced -- and I prosecuted that case in 2013, so --

VADM TRACEY: So in those instances, by your experience, the -- highly likely that there may be mental health materials that were just part of the record in those cases?

COL CHRISTENSEN: Yes, yes, and -- and, you know, my point of all this is that what -- each time a -- a privilege is pierced, that does harm to the witness or the victim, and so we

should not just pierce these privileges without -- without --

VADM TRACEY: Yes, I understood that. Right. All right.

COL CHRISTENSEN: Yes.

MR. STONE: Having myself litigated privileges, I presume your comment about even documents that have been seen by defense counsel at the trial level require some standard of review before they distribute on appeal deals with situations for example when the particular record -- and it might be a confidential national security record or it might be a privileged mental health record -- is no longer even potentially relevant to the appeal, even because the person might have been convicted on a lesser included offense, and therefore the relevance of that record is no longer in the case, or that entire count might not have resulted in a conviction.

So it is usually -- it is a much lower standard, but it is to make sure that that record

is still relevant. It is not just everything that we got at the first level is still relevant because the circumstances have changed. Is that --

COL CHRISTENSEN: Yes.

MR. STONE: -- what you were getting at?

COL CHRISTENSEN: Yes, and you said it much more articulately than I did. Yes, that is exactly what I am talking about, that there -- there may be cases where trial defense counsel saw that evidence and the need to see it at the appellate level is much different, and you should still have a standard before you turn it over.

MR. STONE: Or the particular witness was struck for some other reason --

COL CHRISTENSEN: Right, right.

MR. STONE: -- and there were five witnesses, and that witness maybe as it came to trial didn't even testify, so -- so the point --

COL CHRISTENSEN: Or that he is found not guilty of that charge, or found guilty of

other charges.

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: Mr. Christensen, do you understand the proposal of -- that we have been talking about -- can you hear me?

PARTICIPANT: Yes, we got -- I got that.

JUDGE JONES: That when you have the circumstance that documents have been produced, that the judge -- and they have been given to counsel, but not made public, they have been examined, but remain -- and are ultimately sealed, okay, so that's one group. And under the -- is it JSC? I am always bad with acronyms.

Under the JSC proposal, there is one standard of motion that you have to make, and I think you gentlemen have both just been discussing that. And it's a lower burden than the situation where the judge has reviewed them, but they haven't been made available for examination, and certainly they haven't been made public. So for those, am I correct that the

proposal there is that the court of appeals will actually do an in camera review?

I didn't see -- I assume there has to be an -- a request that they do it? Or are they going to be doing this automatically? But is it -- whichever it is, they have to do that before they make the decision as to whether or not to make those available to both counsel, either counsel. Is that how you understand this?

COL CHRISTENSEN: It is, but I would defer to Mr. Orr about how the court --

JUDGE JONES: I am sorry?

COL CHRISTENSEN: I defer to Mr. Orr. I think he is here to help you in your deliberations on exactly how an appellate court -- I -- I was selected to be an appellate court judge, but I never served on the appellate court, so I -- there are interworkings that he would have a much better understanding of.

JUDGE JONES: Well, I mean, the point that I always come back to with that type of a standard for defense counsel, appellate defense

counsel, is simply that if they are going to be examined by the court of appeals, and they did not try the case, and -- and I guess we are expecting them to read the record and read all the -- you know, the testimony, and then try to figure out, well, did the judge make a mistake or not, I still think it is -- it is unfair not to let appellate counsel under the very strict rules that they have now to take a look at that record. But that has been my opinion all along, so I am just expressing it again, I guess.

COL CHRISTENSEN: And I understand that, and I understand that people have that opinion, but that is where I would go back to the Supreme Court precedent that I talked about, that -- that at that point, the privilege trumps the truth-seeking purpose of a court, of a trial.

JUDGE JONES: What do you say about the appellate judges reviewing it?

COL CHRISTENSEN: Well, I -- that is what I have been trying to really make clear, is I think the appellate judges should not review

it, and so --

JUDGE JONES: So you are totally against the second provision?

COL CHRISTENSEN: Right. I think the appellate judges should have to make the same decision-making process that the trial judge made: should I even order the production? And then now that I have, should I look at these records? Has the defense made enough of a -- a case for me to look at it? And by "me," I mean the appellate courts.

So I don't think it should be routine --

JUDGE JONES: So you would have them go back to the proffer --

COL CHRISTENSEN: Right.

JUDGE JONES: -- and say he should never have ordered these to begin with, he or she --

COL CHRISTENSEN: Right.

JUDGE JONES: -- based on that proffer --

COL CHRISTENSEN: Right.

JUDGE JONES: -- even if there was relevant evidence that came out of that? I am using shorthand --

COL CHRISTENSEN: Right, right. And -- and I know that is an uncomfortable topic for many people, and, you know, that is why there are so few privileges. I mean, there are five that deal with -- with people, personal privileges, in the UCMJ. I mean, that -- you know, we often hear about journalist privilege. Well, there isn't one, and I think most people view that as a very good thing to have, but there isn't one, and so Congress and the President have been very judicious in handing out privileges.

And this is one -- I -- I view 513 and 514 to be identical, basically, but this is one of the very few privileges that we have. It is one of the very few times --

JUDGE JONES: I think I --

COL CHRISTENSEN: -- we say --

JUDGE JONES: -- was -- I once read or

realized that the marital privilege is only an evidentiary one, but I am not disagreeing with you at all that 513 and 514 are far more important.

COL CHRISTENSEN: Yes, and I agree with you too: the spousal privilege, most people don't understand when the police come and talk to them that they have the ability to say I am not going to talk about what I told my husband, but it is a -- an evidentiary privilege whether or not that information is going to be brought before the court.

CHAIR HOLTZMAN: Okay. Thank you. Can I -- yes, go ahead.

VADM TRACEY: I didn't understand that last fine point.

(Laughter.)

CHAIR HOLTZMAN: Okay.

JUDGE JONES: It's a very different kind of privilege, the spousal privilege. It really comes up in trials, and unless the spouse gives the other -- the accused in a criminal case

gives the other spouse the right to speak, they can't, if it was communications between the spouses. But at the end of the day, it is really not the kind of sacrosanct privilege, if you will, of mental health records --

VADM TRACEY: Okay.

JUDGE JONES: -- and --

VADM TRACEY: Thank you.

JUDGE JONES: -- others.

COL CHRISTENSEN: Right.

MR. STONE: I have one question too, one clarifying question. Maybe this is the last one.

Because you mentioned that this privilege goes beyond victims, and we discussed this previously, I was a little bit concerned about the following hypothetical, and tell me if you think that a laxness in the rules would apply here too, and that would be a situation where the convening authority officer is in a situation where his loved ones, maybe his wife and his children, were killed in a car accident by a

drunk driver, okay, and then it is pretty clear that he had some grief --

CHAIR HOLTZMAN: Excuse me --

MR. STONE: -- counseling --

CHAIR HOLTZMAN: -- Mr. Stone --

MR. STONE: -- hereafter --

CHAIR HOLTZMAN: -- could we -- I hate to do this --

MR. STONE: -- and --

CHAIR HOLTZMAN: -- but -- but could we try to get some gender neutrality in this language --

MR. STONE: Oh, he or she --

CHAIR HOLTZMAN: -- because --

MR. STONE: -- he or she --

CHAIR HOLTZMAN: Thank you. I mean, we just celebrated International Women's Day. I know that doesn't have too much relevance in this town, but in general --

MR. STONE: That's why I said convening officer.

CHAIR HOLTZMAN: Thank you.

MR. STONE: Let's just -- convening officer and his or her spouse and children wind up getting killed by a drunk driver, and it is clear that -- that it -- everybody knows there has been some grief counseling, and the next case that gets authorized, the next sexual assault case is a sexual assault case where the defendant, as part of what happened in the offense everybody is aware, was driving drunk just before the sexual assault.

And the defense counsel then makes a motion for selective prosecution to the trial judge, which you are, and says I think this sexual assault is a marginal case that would never have been prosecuted, so it wouldn't be prosecuted because this judge has a thing now -- I am sorry, this convening authority has -- is -- is obsessed with punishing drunk drivers, and to prove that, judge, I would like to see the psychotherapist records of the convening authority.

I think we, you and I, have a right to

review them to see if that is what drove him to authorize this prosecution, which could lead to several other problems down the road, including convening authorities not wanting to go get grief counseling, or that even if they did, their records and them -- if it's a case that they later dropped, there would at least be an appearance that they had their own personal interest in it and therefore dropped the case. It does not involve a victim, but it still involves whether or not, even if the judge denies it, up on appeal there should be a free distribution of that convening authority's psychotherapist records. Is that a concern that is realistic under these rules as they stand?

COL CHRISTENSEN: Yes. I think the -- that concern is only limited by defense counsel and what they do. Right now, defense counsel has been primarily focused on victims when they ask for mental health records, but any -- any potential witness, a staff judge advocate if it's a motion on -- on production of a -- of an

expert, the convening authority if it has to do with improper motive if they're called as a witness, anyone who has received mental health treatment, and there has been a push within the military to have more people receive mental health treatment, and I have seen articles and all the general officers who have said, you know, hey Soldiers, it is not weak to get mental health treatment. I have had mental health treatment.

Well, that person becomes a convening authority, that is public knowledge now, and yes, that is potentially something that could happen that -- that the people at the highest levels mental health records are now being reviewed at some -- by somebody else.

CHAIR HOLTZMAN: Thank you very much, Mr. Christensen. We appreciate your testimony here.

COL CHRISTENSEN: Thank you, and thank the Members of the Panel.

CHAIR HOLTZMAN: Shall we take a five-minute break before our next -- before our next

discussion? Thank you.

(Whereupon, the above-entitled matter went off the record at 10:24 a.m. and resumed at 10:35 a.m.)

CHAIR HOLTZMAN: Okay. Thank you very much, first of all, members of the panel for the willingness to wade through this very delicate and complicated and important issue.

And I want to welcome our panelists, Lieutenant Colonel Verona?

LTC VERGONA: Vergona. Yes, ma'am.

CHAIR HOLTZMAN: Vergona. I'm sorry. My eyesight isn't that great. And Colonel Orr, and Mr. Martinson. I really thank you so much for your willingness to help us think this through.

We really appreciate that. I mean, I at least really appreciate that. Because I need a lot of help here.

Okay. I guess on our -- under our agenda, what we're going to be discussing is the Judicial Proceedings Panel recommendation. Or

not -- I mean the Joint Services Committee recommendation.

And that is at Tab -- where is that? Six, okay. Great. Okay. So, since I am really puzzled about this, do you mind if I just ask a few questions panelists? So I can clarify this in my own head.

All right. So I think there are two proposals that the Joint Services Committee has made, recommendations here. One is what -- let's step back.

There are two scenarios that we're dealing with here. Two scenarios. One is where the judge below has unsealed -- has decided that the mental health records should be produced. Has unsealed those records to the extent of giving them to the prosecutor, trial counsel, and to defense counsel.

Okay. That's -- and that -- now that's on appeal. So that's scenario one.

Scenario two is where the trial judge has said, you've made enough of a showing defense

counsel, so I'm going to order these records to come here. I'm going to look at them. The trial judge has looked at them and decided not to unseal those records.

Those are the only two scenarios you're dealing with. Is that correct?

LTC VERGONA: Mr. Martinson is, just so you know, is also on --

CHAIR HOLTZMAN: I can't hear you, I'm sorry.

LTC VERGONA: I'm sorry. Mr. Martinson is also on the JSC working group. So, --

CHAIR HOLTZMAN: Great.

LTC VERGONA: We have two of us here to assist you.

CHAIR HOLTZMAN: Well --

LTC VERGONA: But yes, ma'am.

CHAIR HOLTZMAN: Two against one is great.

(Laughter.)

CHAIR HOLTZMAN: All right. So, we're

dealing with those -- only those two scenarios?

LTC VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: So, in scenario number one where the records have been unsealed and provided to defense counsel, what you're requiring is on appeal that the -- there be a colorable showing made by the appellate counsel.

LTC VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: Is that correct?

LTC VERGONA: Yes.

CHAIR HOLTZMAN: Okay. And is it my sense that that's -- I don't want to put words in your mouth, and maybe you'll -- and I'm sure you will object to this characterization, but is that going to be sort of -- I won't say exactly pro forma, but that it's basically designed to screen out requests where it's not relevant at all.

I think the example is made of -- well, is that in essence correct? I don't -- maybe pro forma isn't the right word. But, Mr. Stone didn't you just -- you had --

MR. STONE: We were caught on a

calendar's draft or a --

CHAIR HOLTZMAN: Right.

MR. STONE: The witness never testified.

CHAIR HOLTZMAN: Right. Something like that. So it's really completely not relevant. Is that more or less what you're trying to screen out?

It would be in essence a frivolous request just about. You're trying to screen that out. Is that more or less what you're -- what that's aimed at, Mr. Martinson? Is that an unfair characterization?

LTC VERGONA: We can't exactly say what the reasons why the JSC --

CHAIR HOLTZMAN: No, no, no. I understand that. I'm not asking you for your motivations.

LTC VERGONA: But yes, ma'am.

CHAIR HOLTZMAN: I'm talking about what it would do. In essence what this tries to do, its objective is to screen out what would be

a frivolous --

LTC VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: Request. Or a request that was, you know, really didn't relate to the fact of the matter.

MR. STONE: Irrelevant might be a fairer word.

CHAIR HOLTZMAN: Irrelevant. Okay.

MR. MARTINSON: Colorable showing is a low threshold. It's a low threshold, but if you could not make any threshold whatsoever, then you probably don't meet that threshold.

CHAIR HOLTZMAN: All right. Because I'm concerned about that. Okay.

LTC VERGONA: So ma'am, if I could give you an example.

CHAIR HOLTZMAN: Yes. Give me an example.

LTC VERGONA: Right now in my position as in the Policy Division at Army Criminal Law, I review 69-A appeals. Those are records that do not meet the requirements to go to a Service

court.

But, the person has gone through a court-martial. And so the appeal has a different avenue. And it comes -- and I'm reviewing those.

If I'm looking at the charge sheet, and the charge sheet is for a sexual assault, but the accused is found guilty of an AWOL, but there are sealed materials because they were sealed materials at the trial level, there is absolutely no reason for me to look at those sealed materials.

Right now the rules if I thought it was important, I could look at those. But there really isn't any reason for me to be able to do the legal review that is required for me.

CHAIR HOLTZMAN: Are you defense counsel?

LTC VERGONA: No, ma'am. So this is a quasi -- I'm not reviewing. I'm just --

CHAIR HOLTZMAN: Oh, okay. I thought you were reviewing for -- okay. You're talking about yourself, your real self.

LTC VERGONA: Currently. Yes, ma'am.

CHAIR HOLTZMAN: Okay.

LTC VERGONA: Currently doing reviewing authority of --

CHAIR HOLTZMAN: I didn't know I had you aware of this.

MR. STONE: You're an administrative law judge basically.

LTC VERGONA: Yes, sir. So, in that situation there isn't any reason for me to look at those materials.

CHAIR HOLTZMAN: Right. But, if the person were, let's say, convicted of something related to a sexual assault then maybe you would open them up.

MR. STONE: If it was the opposite. They got acquitted for the AWOL, but convicted of the sexual assault, you'd look.

LTC VERGONA: Yes, sir.

CHAIR HOLTZMAN: Okay. So, in other words, we're not imposing a very high burden on defense counsel to obtain these records when

they've been produced below.

LTC VERGONA: A colorable showing is not a high burden.

CHAIR HOLTZMAN: Okay. Do you agree with that Mr. Martinson?

MR. MARTINSON: I do agree with that.

CHAIR HOLTZMAN: Okay. Now, let's go to the -- when the records have been ordered produced below, but not turned over. There was enough of a showing of relevance or need to get them into the court. Or at least the judge thought so.

But then the judge looking at them said, well no, there's nothing in here. Okay. What's the procedure under your new rule, proposed rule on appeal?

Does this matter then? Does the whole record go up, including the sealed material? And is everything reviewed first by the appellate court?

Or what point does the lawyer get into this process to -- does the lawyer have to make a

motion to see these records? What is the process?

LTC VERGONA: So ma'am, the verbiage is that those sealed materials may be examined by reviewing or appellate authorities. So they may be reviewed.

It could be upon a motion to review those. It could be sua sponte. There isn't -- we're not dictating. The JSC has not dictated the procedural -- the exact procedure to do so.

CHAIR HOLTZMAN: Okay.

LTC VERGONA: But has provided that they may be examined.

CHAIR HOLTZMAN: Okay.

LTC VERGONA: And then once -- and then once they are reviewed, if it turns out that they are examined, then the appellate authority may permit examination by appellate counsel.

So the appellate authority has to look at them. And is going to make a determination on whether those should be released.

CHAIR HOLTZMAN: Okay. And would it

be your anticipation --

LTC VERGONA: For good cause.

CHAIR HOLTZMAN: Right. I got it. Right, those are the two things. One the court has to review it. And then has to decide then it has -- that there's good cause.

LTC VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: Would it normally be reviewed by the three judges on the appellate panel?

LTC VERGONA: I can't say exactly how all of the Service courts are going to do it. The Army court, one judge, that's probably going to be each of the Services are going to decide how they're going to do that.

CHAIR HOLTZMAN: But it could be that the three judges review.

LTC VERGONA: It could be all three. It could be one on that panel. It could be that the courts, the Service courts decide to designate some -- an appellate judge from another panel to review those.

There's some various scenarios of how they can decide that.

CHAIR HOLTZMAN: Okay So here's my question which occurred to me. I'm sorry, because I'm still grappling with this.

LTC VERGONA: That's all right.

CHAIR HOLTZMAN: I think there are really two very important concern -- issues here. One is the concern of the victim for privacy. It's very weighty and important.

And the other is due process for the defendant. And the rights of the accused and the rights of the whole -- society is concerned about both issues of privacy rights and the defendant's rights. So these are not -- these are weighty on both sides.

Now if you have the judges reviewing the sealed material that's possibly three more people plus their law clerks reviewing the material before giving that to defense -- before deciding whether defense or appellate counsel should see it. Is that possible?

LTC VERGONA: It is possible. Yes, ma'am.

CHAIR HOLTZMAN: It may not even be possible. It could happen. I mean, the courts could decide that's how they want to do it.

Okay. But if -- but on the other hand, if you had the defense counsel operating under existing proceedings, procedures per your proposal, the present law, defense -- appellate counsel could look at those records, one person, maybe an assistant.

No, I think it's one person actually under this rule, and decide that there's nothing there. That to make an argument based on the production of these records when there's nothing that would be frivolous and unethical. And so it wouldn't happen.

So you have a possibility, we're talking about victim's privacy rights here. It's not so clear how this falls out.

Because you can have one person deciding, you know, there's nothing here. One

person looks at it and says there's nothing here. And then nothing happens.

And then judges never look at it because that argument isn't even going to be raised on appeal. So you have only one person looking at that.

Whereas, under the proposal you're making, in some circumstances you have at least one person looking at it. Possibly that judge is -- I mean that being the judge, possibly a law clerk also. So you might have two people most likely. And you might even have six, as many as six people.

So wait -- I see that you're trying to help me here. So, --

LTC VERGONA: Right. Except for the appellate court's responsibilities under Article 626, the appellate courts, regardless of what defense raises as a legal issue in their brief, they have the requirement to ensure that the trial --

CHAIR HOLTZMAN: So they have a --

LTC VERGONA: So they will -- they should.

CHAIR HOLTZMAN: So they're -- they are supposed to look at the sealed material no matter what.

LTC VERGONA: They're supposed to look at the trial to ensure that everything that happened at the trial was conducted properly. Regardless of whether defense raises an issue or not.

CHAIR HOLTZMAN: So they're looking --

LTC VERGONA: That is their responsibility.

CHAIR HOLTZMAN: So in other words they're looking, they're supposed to, I mean, theoretically, they're supposed to be looking at what the judge did in terms of sealing -- the sealing order below.

LTC VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: So, the privacy rights on appeal, once a matter is appealed, has been attenuated, we'll say that. Under the

present system or under your system. That's not going to change. Your rule doesn't change the responsibility --

LTC VERGONA: The responsibilities.

CHAIR HOLTZMAN: Of the judges, appellate judges doing this.

LTC VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: Thank you Panel Members for indulging me here. I'm just trying to understand. Admiral Tracey?

VADM TRACEY: Is there a third category that was surfaced by this case where the judge at trial did not order the materials? But they put it back to be ordered at the appellate level?

LTC VERGONA: So I'm going to let Colonel Orr --

COL ORR: Yes. Can I address the Judge and panelists? The concerns that were raised by the Chisum case are very, very rare.

You had a case where you had one witness testifying at two trials. And in the

first trial, the military judge says, I'm going to release the mental health records.

And the second trial the military judge says, I am not going to release the military justice -- or the mental health records.

So the concern on appeal from the judges was, defense counsel says how come defense counsel A got the records, but I did not get those records?

In order to make an examination of that, the court decided, we have to see why there is a difference. Because we're not sure. Because this is an unusual case where you have records disclosed in one case, but not in a second.

As an appellate judge, you order the installation, the mental health facility, as a judge you can sign an order saying, I want these records. I want them to be sealed. Send them to us. Don't look at them. Just send them what you have.

And then we will determine whether or

not the judge in the first case was correct or the second case was correct. In this particular case they decided the first judge was correct and should have released it. The second one should not have prevented the release of those records.

When it was all said and done, the evidence that was released after looking at them, came out through the trial in all, so they found no prejudice. And the fact that the military judge in the second case abused their discretion by not releasing the records down below to the counsel.

VADM TRACEY: I think I understand that even at trial the judge can't ask for the entire record unless there's a reason to ask for the entire record. It has to be a focused request. Is that correct?

COL ORR: That's correct.

VADM TRACEY: Is that true at appellate?

COL ORR: Yes. But generally what happens is, we're only reviewing what happened

below. So, unless there's -- if it's not attached to the record when it comes up, in most cases you don't have an interest of what could or should have happened.

But in this case where you have two cases, same witness, same set of facts, it was a drug case. Same witness in both cases. It was unusual to have one judge say yes and the other say no.

And that was the reason in order to resolve that, that they believed the appellate defense counsel had met that threshold for the release of the records.

VADM TRACEY: And as was indicated earlier, there are apparently some cases that were tried at the trial level under previous practice under M.R.E. 513.

COL ORR: Yes.

VADM TRACEY: That still have to go through appeal.

COL ORR: That's correct.

VADM TRACEY: And have you all

contemplated how you are going to treat those? The materials?

COL ORR: The rules are, whatever the law of the case is when it started that's the way it will be processed all the way through. So, if the law became more stringent as the cases went on, you go by the rules that are -- the law that is in effect at the time of the case.

VADM TRACEY: So those --

COL ORR: So it's more likely that records will be attached to the old rule then it is --

VADM TRACEY: Individuals whose privileges were apparently thrown -- yes.

COL ORR: It's more likely that you'll have it. But those cases are getting few and far between.

VADM TRACEY: Thank you.

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: So you don't contemplate a situation where the appellate court looks at this and sees the colloquy at the beginning about

we should have these records. The judge decides no, you can't have them, and you order them at the appellate level?

I mean, that's what's floating around out there.

COL ORR: Generally, it's going to be rare. Because --

JUDGE JONES: I know Chisum is rare.

COL ORR: You're still going to have to make that threshold showing of why they should be released. And if you couldn't make it down below, it's very hard to make it at the appellate level.

LTC VERGONA: And the appellate courts' charter is to only look at what was presented at trial.

JUDGE JONES: I just wanted to make sure that was off the table. I mean, somebody could come back, I guess, with a new trial motion, with new -- and ask for newly dis -- have some newly discovered evidence or a better whatever, argument on this.

LTC VERGONA: Not in this appellate context. That would not happen.

JUDGE JONES: Okay.

CHAIR HOLTZMAN: Mr. Taylor?

PROF. TAYLOR: Yes. Thank you. What would be the impact if the rule were tweaked to provide the victim an opportunity to file a motion or otherwise participate in the hearing prior to the release of the information? Consideration of releasing the documents?

COL ORR: As it is now?

PROF. TAYLOR: No. Under the proposed rule. Excuse me.

COL ORR: Oh, I think it would just be time. It would just slow the process down. If there were some rationale for disclosing the records or not, the courts could -- we can handle that.

As a judge you can handle that, the right to be heard. It's just a matter of time. The process is just going to take longer.

LTC VERGONA: The court can certainly

handle that, sir. But keep in mind then that victim will need to have counsel assigned to him or her.

So, that -- our SVC, the Army's SVC program would have to adjust for that. Or you know, it's a personnel issue as well.

PROF. TAYLOR: So under the present system though, or under the present system and whatever system you contemplate, would there be notice to the victim so the victim would even have any idea that this was going on? Regardless of whether the victim decided to pursue some sort of motion.

COL ORR: Under our present system in the Air Force, because you must file a motion in order to see sealed records, yes, the victim is going to be notified.

And we have victim appellate counsel. So, as of right now, they would have the opportunity to be heard if they so desire.

PROF. TAYLOR: And can anyone comment about the other Services?

LTC VERGONA: I can on the ACCA notification procedures. Now the ACCA does not -- Army Court of Criminal Appeals, does not give notice necessarily that these sealed materials are going to be looked at.

But they do provide at different stages of the appellate process notice to victims that their case is at the appellate process and when an oral argument is going to be heard. There's a series of five different letters that our court goes ahead and sends out.

So they're given notice of the appellate process. Not necessarily that their sealed materials are going to be reviewed.

MR. MARTINSON: At the Navy and Marine Corps appellate level, there is no statutory right at this point under Article 6b of the Uniform Code of Military Justice to provide notice of the particular issue.

However, this is a DoD instruction that's in progress that has not hit the street yet that would provide notice of a docketing of

an appellate case. And the results of a review by the appellate authority either at the -- under Article 69 or at the Service court.

But that is not in place now. Although there is discussion about providing that notice. Whether it will be full pleadings or not, is not in place at this point.

PROF. TAYLOR: Thank you.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Yes. Let me follow up with that last one. I think the specific question was, do the Services give the victim notice of the appellate court's contemplation before they have unsealed? Not the whole appeal, the unsealing act.

And I gather the answer is, they don't do that at this time. Am I right?

LTC VERGONA: You're correct, sir.

COL ORR: That is correct.

MR. STONE: Okay.

COL ORR: We do.

MR. STONE: Okay. Of the -- that the

record is going to be unsealed?

COL ORR: Right. Because when the motion is filed, the process we have in place and it's in all --

MR. STONE: This is just in the --

COL ORR: In the Air Force.

MR. STONE: Just the Air Force.

COL ORR: What happens is, any motion that is filed by appellate defense, --

MR. STONE: Right.

COL ORR: Is forwarded to appellate government. And appellate government then forwards it to the victim's counsel.

MR. STONE: And do the appellate judges, since they have the whole record, go back and look at the motions that were filed below on behalf of the victim, the victim's 513 motion in the trial court? And the defenses' request in the trial court?

COL ORR: At some point they will. Yes.

MR. STONE: I don't mean at some

point. Before they make an unsealing decision? Because those are motions as to unsealing.

COL ORR: Well, the way the rules are structured right now, unless you are -- the only time they will not release anything is whether or not you are not convicted of the offense in which the record is sealed.

MR. STONE: Okay. So they don't need to go back and look at the arguments for unsealing.

COL ORR: That is correct.

MR. STONE: Again, this is low threshold, as if they had seen it the first time.

COL ORR: Correct.

MR. STONE: What we were talking about before.

COL ORR: Well, 1103A says, if it's attached to the record, the reviewing authority, it will eventually go to defense.

MR. STONE: Unless of course, the case is like Chisum where they order records to come in that the judge never sealed, right? And I

gather under the current 513 rules that is an option today.

In fact the Subcommittee panel proceedings material that we just got under Tab 13, tells us with regards to Military Rules of Evidence 412 513, that because of the new in camera standards at the trial level, judges, and I'm quoting from it, routinely rule the defense has not presented a sufficient factual basis demonstrating that the records likely contain relevant evidence.

Therefore, it's going to be increasingly common, or it is already according to this, that the trial judges are not taking and sealing those rules. So even if looking at older cases, Chisum is not so common. Now according to the Subcommittee it is going to be common.

COL ORR: It will become uncommon. Chisum is very rare. And the likelihood that an appellate court would decide sua sponte to say, the judge got it wrong below, is just very rare. It's just not --

MR. STONE: Well, isn't that a problem for the defendants as well? I don't understand that myself. If I'm a defense counsel and I move to see those records and the judge said, no. I'm not even going to look at them. And I'm not taking them in and sealing them, how is the defendant supposed to raise that issue on appeal?

COL ORR: That's why --

MR. STONE: You've made it impossible for him.

COL ORR: That's why it's going to be rare.

MR. STONE: No, no, no. It's not going to be rare. It's going to be denying the defendant an opportunity. That's a real due process argument on behalf of the defendant I don't understand.

And I guess my question with regard to the JSC's comments now, and I'd like to turn to that for a second. I've been directed since the last meeting to a lot of the various explanatory notes to the various military rules.

Is the JSC going to put out military explanatory notes to their proposal, which is going to explain whether some of the questions you were asked previously? You know, is there going to be notice to the victim? Is he going to have a right to supplement his original pleading in the trial court?

Will the defendant, who now may have a much better case for the unsealing because of what happened at the trial, if it turned out that that particular victim/witness was the crucial witness, and there was other evidence similar to what the allegation was before, they may say, now when I go to trial I have a much better case for unsealing those records.

I mean, they're not getting a chance, I gather, under the JSC's proposal to make that argument either. I mean, they all had pleadings below.

The only question now is, do they want to amplify those pleadings? They're not starting from scratch. They've already litigated this

those lawyers.

But I don't see the JSC's proposal giving the defendant or the witness whose records are being invaded, a chance to say what they need to say. Am I wrong or is this some history that you're writing those explanatory notes?

LTC VERGONA: So, you're right Mr. Stone. That many times below a rule there'll be a section discussion. And that states explanatory notes.

The proposal that went out for public comment, it does not have a discussion. So that's the proposal as is.

So, if it's not there now, certainly after the JSC reviews the comments, and some of the comments may be exactly like you're saying that there needs to be more explanation. Then they may go ahead and put in a discussion.

But as of right now that's now how it's written up. A lot of times though, sir, that when the rules are created, you know, Services -- each of the Services may choose to

process the rules that's a little differently.

And so a lot of times there's not a whole lot of direction on how to do it. But, this is what you must do. And then they allow the Services to come up with their how.

But right now, as the rule -- what went out on the Public Register, there is not a discussion of what we are talking about. The explanatory notes.

MR. STONE: Should we be recommending --

LTC VERGONA: You certainly can do that.

MR. STONE: That there is -- the JSC consider number one, that their rule about records that were not examined below by defense counsel include that the same standards apply to whether the judge took them and sealed them, or didn't take them and seal them.

LTC. VERGONA: Yes, sir.

MR. STONE: I mean, I don't see any logical difference except that that circumstance

is going to arise more and more now that 513 has been amended. And that if it's ignored, it's leaving a tremendous loophole.

And it invites courts like the Chisum court who are put in a bind as they felt they were, they'd have to do what the lower said. Which is, just say well, I have a guarded issuing order, an issuing order that clearly it seems to me is the same as a 513 or whatever. Except without having followed any semblance of a 513 process when those same parties litigated it before.

So, I'm sort of confused. Has the JSC even considered the third option and broadening the option about records that have been distributed before?

MR. MARTINSON: Mr. Stone, as a pre-decisional body, we can't tell you what they've considered or not considered. But we have encouraged this group, I don't -- Lieutenant Colonel Vergona has invited any public comments from the JPP or anyone else to weigh into this

process to help formulate the final rule that will be presented to the President.

MR. STONE: Did the JSC write things for comment that currently appears as the -- explanatory comment to the RCM 1103A? Is that where it comes from, the JSC?

MR. MARTINSON: Are you talking about the current rule?

MR. STONE: The current one.

MR. MARTINSON: Oh.

LTC VERGONA: Yes, sir. That would have been how it would have been processed.

MR. STONE: Because the current explanatory comment was just sent to us in a follow up letter. And the current comment to 1103A today says, certain aspects of the military justice system, particularly during appellate review, seemingly mandate access to sealed material.

And it goes on to say, there is some uncertainty about appellate defense counsel's authority to examine sealed material in the

absence of court order. So, I gather that that's the 2016 language.

So, I gather the JSC's effort today is to address that uncertainty. Am I correct in assuming that?

MR. MARTINSON: We can't tell you what the JSC is --

MR. STONE: Okay. Okay. I realize that. I realize that. Okay, I take that back. But, it looks like the uncertainty is what we're addressing.

And I guess my concern is that the uncertainty won't be resolved unless you also deal with the records that the judge said, I didn't get a sufficient proffer. I don't need those here. Therefore, they're not sealed.

And everything in 1103A today, and even the E6 provision of 513 talks about records the judge sealed. The current -- again, the current rule, explanatory note says, the rule is designed to respect the privacy and other interests that justify sealing the material in

the first place.

And it says the same thing again, protect the interest that justified sealing the material in the first place. But it wasn't sealed in the first place if the judge didn't order it.

So that whole category of records is out there. And the JSC is not planning, I gather, as we see this proposal, to deal with it.

Has the JSC received comment other than us on that category rule? Can you tell me that much?

LTC VERGONA: I know actually you have, the JSC has received seven public comments. I haven't gone through this.

MR. STONE: Okay.

LTC VERGONA: But they are commenting on what you're talking about, so.

MR. STONE: Right. But it doesn't jump out at you that someone said wait, there's another -- there's a third category of rules you haven't picked up on documents yet.

LTC VERGONA: No. It doesn't.

MR. MARTINSON: I believe those public comments have been supplied to the Panel. And whether they exist in there, I didn't see it. But, you know, whether it's there --

MR. STONE: Oh, I've only gotten one in that. We just got the sample or the latest. Or --

LTC VERGONA: Oh, no. This is all of them.

MR. MARTINSON: You've gotten every -- yes. You've got every public one that the JSC has received.

MR. STONE: So, in a case though, it's not unusual for the appellate judges to look first and read the pleadings that were filed at the 513 hearing by the defendant, who explained why he wanted to see those records, and the victim, as to whether it should come out before the appellate authority decides to unseal them. Right?

Or you have no idea?

COL ORR: Are you talking about current practice?

MR. STONE: Yes. Current practice.

COL ORR: Current practice is new. You wouldn't. Basically, because 1103 says, reviewing authorities get the entire record, what the Air Force does, is we look at it. If you are convicted based upon evidence that is sealed for a specific offense, we're going to hand that over. That's it.

MR. STONE: Right. You're just going to use that low standard we spoke about before that practice.

COL ORR: It's not even a little standard.

MR. MARTINSON: No. There is no -- it's automatic.

COL ORR: It's, is it -- are they connected.

MR. STONE: Oh, it's automatic. There's no standard. It's automatic.

COL ORR: That's right. There's no

standard right now.

MR. STONE: I see.

COL ORR: It's just your motion. And that puts everybody on notice that someone is going to look at these records. And at some point, they're going to be turned over.

MR. STONE: And if situations like Chisum arise again, that the records aren't sealed and not sent up to the Air Force court, but the Air Force court judges think they want to see those records, they could do the same thing again.

They just issue an order. And say --

COL ORR: Theoretically, yes.

MR. STONE: To whomever it is, to be --

COL ORR: But the likelihood of --

MR. STONE: It could be a military hospital or a non-military hospital, bring those records in here.

COL ORR: Correct.

MR. STONE: That's what they did in

that case.

COL ORR: That's correct. But like I said, theoretically, the basis for this was the fact that you had one judge allowed that in. And the second one saying no.

CHAIR HOLTZMAN: Can you -- can I just follow up on that point? You told me that, this is again, I'm just having a problem here. Please enlighten me.

The whole record is before the appellate court. Correct?

COL ORR: Correct.

CHAIR HOLTZMAN: Including the sealed material.

COL ORR: Correct.

CHAIR HOLTZMAN: So in the case where the judge said, no, I'm not going to look at these records, you've made an improper proffer, those -- the sealed materials did not go up on appeal. Is that correct?

COL ORR: That's correct. So you do not have --

CHAIR HOLTZMAN: But they were in the record on the first case?

COL ORR: Or -- for Chisum?

CHAIR HOLTZMAN: In Chisum. You said there were two cases with two separate decisions.

COL ORR: The commanding case, they were admitted at trial.

CHAIR HOLTZMAN: Right.

COL ORR: So yes, they would have come in in that track in that trial.

CHAIR HOLTZMAN: So why couldn't the court have just looked at the records that already existed in the first case?

COL ORR: I can't explain that. All I do know --

CHAIR HOLTZMAN: But they could have?

COL ORR: They could have. They could have.

CHAIR HOLTZMAN: So in other words, they wouldn't have had to go to unseal records or do whatever they did. They could have looked at the trial record in the first case. They would

have had everything they needed.

COL ORR: They could have.

CHAIR HOLTZMAN: And then we wouldn't have this argument.

(Laughter.)

CHAIR HOLTZMAN: How interesting. But that position that goes --

MR. STONE: And even though the case was reversed, they looked at so many records.

CHAIR HOLTZMAN: No, no. I'm saying that the records, the sealed records that the judges reached out for in Chisum were already in the court system. And they didn't have to reach out for something else.

I'm just asking.

COL ORR: I'm not sure about that. I'm not sure that in the first trial the person was convicted. So, I'd have to check to see if they were even available.

CHAIR HOLTZMAN: Because the person was not convicted?

COL ORR: I don't know either way. I

don't know if they were available.

CHAIR HOLTZMAN: But if the person was convicted, or -- there was a trial record, those materials should have been with the record.

COL ORR: If they were convicted then yes, they would have been there. And they met the jurisdictional court. Because it actually has to get to the Air Force court.

CHAIR HOLTZMAN: Okay. Well --

COL ORR: There's a lot of reasons why it may not have been available.

CHAIR HOLTZMAN: Okay.

COL ORR: And I just don't know what that reason is. I could find out if you'd like.

CHAIR HOLTZMAN: No. It's just -- it's not necessary. I'm sorry. Mr. Stone, do you have any other questions?

MR. STONE: Well, I just think I expressed my concern that as we have more and more implementation of the FY 2015 513 revision, which really is only started to happen in 2016, we're going to, as the Subcommittee found, have

more and more of these cases where the judge says, no, you haven't met the threshold. I don't want the records. I'm not asking you to produce them to the court.

So, I think it's going to become a serious third category. As actually at the last meeting I was corrected when I didn't think it was much of a category.

And I realized based on these materials it is a category that has to be -- if we're going to do a comprehensive, someone's going to try and clarify the situation, because it makes sense not to just say, there's two categories of rules.

One is where the judge has not distributed it to the defense counsel. And one is where the judge has distributed it to the defense counsel. And therefore cover the universe --

JUDGE JONES: Can I just -- aren't you talking about the third category being where the judge hasn't even ordered it, so no one's had it?

Or have I missed this whole conversation?

VADM TRACEY: And that the appellate defense is asserting that that is --

JUDGE JONES: Yes.

VADM TRACEY: Has resulted in the conviction.

JUDGE JONES: Right.

MR. STONE: Right. And they want to challenge it, but they have nothing to ask to have unsealed.

JUDGE JONES: Well, that argues for judges doing what's prudent. Which is getting the records. And whether they look at them or not, having --

MR. STONE: No. I disagree. Because that argues for the judges to get records that are privileged that they're not supposed to be going to the doctor's office to get.

And as I pointed out, if it was the convening authority's records from grief counseling, everybody would be up in arms. Or if it was an attorney/client record. So I think the

judges under the rule, which is there, we're dealing with 513, are trying to respect that rule.

But, I'm perfectly willing to let the defense counsel have the right to argue when he gets, just like they do when the records that would have been sealed, I think, that they haven't seen, that now that I have the whole trial transcript, I can make an improved argument for why I should have seen those before. And I'd like to have them.

And in fact that's -- you can argue exactly what happens in Chisum. Because there's a trial, there's a better record for defense counsel in the second trial to say, maybe I should have seen those.

I'm not for cutting the defendant off. I'm just for not leaving a big loophole that you can drive a truck through.

CHAIR HOLTZMAN: I just want to ask about another area that Mr. Taylor raised. Which is the notice to the victim.

In the Air Force, which does have a procedure for providing notice to the victim, do you know in what percentage of cases or if ever victim's counsel tries to respond to the notice that someone's trying to obtain the record?

Is that -- how does it work in practice?

COL ORR: It is available. I don't know the exact number. But the, you know, but they receive notice.

CHAIR HOLTZMAN: Right. I know they receive notice. But, what happens as a result of that? Anything in practice?

I mean, does it -- because I mean, I guess one of the questions I would have is -- and you said it delays the proceedings. But, in fact nobody's responding.

Well, maybe they're not responding -- if they're not responding, maybe they're not responding because they don't know that they have any right to respond.

But I was just curious as to how

that's working in practice.

COL ORR: Yes. I'm sure they know they have a right to respond. I'm sure of that.

LTC VERGONA: I mean, this is a little bit of a different category because in the Army court where we just sent notice that hey, your case is on appeal, the person who administers that program told me that in the last three years, only about five people have asked for the pleadings.

But they don't ask for it very often. That they -- she sends the notice out. They acknowledge they've received the notice. And there usually isn't too much follow up.

And so at least for her, in the last three years, five times someone has asked for pleadings. I don't know if that will indicate how often.

CHAIR HOLTZMAN: Well, my second point is, on piercing the privilege. Which is, I mean, if the privilege is an absolute, which is never. And I don't think any privilege is absolute.

And there are always circumstances where it's been pierced. Why is the harm to the victim any less when the judges pierce that privilege as opposed to defense counsel or appellate defense counsel?

I mean, what's happen -- the procedure now is that, from what you tell me, the judges look at the record. So if the materials have been produced, not going to category three where they've never been produced below. Okay.

But where they've been produced below that's going to be -- those sealed records are going to be reviewed.

COL ORR: That's correct.

CHAIR HOLTZMAN: Right. So the privilege is being pierced. The privacy of the victim is affected by that. You know, how much, I mean, if we're quantifying it, I mean, I guess it's what you did.

You're saying, well, it's okay that the three judges will look at this material and maybe their law clerks. But, there's an

additional added invasion of privacy if defense counsel looks at it.

And that we're going to make -- we're not going to allow that automatically. We're going to require good cause. We're going to make it tougher because there's a privacy right here.

Well, you know, much additional harm is caused under this -- under those circumstances when you already have three judges breaching the privilege?

I mean, I think Mr. Christensen sort of raised the argument. He doesn't come to the same conclusion that I've come to. He says well, they shouldn't be looking at it at all. There should be a preliminary hurdle.

But really, if we're having so much invasion of privacy, to use that term, what's the additional harm here when you also have another issue, another concern, which is the defendant's right to a fair trial?

And there is -- so there is a balancing issue. I just -- I'm just interested

in how you drew the line, not at the judges, but at defense counsel.

Either Mr. Martinson or Ms. Vergona? Or even does anybody want to comment on that? If you can. I mean, it's not easy answering obviously.

LTC VERGONA: I think there was just this impression that defense counsel are not taking their professional responsibility rules seriously. And are going down and looking at records and just going through records because they wanted to read materials, I don't know why.

I can't say why. I --

CHAIR HOLTZMAN: I never heard any complaint about defense appellate counsel in this respect, a lack of professionals. And that may be the case. But we've never heard of that.

LTC VERGONA: Yes, ma'am.

MR. STONE: So we have heard that they invest in their case and I think they that may be the case. So maybe that's the answer. That there's no discrimination.

And if you're a defense counsel, you may think that that's your ethical obligation in every case.

CHAIR HOLTZMAN: Yes, that's correct.

MR. MARTINSON: To avoid getting into pre-decisional discussions in the JSC, what the Panel does have, are those requested by your staff for the positions of the different Services on the proposal of 1103A. And that was provided in January, I believe.

CHAIR HOLTZMAN: Um-hum.

MR. MARTINSON: And it has been included in the materials. And in there, there is some explanation for rationale that certainly is available to the public. And I know the Navy/Marine Corps provided the input on 1103A comparing the current proposal or the Air Force's procedure, I think that was the question with regard.

CHAIR HOLTZMAN: All right.

MR. MARTINSON: And the comment was, JSC's 1103A is different. And it balances -- a

better balance then the current rule. Which is no balance at all. It's automatic.

So, those are available to you. I can't speak for the JSC at this point in terms of why they did it. But certainly that was what's available to me.

CHAIR HOLTZMAN: Well, if nobody has any other questions --

MR. STONE: I do. I have another.

CHAIR HOLTZMAN: Okay.

MR. STONE: And this goes to the JSC rule you're talking about. Does the JSC rule contemplate that before judges decide to release the rule, whether it's one or three, that they will look at the pleadings in the 513 proceeding below?

Which was the one that determined in the first place whether the records would be sealed, unsealed, used at trial or not at trial. Does it contemplate that they will look at those motions?

LTC VERGONA: That's going to be up to

the individual judge what they choose to look at. JSC isn't directing what -- this proposal is not directing what the appellate court has to look at.

MR. MARTINSON: What I will add is that the rules for court-martial do not typically direct appellate review judges to do certain things unless there is a basis for that.

MR. STONE: So --

MR. MARTINSON: And so whether they would review it or not is not in the rules.

MR. STONE: Right. So that if we don't recommend that the defense counsel, government counsel if they want the prosecution and the persons or direct it at issue, have a chance to file a pleading before the records are seen by anybody, there's no guarantee that any of the judges will even look back to their prior pleadings that were filed in the case by those parties.

They could just decide to do it no differently then they're doing it now. So, what

you're telling me is we need to specify if there's going to be a chance to file pleadings.

CHAIR HOLTZMAN: Excuse me. That's not the conclusion. They've already said that the entire record below is --

MR. STONE: Well no, that is the conclusion. I beg to differ. That's why I asked the question, whether they were obligated to look at anything including the prior pleadings.

And I was just told they're not obligated by anything in the current rule that's being proposed, or their normal procedures.

MR. MARTINSON: Under the plain reading of 1103A as proposed, and it is included in your materials, it is the -- those materials may be reviewed by an appellate judge or an authority. It could be the judge advocate doing the review of a case that did not go to the appellate court.

Before and only would be disclosing those if there is a good cause of, they find something in the record that is of significance

that could make a difference on the appeal.

MR. STONE: So that doesn't even give the defense counsel on appeal an opportunity to file a pleading that says, I think now in hindsight the trial is over, I have good cause. Even if I didn't have it below in the 513 hearing, I have good cause now.

Even he doesn't have the right to file an initial pleading asking for those records to be unsealed. Is that right?

MR. MARTINSON: Not under --

LTC VERGONA: Not under this rule.

MR. STONE: Okay.

MR. MARTINSON: Not under this part of the rule.

MR. STONE: Right.

CHAIR HOLTZMAN: May I just make a point here though. This rule doesn't provide any -- I thought you answered this question earlier.

Does not deal with how the proceedings for the sub -- dealing with the substance of this rule. So, whether defense counsel will or will

not be able to make a motion is not specified in this rule. How the rule will work in practice. It's not specified in this rule.

Am I correct on that?

LTC VERGONA: Yes, ma'am.

CHAIR HOLTZMAN: And with regard to looking at the entire record, that is still an obligation of the appellate judges. Is that correct?

LTC VERGONA: That's correct.

CHAIR HOLTZMAN: Including whatever decision is made below on the issue of the sealing or non-sealing of the records.

MR. MARTINSON: That's correct.

MS. FRIED: And that's an Article 66.

MR. MARTINSON: That's correct.

MR. STONE: That obligation doesn't proceed that initial unsealing decision before defense counsel's even filed a brief. Is that right?

They could look at the whole record after they get the regular appellate briefs and

after everything's been unsealed. Is that right?

COL ORR: As a practical matter, you don't look at the record until all the briefs are filed.

MR. STONE: That's right. They do.

COL ORR: That's the process.

CHAIR HOLTZMAN: Now, at this time --

COL ORR: Yes. But I don't envision that will change. I mean, as a practical matter, the parties present their position. You incorporate them and then you read the record.

LTC VERGONA: And that's why I was saying, I can't tell you what a judge is going to look at. If the rule changes and there is -- that there isn't specifically a requirement for them to look at the motions below, maybe they will, maybe they won't.

They certainly will when they're reviewing the whole record. But they may not -- they're not directed that they must in rule, when they're trying to decide whether to release those sealed materials.

MR. STONE: Which is clearly going to be before anybody writes a brief. Because that's the materials they're going to use to write a brief, right?

CHAIR HOLTZMAN: Okay. I think we've finished our discussion of this rule. I think I'd like to go to voting. Okay.

Ms. Gupta, do you have the issues before us now?

MS. GUPTA: Sure. So it's at the court --

CAPT TIDESWELL: Did you want the one to direct the court? Or did you want --

CHAIR HOLTZMAN: No. I want to vote on the --

CAPT TIDESWELL: The JSC decision?

CHAIR HOLTZMAN: Correct. That's what we're doing right now.

CAPT TIDESWELL: Yes, ma'am.

MS. GUPTA: That's Tab 6 is where it's located.

CHAIR HOLTZMAN: At Tab 6. So, should

we break this up -- I should have had a motion. Okay. Do you want to, I mean, just as a practical matter, do we want to review -- vote on the entire proposal? Or should we break the proposal up into segments?

MR. STONE: Are you asking for our views?

CHAIR HOLTZMAN: Yes. Anybody have thoughts?

MR. STONE: My view is that we ought to break it up. Because I don't know, but I don't think any of us have trouble with the idea that if the documents were previously distributed to defense counsel that that low burden is not going to be a hindrance. And that ought to prevail at the appellate level.

I mean, that's an easy piece.

JUDGE JONES: I agree with that.

CHAIR HOLTZMAN: All right. So let's try to break that up. And then we'll decide whether we want to deal separately with disclosure on C, D and so forth.

Okay. So, proposal, this is B(4). B, correct?

JUDGE JONES: Yes. It's 4(b)(I), right?

CHAIR HOLTZMAN: Yes. All right. Is there any objection, let's put it that way, to approving that proposal? 4(b)(i)?

(No response.)

CHAIR HOLTZMAN: Okay. So I hear no objection. That's adopted. Okay. Let's go to 4(b)(ii). Which is sealed material reviewed in camera but not released to trial, government -- to trial, government or defense counsel.

Okay. Material reviewed in camera by a military judge not released to trial, government or defense counsel and subsequently sealed, may be examined by reviewing or appellate authority. After examination of said materials by reviewing or appellate authority may permit examination by appellate counsel for good cause.

Okay.

MR. STONE: I guess I'm -- to make it

easy, I just picked up my pen. And I would say that I would not endorse this as written.

But suggest instead that it say, instead of sealed materials, simply materials and I did add the word not. Not reviewed in camera. And then instead of but, and not released to trial, government or defense counsel. To try and encompass everything here.

I don't think it matters whether they were seen. It's whether they were reviewed.

CHAIR HOLTZMAN: Okay. I'm going to break this, I mean, I -- since the suggestion was to break this into parts, --

MR. STONE: Yes.

CHAIR HOLTZMAN: I think scenario number one, which is where it was released below, we should vote on that. We've already voted on that.

Scenario number two, which is where it was produced in court and not released, we should vote on that. And then we can do scenario number three. Which is, wasn't even produced.

So, I think that that makes it clearer.

MR. STONE: Okay.

CHAIRMAN HOLTZMAN: Okay. So scenario number two is what we have right in front of us. Which is 4(b)(ii).

MR. STONE: Two. Okay. And then my comment to that is just to add the language that was discussed by some of us last week. At the end of the second sentence, where it says, may be examined by reviewing or appellate authorities, and I would add, after notice and an opportunity to be heard by trial, government, defense, and victim's counsel.

CHAIR HOLTZMAN: Okay.

MR. STONE: And they can implement that however they want. An opportunity to be heard could be a written pleading. They could put litmus on how long the pleading is. They could give them time on its own when they wanted it. They could do any of those things.

But, it would simply provide notice,

which may or may not be happening now. But it would clarify that they do provide notice and an opportunity to be heard. Which is typically a written pleading in the appellate military courts. And I'll just do it to the three.

And under that -- you know, with those comments, I'm fine with roman numeral (ii).

CHAIR HOLTZMAN: I would prefer that we meet at -- because that's a separate discussion, about the notice and the hearing. I agree that we should vote on that. But could we separate that out for another point?

I want to say -- I want to vote on this without raising an issue of the notice and hearing and opportunity to be heard.

VADM TRACEY: I don't understand how you can separate those.

MR. STONE: I don't either.

CHAIR HOLTZMAN: All right. Then let's --

MR. STONE: I'd have to vote no without it. But I'd like to vote yes.

JUDGE JONES: Well, I guess what we're doing here is we're just making our recommendations. So we can be a little more free form.

We're not approving or disapproving of the JSC's specifically. These are our comments and our recommendations.

So, I mean, I think I know, I'm concerned about the second one and where defense counsel doesn't have the opportunity to make an argument as too why the records should be provided to, you know, rather why he doesn't get a chance to see the record so he can make an argument on the ruling below.

So, I'm not for (ii), section (ii). But, I guess what we need to talk about is what are we for in section (ii)?

CHAIR HOLTZMAN: Well --

JUDGE JONES: Unless others -- I mean, I, you know, don't really, I don't know how anyone else feels about having the appellate authorities look at it.

I'm assuming defense counsel is going to make motions. The appellate judges are going to take a look at it. Review what they should responsibly review.

And then make a decision as to whether or not the defense counsel should be allowed to look at the unsealed records. And you know that -- what? That might work perfectly.

I'm just worried that the defense counsel doesn't have a chance to make some arguments or explanations that they would not. Which I think you can agree me on, they wouldn't otherwise think of. Because they're unaided by the defense counsel.

MR. STONE: Right. And the defense counsel could point them to something.

JUDGE JONES: Right.

MR. STONE: And might even have something -- and that's why I was asking before about the 513 record. That's before trial.

It may be after the trial that defense counsel would say, oh, go look at transcript page

239. Now you see why we said that. And the judges might say yes.

So, I think that the briefing, the opportunity to be heard always helps a judge. In the same way, and I might add that if we don't as a Panel, typically like to make a decision until we get expert opinions on both sides that point us to where we should be going.

It's much easier then saying I've got to learn the whole military courts-martial manual. I don't think I could do that. And that's what this is doing for judges and what typically happens.

They say, okay people who have an interest, point me to why we should do this. And so I think that actually saves them time.

It means they don't have to independently review the whole transcript or even all the motions that were filed at the 513 hearing. Because they said, this is your chance. You want to say something, you've got 15 pages. I'm giving you ten days. You figure out why I

should or shouldn't do it and tell me.

Now they've not gotten -- you know, they can speed read it if they heard it all before. They don't have to order oral argument on it. But it in addition basically complied with their 513 rule.

JUDGE JONES: Well, well, before we get into -- yes, in addition to -- not -- before we go to other scenarios, --

MR. STONE: Yes.

JUDGE JONES: I think what you and I are saying is that the first rule should work for both. The defense counsel should be -- if they put in a colorable showing as a sort of a motion as to why they should be entitled to look at these documents that the judge ordered but never released to either counsel, then the same standard should apply.

MR. STONE: No. I don't think we're saying that. And the reason is, because under the first provision, --

JUDGE JONES: Yes.

MR. STONE: We're talking about records where the privilege has already been determined by judicial order not to imply that there is an exception. The exception might be motive, whatever.

JUDGE JONES: Okay. And then --

MR. STONE: These are records with which the privilege has never been breached on. The judge may well not have looked at them.

But he said, no, no, no. These really are privileged. Nobody gets into these. Whether he looked at them or he didn't look at them, he's decided that these are privileged.

VADM TRACEY: No. As framed, (ii) deals with records the judge has actually looked at.

MR. STONE: Yes.

VADM TRACEY: And determined not to be -- release it.

MR. STONE: Because they're privileged. He's made a judicial determination they're privileged. And the first one stated --

CHAIR HOLTZMAN: And sometimes it's a she.

MR. STONE: That they're not privileged. So, that's a different standard. They're not privileged, fine. We're going to give him some credit for knowing what he's doing.

CHAIR HOLTZMAN: Well, we have two issues that we now want to deal within (ii). Okay. One, is this new issue that's raised about notice and to all the sides and the right to be heard by trial counsel, special victims' counsel, et cetera.

And the other is whether this procedure -- whether the procedure with the notice or without the notice is acceptable as a change to the present practice.

I don't know whether -- I mean, we can go into parliamentary procedure. I mean, I have some serious questions about the notice provision. Because I don't know how much is on our record with regard to that.

I asked about it here. And I just

don't know what it means to -- I'm not saying I'm opposed to it. But I'm not -- I don't know what it means to have special victims' counsel when there is no, you know, right in the Army for appellate -- for right on appeal for appellate -- a right to special victims' counsel on appeal, what we're getting into here.

I'm not necessarily opposed to that. But we haven't really focused on that. Except in a tangential way. I'm not saying, and I'm not meaning to minimize it. I think it's a very important question.

But, --

JUDGE JONES: Can I just ask, what would your standard be under (ii)? I'm just trying to see if we had some agreement here?

MR. STONE: On (ii)? Two? Two?

JUDGE JONES: Yes. I mean, we're talking in the first one, we have sealed materials that were released.

MR. STONE: Right.

JUDGE JONES: So there's already been

defense in trial and trial counsel looking at them.

MR. STONE: Yep, yep.

JUDGE JONES: And so for that, for defense appellate people, all you need is a colorable.

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

JUDGE JONES: What standard would you apply in the case where once again, we're talking just about the materials reviewed in camera, but this time nobody else saw them but the trial judge.

MR. STONE: I'm saying --

JUDGE JONES: But what standard would that be?

MR. STONE: I'm not thrilled with the standard that's currently in here. The last words are good cause. But I can defer to it.

I think it's worth accepting the JSC's expertise that they think that will properly balance what's going on. My view is it probably should be interpreted using the 513 cases.

Because that's the same determination at the level below.

And so I think good cause, one way you address that is by looking at exactly the same determination that was made by the trial judge. My preference would be to say, made from an examination by appellate counsel under the same standards that applied to the trial judge.

That's how I would do it. But, you know, I can live with this. Because I'm not -- we haven't seen the commentary yet. I mean, it seems to me that's the good cause.

And I'd like this to be in substantial compliance with 513. Which is the privilege ruling, to take care of that problem.

So, that's why I'm willing to defer to that last sentence. Even though I would have preferred for, you know, for reasons that are equivalent to the trial judge's ruling would have made me feel a little better.

VADM TRACEY: May I ask, when a judge has taken materials in and reviewed them in

camera and makes a determination to -- not to release some of them to counsel, what record is kept of the judge's rationale for making that determination?

JUDGE JONES: Well, there should be either an oral decision that's on the record, or a written opinion. And it should designate which documents are going to remain under seal.

MR. STONE: And under 513 --

VADM TRACEY: But is it more than which documents is his or her reasoning for making that decision?

JUDGE JONES: Yes. And it may be nothing more than I see absolutely no, you know, relevant -- relevance here.

VADM TRACEY: Okay. So, maybe not particularly there.

JUDGE JONES: It could be one sentence. But there will be a rationale.

MR. STONE: And those do go up. That's part of what 1103 -- I'm sorry, 513(a)(6) says, that the papers and the motion, and the

hearing on it gets sealed and go up.

So that does go up.

JUDGE JONES: No. That all goes up. Of course.

MR. STONE: You know, but I in effect want to be sure that the judges realize that if they're going to change that ruling they've got to examine that stuff.

And if they don't want to examine it and there's no clear thing that says they have to, at least give the parties a chance to write a short pleading and say, judge below said this. We think he's right because of that.

Or the defense counsel to say, judge below said this. We think he's wrong because of what later happened in the trial. Let them provide the pointers. That's what lawyers do.

JUDGE JONES: Well, I guess my -- I would use the same standard. I would let appellate counsel. For (ii) what I would say is at -- the materials read in camera by a military judge not released at trial, government or

defense counsel may be examined by appellate counsel.

And if you want, I'd have to think about -- my -- I want the appellate counsel to have the opportunity to see them first. Before that brief is filed.

That's what I'm looking at.

MR. STONE: Um-hum. That's the current -- that's basically the current status quo.

JUDGE JONES: Yes.

MR. STONE: Okay.

CHAIR HOLTZMAN: So you're opposed to the -- I mean, in -- so in some.

JUDGE JONES: I'm opposed to number (ii).

CHAIR HOLTZMAN: You're opposed to number (ii). Okay.

JUDGE JONES: Yes.

CHAIR HOLTZMAN: As it is. Well, as I said, I mean, I have -- I'm not happy about (ii). But I'm very troubled about having to vote

on this when we have this other issue before us that we haven't really fully examined.

Maybe Ms. Gupta, you could tell us what kind of material and record we have with regard to notice.

MS. GUPTA: Sure.

MR. STONE: We have a second recommendation to my recollection. That recommends that in the future the victims' counsel, special victims' counsel is going to get notice of everything at the appellate level.

MS. GUPTA: Right. I can draw the Panel's attention to Tab 9, which is the JPP report. We can look at the recommendation from November on notice.

And that is on page six.

CHAIR HOLTZMAN: Where is that?

MS. GUPTA: That is Tab 9. And I think this contemplated notice for victims even in the case when they were not represented by counsel. I'll read it out loud.

It's the recommendation in blue,

recommendation 40. The Services formalize procedures.

CHAIR HOLTZMAN: We're at 40? On page six? Tab 6?

MR. STONE: Tab 9.

MS. GUPTA: Tab 9.

CHAIR HOLTZMAN: Tab 9, page six?

MR. STONE: Yes. The numbering is in reverse.

CHAIR HOLTZMAN: Where is the numbers?

MR. STONE: But we did it in the past. It won't be 40 anymore.

JUDGE JONES: It's in yellow, highlighted at the top.

CHAIR HOLTZMAN: Oh, oh, I see. Okay. Right. Sorry.

MS. GUPTA: I'm actually looking at the blue highlight. The yellow is a suggested amendment.

But recommendation 40 in blue says, "The Services formalize procedures to one,

provide victims with notice of significant appellate matters including but not limited to the date and time of any appellate courtroom proceedings, and the final decision of any appellate court, if requested."

And two, "Provide victims with the means to receive appellate pleadings and briefs if requested." And I believe like I just mentioned, that this -- the Panel contemplated situations when the victim was not represented by an SVC or VLC on appeal.

And that's why we have the words, if requested. We're putting the onus on the victim perhaps to opt in so that the appellate government counsel or whoever is the appropriate body at the appellate court, can provide notification.

MR. STONE: Because in theory, if they wanted, they could go hire outside private counsel just like the defendant could.

MS. GUPTA: Exactly. Right. And I think that would, -- I know in the Army as

mentioned, there's no automatic representation on appeal. So that would take care of the issue there.

CHAIR HOLTZMAN: So, does that -- I mean, to Mr. Stone, does that provision satisfy you with regard to what you had proposed with regard to this, number (ii)?

MR. STONE: I think that will --

CHAIR HOLTZMAN: Do we need to add that? In other words, do we need to add your language here if we have the --

MR. STONE: Well, the only reason I -- if we add the after notice and an opportunity to comment. And then let the Services decide again, what they want to do with notice.

I don't think we need to specify it. I'm perfectly willing to sit back. They have at the moment different electronic notice procedures. And some of them may automatically already be telling the SVCs, so he has nothing. Or they may have to add the SVCs.

I mean, I don't think we need to

specify it.

CHAIR HOLTZMAN: But my question isn't that.

MR. STONE: Okay.

CHAIR HOLTZMAN: My question is, do we even need your language here if we have that language in nine -- in Tab nine. That's all I'm asking.

MS. GUPTA: Can I provide one clarification? Recommendation 40 is only on notice. The Panel had voted in November not to provide standing.

I believe what Mr. Stone is talking about is both notice and an opportunity to be heard. I believe under the Panel's previous or initial recommendations from November, under recommendation 41 they recommended no standing.

And that -- so that would be in conflict with what Mr. Stone is suggesting.

PROF. TAYLOR: Well, but that's what I was going to say. I mean, I think that's the difference. Is here we're moving the needle one

step further.

And saying that in this instance, in this situation, a victim through the special victim counsel has an opportunity to be heard on this issue. And it does tie into the question of appellate rights of course.

MR. STONE: And I think we want to -- now that I think about it, we want to say the person -- we don't want to say the special victim counsel, or the victims' counsel. I think we want to say, the person whose records are at issue.

Because as I hypothesized before, it could be the convening authority under a scenario that we're not looking at now. It could be a third-party all together.

Which is what happened in the Chisum case. They weren't victims. And it even could be the defense counsel if the attorney/client record.

So I think we just want to say the persons whose records they're going to look at.

As long -- as well as the prosecution and the defense counsel. I think we just have to do that.

And they get a chance to file whatever they want to file under whatever timely rules and page limits the various Service courts want to give them. The number of copies they wanted. Whether they want it electronic to everybody.

CHAIR HOLTZMAN: So in essence, your language added to the third -- it would be the last sentence.

MR. STONE: No.

CHAIR HOLTZMAN: After examination of said materials, the reviewing would be --

MR. STONE: No. No. It's before that. Because I want it to be, they get the mater -- they get the briefs before the examination by the judges.

It takes -- it's exactly what you said before. That the judges examining it when, for example, the trial judge never examined it.

CHAIR HOLTZMAN: Oh, you're saying

before --

MR. STONE: This is a breach.

CHAIR HOLTZMAN: The judges examine it. Is it your motion? I don't have the language in the motion. I'm trying to understand it. So this is really important.

So your motion is before the judges examine the material.

MR. STONE: Correct.

CHAIR HOLTZMAN: They are required to give notice to the -- okay.

MR. STONE: And what that does is, it gives the judges a scorecard when they do examine it. They may not have to examine the whole thing.

Defense counsel says, on page 236 of the transcript, this is relevant to what I believe is in there. They know what they're looking for when they examine the materials.

Or the prosecution says, or even the victims' counsel could say, I no longer object to anybody seeing, I don't know, any listed days.

Or maybe he's got two different psychological counseling records in there, and no longer object to one of those. That's not at issue anymore. I'm only objecting to the second one.

I mean, it gives the judges, like with any briefing, a way to look at the rest of the records. It's the directional pointer.

And at the same time it gives the people the reasons why, when they're looking at those records, they should or shouldn't be deciding to release them.

They could read those briefs and decide, there still isn't a reason to differ with what the trial judge did. Or they could say yes, there is a reason. That's what they're looking for.

There is good cause or there isn't good cause to go beyond what the trial judge did. This is essentially an appeal of the 513 ruling. We already allowed under the statutes an appeal of an adverse 513 ruling under all the same 513 standards.

All this does is say, by the way, by the same token, if there was a favorable 513 ruling and they want to challenge it up on appeal, the same thing happens. You file preliminary briefs on whether that judge was right when he said it's still privileged, not wrong.

JUDGE JONES: Okay. Could you just take me back for a minute?

MR. STONE: Sure.

JUDGE JONES: So you said the defense counsel has the opportunity then to put, see page 236 of the trial record. Correct?

MR. STONE: Yes. Definitely.

JUDGE JONES: So you're contemplating that -- are you contemplating that the defense counsel would see the records ahead of time?

MR. STONE: The trial records. Not the sealed records. What I'm saying is, the way the trial and conviction played out --

JUDGE JONES: So you're saying based solely on the trial they can take another shot.

MR. STONE: I mean, well their original shot was hypothetical about what was going to happen at the trial.

JUDGE JONES: Okay.

MR. STONE: But at the trial this witness was a he said/she said. And it was only this witness.

The judges might say, well, under the circumstance it's a one witness case. We happen to think that there is good cause.

Whereas in a case where it turned out it's a trial with three witnesses, which is sort of like in Chisum, they said, it was harmless error. If there's more witnesses, it may be that you didn't need to pierce the privilege.

I'm just saying it gives them another chance to rethink how they want to do it. And it gives the victim a chance, but now I don't want to say the victim, the person whose records are being invaded, to think about it too.

Because they may say, I went to two different psychotherapists. I don't care about

psychotherapist A. You want to give them those records, I'm not even opposing that. I'm only interested in psychotherapist B.

CHAIR HOLTZMAN: Well, I guess my concern here is that this is a big leap to say that the judges can't make a -- can't review it without notice to the various parties here.

I can understand the decision not to release to defense counsel without giving notice to victims and whoever's records are involved. But, I really am not sure why you want to have notice before the judges review this.

And I'm concerned about that as it's -- I mean, in terms of the precedent that it establishes. I don't know why we're doing that.

I don't know whether you have any comment to that.

LTC VERGONA: Yes, ma'am. Under the Article 66 requirements, so a statutory requirement to review the record, these judges have to have the ability to review the entire record.

Even materials that are sealed. Regardless of what issues are raised from the defense. They must look at the record in its entirety. It's statutory.

CHAIR HOLTZMAN: Okay. That's why I'm -- I mean, basically what you're doing there is creating a -- it's not exactly creating a -- well, it's changing that rule about the viewing.

Because they can't review it at any point in the process without giving notice. Even if the -- if there's not challenge to the seal. This language would require if they even open those records as part of the normal process under 60 -- whatever that Article is that they give notice.

I don't know if that's appropriate. I mean, I -- it seems to me that's a big -- a pretty big leap. I think it's different when you're talking about giving notice when defense counsel is going to look at it.

But I don't know about giving notice when the judges are. It gives me a big pause.

PROF. TAYLOR: I just have a clarifying question. Because I thought that the way this is constructed that as the Lieutenant Colonel said, the judge would look at all of the material.

And then in the second sentence there, after examining said materials, may permit examination. That that would be the point at which there would be an opportunity for people to weigh in.

CHAIR HOLTZMAN: Right. That's what I -- but Mr. Stone's view is that it should come before the judges look at it. That's the way he's proposed the amendment.

I wanted to postpone all the discussion of the amendment until we decided the basic substance. But if you want to get into this, let's get into it big time.

And the fact of the matter is, yes. We have of now not only do we have the question of whether we want notice, but the question is whether the notice requirement applies to whether

the judge is -- whenever the judges want to look at this. Or whether the notice requirement should be when the defense counsel is going to be looking at it.

I personally think that before we start interfering with what the judges can look at and when they can look at it, I think we've got to give it very careful thought. Let's put it that way to be diplomatic.

And I would not be in favor at this point of doing that.

VADM TRACEY: Colonel, did you have something to say?

LTC VERGONA: Ma'am, the -- these rules don't trump the statute. So, the statutory requirement of them reviewing the record, regardless of what this rule says, that's what's going to happen.

MR. STONE: I see. So it doesn't really advance the ball not to add after notice and an opportunity to comment to the second sentence. But we might as well add it to the

third sentence. Because we -- because it's beyond the JSC's --

LTC VERGONA: Well, you were saying to make a requirement for notice to go out before a judge sees it. I'm just saying the judges are different.

MR. STONE: Right.

LTC VERGONA: The judges are going to see it by statute. Regardless of what a rule tells them what they can and can't look at.

MR. STONE: Well, I guess in light of that, I don't have a problem because of that structure, in moving the phrase about after notice and an opportunity to be heard by the various parties who are interested in it, to the end of two.

But it does raise a question about roman numeral -- well, we will have to -- well, we haven't reached yet, roman numeral (iii), where these trial judges start to realize, and they have already according to the Subcommittee that they're not going to call for the records

because the burden wasn't met.

And they're not going to chill people by calling for their records. And that could be the convening authority's records. But they're not going to call for them.

LTC VERGONA: But I will say, Mr. Stone, on appeal what's reviewed is the judge's reasoning.

MR. STONE: Um-hum.

LTC VERGONA: And so on appeal they wouldn't say, well let me see those records to see if he was wrong. They're going to review the two motions, the defense and government motions, and the judge's reasonings, whether the judge was wrong, and whether it was prejudicial to the accused.

If it turns out that it was prejudicial to the accused, the process would be, send it back to the trial court. And then do it at that level. So, it is going -- this is a very rare situation.

I disagree that there is going to be

more -- a category three. I disagree that there's going to be a category three because that's not how the process would work.

MR. STONE: So you think that this case is a -- Chisum is one time?

LTC VERGONA: I'm not offering. Yes, sir. I personally, yes.

CHAIR HOLTZMAN: All right. So --

JUDGE JONES: I think I agree that we should not put -- start talking about notice here and the right to be heard in this. Because it will be covered in broader -- it may be statutorily by Congress when they go to amend 6b. When they talk about appellate proceedings.

I would just like to figure out, I could be the only one who's concerned about the defense not reviewing --

CHAIR HOLTZMAN: I'm with you.

JUDGE JONES: Well, reviewing it. And I think that's what -- that's where we need to vote. I gather everybody's perfectly fine with the colorable showing.

CHAIR HOLTZMAN: Well, we voted on that.

JUDGE JONES: And we voted on it. So, I don't know, I think we really should just go to (ii). And my only objection, or my objection to (ii) is what I've stated.

And that may be fine with other numbers. I don't know.

CHAIR HOLTZMAN: Well, but we have a procedural debate here as to whether we're going to include the notice issue in this section.

JUDGE JONES: Right.

CHAIR HOLTZMAN: Or whether we're going to include the notice issue in our general recommendation on victims' appellate rights.

VADM TRACEY: So I guess I don't know what it means to vote on the JSC's --

JUDGE JONES: Well and I've made that distinction before.

CHAIR HOLTZMAN: Well, we're going to be --

JUDGE JONES: That we adopted or

agreed --

CHAIR HOLTZMAN: Right.

JUDGE JONES: As our recommendation or what have you.

CHAIR HOLTZMAN: Exactly.

VADM TRACEY: And I think that, at least for me, the (ii) is acceptable as far as it goes. I want to address issues of notice to the victims and other witnesses and the opportunity to respond.

JUDGE JONES: Right.

VADM TRACEY: So, is there a way to adopt (ii) with those caveats?

JUDGE JONES: Yes. Either -- right. Adopt it or not adopt it. But leave the notice part out. Right?

CHAIR HOLTZMAN: No. She wants to have the notice part in.

JUDGE JONES: Oh, you want it in?

MR. STONE: Me too.

JUDGE JONES: Okay.

CHAIR HOLTZMAN: Am I wrong? So maybe

I'm misunderstanding you.

VADM TRACEY: (ii) is as good as far as it goes. But there are issues of whether just the notice that a proceeding is taking place is sufficient to alert a victim or witness that in fact their records may be subject to being viewed again in a way that they were not allowed to be viewed at trial.

JUDGE JONES: Right.

PROF. TAYLOR: Yes. I mean, if I could just add to that. The reason I asked the question about notice is because I had concerns that there was a difference in the way notice was actually being provided.

So, I think it is an issue. But back to Admiral Tracey's point, so far as (ii) goes, I'm okay with it.

It's been thoroughly discussed by the Joint Service Committee. I've read all the comments as everyone else has. It seems to enjoy the support of the Services. Not that that would be dispositive.

But I do think this represents a fair balance. And it's a work in progress.

CHAIR HOLTZMAN: Okay. I'm just trying procedurally to address this. I was hoping, and that's why I suggested earlier that we separate out the notice and deal with that after we deal with the substance of (ii).

Go ahead.

MS. FRIED: If I could clarify it. So, in fact this is what I think (ii) is saying is, the materials that were sealed were reviewed in camera by the military judge at the trial level and sealed.

They get up to the appellate level, and a Service judge is reviewing it under Article 66. And he determines that those records may be relevant.

What would typically happen after that is they would certify the issue and notify the parties to provide a briefing on the positions that they would have. So in that case, that's probably where the notice would come in.

But that's almost like after what (ii) is saying.

CHAIR HOLTZMAN: Of course. Well, we've already decided that -- I think we've decided. Maybe we haven't formally decided. That we're not going to deal with the notice issue with regard to the judges.

MS. FRIED: Right. Because to put it in --

CHAIR HOLTZMAN: Because that's interference, --

MS. FRIED: Right.

CHAIR HOLTZMAN: And a major interference with the procedure as it now exists, or a major change. And we haven't heard enough information about that.

MS. FRIED: But I -- the way I understood Admiral Tracey's comments though is, by putting it in here in (ii), it seems like it has to happen concurrently before the judge is doing it. But I don't think that's what you're all saying.

So, I think you could rectify the notice part by just clarifying that that would happen after the judge or the appellate authority has made a determination as to whether or not he wants to move forward with producing these records to appellate counsel.

CHAIR HOLTZMAN: Yes. Well, the question about the notice point, I would really -- I think it might be easier if we just look at (ii) and decided whether we're for (ii) or against (ii) as it is.

MS. FRIED: Right.

CHAIR HOLTZMAN: Recognizing that we may want to add, if the Panel agrees, a notice that --

VADM TRACEY: I'm okay with that. Right.

CHAIR HOLTZMAN: Okay. So can we do that as a procedural matter?

VADM TRACEY: Okay.

CHAIR HOLTZMAN: All right. And if we -- okay. So, are we ready to vote now?

MR. STONE: What is the recommendation? Can we hear what that recommendation is about the --

CHAIR HOLTZMAN: The recommendation -- let me just --

MR. STONE: About the notice and the procedure.

CHAIR HOLTZMAN: Yes. Okay. Let me just see if I can -- right.

MR. STONE: And we can go to the other. Because I think it's subject to that.

CHAIR HOLTZMAN: Subject to that?

MR. STONE: Yes. In other words, we're saying this should have this --

CHAIR HOLTZMAN: All right. Listen. I don't know. No. I'm going to -- the parliamentary procedure now is that we're going to vote on (ii).

And then we're going to vote on whether we want to attach a notice requirement to (ii). Okay?

And that will be by a majority vote.

I think that that's the fairest way. And I think that is everybody's decision.

MR. STONE: Right. But --

CHAIR HOLTZMAN: And if you can -- and if you don't want to --

MR. STONE: I'm going to object to that and explain why.

CHAIR HOLTZMAN: Oh, no. No explanations. Enough. We're going to vote.

MR. STONE: I'm sorry. I'm going to state for the record that the next proceeding -- the recommendation we're talking about with notice doesn't talk about an opportunity to comment.

CHAIR HOLTZMAN: I didn't say that it was the next.

MR. STONE: That's what con --

CHAIR HOLTZMAN: Excuse me. We will discuss the issue of notice ad nauseam if you want after we finish number (ii). We will discuss it.

I'm not going to cut anybody off in

discussing the notice and how it's to fit into (ii).

MS. FRIED: And certainly, if Mr. Stone doesn't agree with how the majority votes on (ii), he can write separately on that.

CHAIR HOLTZMAN: Anybody can if they don't agree.

MS. FRIED: Correct.

CHAIR HOLTZMAN: Okay. So, with full understanding that we will discuss the notice requirement too.

The people whose records are being reviewed, we're not dealing with the judges. Post-judicial review, will be discussed fully and voted on fully after we vote on (ii). Can we just vote on (ii) itself?

So the motion is, are we going to support or adopt or agree with the recommendation of the Joint Services Committee 4(b)(ii) in so far as -- as far as it goes, leaving aside the notice -- the question of notice for the next -- to be decided on next.

Okay. All in favor, say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: All opposed, no.

(Chorus of no.)

CHAIR HOLTZMAN: I hear a tie vote.

MR. STONE: Aye.

CHAIR HOLTZMAN: Okay. So that gets -- so the second recommendation of the Joint Services Committee is carried. I mean little (ii).

Okay. Now can we discuss the notice issue? The question is, I think, if I'm listening to what people have to say correctly, and I don't mean to mischaracterize it.

After the third sentence in (ii), where it says after examination of said materials, the reviewing or appellate authority may permit examination by appellate counsel for good cause. Do we want to put a comma, upon notice? Or do we want to put that somewhere else?

And do we have -- so that would be the

first question. And then what would be the substance of it? Upon notice and opportunity -- notice to the person whose records have been sealed?

MS. FRIED: Ms. Holtzman, If I can say one more thing on (b)(ii).

CHAIR HOLTZMAN: Go ahead.

MS. FRIED: (ii) could be done sua sponte by the court.

CHAIRMAN HOLTZMAN: Yes.

MS. FRIED: Or upon motion by the defense counsel who's representing --

CHAIRMAN HOLTZMAN: Right.

MS. FRIED: The appellate defense counsel. I just am open towards clarifying that. Because defense counsel can always petition an appellate court.

CHAIRMAN HOLTZMAN: Right.

MS. FRIED: And show good cause as to why those records need to be made available.

CHAIRMAN HOLTZMAN: But the defense -- presumably defense counsel makes a motion, the

defense counsel is going to want to see the material.

MS. FRIED: Correct.

CHAIRMAN HOLTZMAN: So that would be before -- so, if you put it after -- I see what you're saying.

Well, right. I see what you're saying. So, how do you put it?

VADM TRACEY: So the language of (ii) is may.

CHAIR HOLTZMAN: Right.

VADM TRACEY: Judges may review and they may then release them. So I think (ii) can stand on its own.

CHAIR HOLTZMAN: Right.

VADM TRACEY: Should the Panel then make recommendations with regard to what notice we believe should be made --

CHAIR HOLTZMAN: Right. Right.

VADM TRACEY: To people whose records are subject to review?

CHAIR HOLTZMAN: Correct.

VADM TRACEY: And it's not editing (ii). It's a second recommendation.

CHAIR HOLTZMAN: Right. Right. I'm just trying to figure out the language of that. Because she raised the point that this might not only happen under the procedures under (ii).

MS. FRIED: You wouldn't recommend that if it's necessarily the defense, the appellate defense counsel is raising it. Because then you have to decide, all right, now you've got to give notice to the victim.

This --

CHAIR HOLTZMAN: I'm not hearing you. I'm sorry.

MS. FRIED: So, if the appellate defense counsel is making the motion, you wouldn't have to give notice to the appellate defense counsel. Then you'd have to see, where does the notice go in for purposes of the witness having an opportunity to respond.

That's how come I see this as potentially two different tracks. One where the

judge is deciding on his own to go ahead and raise this sua sponte. And then he's got to notify the parties and the victim and the witness.

Or, in the alternative, if appellate defense counsel is filing the briefs.

CHAIR HOLTZMAN: Both would have the number little (iii). Which would say something like, before any decision has been made to unseal any previously sealed material or non-disclosed material, notice has to be given to the party whose documents -- the person whose records are in question, and to trial counsel.

So that to where -- I mean, and that's not -- I mean, it's really off the top of my head. But would that more or less?

MR. STONE: With notice and an opportunity to come at -- in other words, notice they may be giving now. But if the court doesn't allow them to file --

CHAIR HOLTZMAN: Okay. Notice and opportunity to be heard. Right. So you'd have

three things. Before any decision is made on any -- to unseal any material.

I don't know. I mean, do you have some other thoughts?

COL ORR: Yes. I was thinking to release it. Because at that point it's already -- until we've already looked at it.

CHAIR HOLTZMAN: Okay. So you say before any decision is made to release?

COL ORR: Disclose.

CHAIR HOLTZMAN: But they don't --

VADM TRACEY: This is just from the judges from this notice, right?

CHAIR HOLTZMAN: Yes. Right, the judges. Right.

COL ORR: All the judges will look at it. If they decide on their own that the parties being unsealed.

CHAIR HOLTZMAN: Right.

MR. STONE: Well, I don't think they're releasing it. Because it could still be unsealed and just allowing --

MR. MARTINSON: Examination.

MR. STONE: A party's counsel to look at it.

MR. MARTINSON: under the JSC proposal it would be an examination of the sealed materials. Which is distinguished from disclosure. Which would be to make it public or something.

MR. STONE: Right.

VADM TRACEY: Right.

CHAIR HOLTZMAN: All right. So before -- I'm not sure it should be a separate number. Maybe it just -- well, number (iii). But because I don't -- I'm not -- I think -- what?

MS. FRIED: It could be sub (a).

CHAIR HOLTZMAN: Yes. Or you could do number (iii) here I guess. Or something like before examination of any sealed material.

MS. GUPTA: By appellate counsel.

CHAIR HOLTZMAN: By appellate defense counsel. But what does this mean --

MS. GUPTA: Or it could be government.

CHAIR HOLTZMAN: But what does it --

JUDGE JONES: It could be contemplated going to the trial counsel, the government. This is an opportunity for defense counsel to get the materials.

CHAIR HOLTZMAN: Right.

JUDGE JONES: To make an argument on it.

CHAIR HOLTZMAN: Right. But they want a notice of --

JUDGE JONES: No. I know. I'm sorry. I just happened to notice that this really only seems to contemplate.

CHAIR HOLTZMAN: Yes. This doesn't have anything to do with trial counsel. And then if you use my language, then you're opening up the possibility of notice and opportunity to be heard with regard to point number one. Which we hadn't addressed.

That would be broaden -- the language would be broad enough to cover that.

JUDGE JONES: But something, I mean,

on the --

MR. STONE: Which is --

JUDGE JONES: Again, where I'm against notice.

MR. STONE: Which is -- and I want to make some sense too. I think that you're much less likely to get pleadings when the standard is upheld.

But it seems to me that's equally fair if the defense counsel has overlooked the fact that that count dropped out, what's wrong with then the prosecutor having a chance to say, oops. You know this was a 30-count case. If they've overlooked the fact that the count that this was relevant to did not result in a conviction.

Or it did, but the convening authority set it aside. Or something like that happened. There's no reason that that doesn't make sense too.

Notice and opportunity to comment helps the judges. It doesn't hurt them. It helps them.

VADM TRACEY: My focus is on materials that did not get into the trial.

JUDGE JONES: Correct. Which is fine in the lower court.

CHAIR HOLTZMAN: Right.

JUDGE JONES: Well, and it didn't get seen by anyone but the judge.

CHAIR HOLTZMAN: Right.

JUDGE JONES: I mean, it's a far less harm I think then the first. So I agree, I would not get involved in notice in the first one at all. Or nothing would ever get done.

CHAIR HOLTZMAN: All right. So, maybe the language would be, prior to examination of materials, -- no, I don't know. I'd have to -- I'd have to sit down and write the -- write the language here.

VADM TRACEY: So prior to permitting examination by appellate counsel, the appellate authority will provide --

CHAIR HOLTZMAN: Of materials that have been previously seal -- that have not been

dis --

JUDGE JONES: Well, they define it in there. Are you putting this in (ii) or not?

CHAIR HOLTZMAN: Well, you know, the problem -- the problem with putting it in (ii) as Maria pointed out --

MR. STONE: So just say prior to the materials, blah, blah, blah, that are contained there or described in (ii).

CHAIR HOLTZMAN: Okay. Fine. Yes. So, it would be prior to examination of materials --

VADM TRACEY: Prior to permitting examination.

CHAIR HOLTZMAN: Well, it should be a decision, not even permitting. Either one. Prior to a decision to permit examination of material described above -- in this subparagraph, notice shall be given -- notice and an opportunity to be heard shall be given to the person -- to any person whose --

VADM TRACEY: Maybe breached?

CHAIR HOLTZMAN: Who was the subject of the sealing? Is that -- would that be better?

MR. STONE: Whose records.

CHAIRMAN HOLTZMAN: Yes. Whose --

MS. FRIED: The only note I would point out there, Madam Chair, is if the note, the right to be heard attaches to the victim rights, I think that would probably have to be victim and not every witness.

MR. STONE: That's why it's additional, we don't want to -- that's why we're doing it here. Because it may not be the victim. It may be the convening authority would be it.

MS. FRIED: Right. My point though is --

CHAIR HOLTZMAN: The convening authority is -- the likelihood is like remote.

MS. FRIED: I guess the right to be heard is under the victim rights structure.

MR. STONE: No. No, no.

CHAIR HOLTZMAN: We didn't say right to be heard. Opportunity to be heard.

MR. STONE: No, this is under 513. 513 is not just limited to victims. It's limited to the owner of the person's records for that to be disclosed.

Mostly, it's going to cover victims. But not exclusively. It didn't in Chisum. There's two other people who were witnesses. They may have been victims in the other case. But they weren't victims in this case.

CHAIR HOLTZMAN: Okay. So something like prior to a decision to permit examination of materials described in this subparagraph, notice and an opportunity to be heard shall be given to any person whose records are about to be disclosed -- examined.

MR. STONE: And appellate counsel. Don't you want to get that, and appellate counsel? Don't you want to give them the right to read it too?

I thought that was part of the point to be giving the defense counsel the chance to say something.

JUDGE JONES: That's the only reason that that's triggering notice.

CHAIR HOLTZMAN: Yes. Well, that's prior to his right.

MR. STONE: Oh, no, no. The court's sua sponte to this already.

CHAIR HOLTZMAN: Yes. Prior to a decision to permit, you could say defense counsel, defense appellate counsel, defense counsel, fine.

MR. STONE: Well, it's all counsel. Government counsel too. They don't get to look at those records first.

JUDGE JONES: Right.

MR. STONE: I mean, if --

CHAIR HOLTZMAN: I'm just seeing what's the triggering thing. I'm not saying whose covered by it, Mr. Stone.

MR. STONE: Okay.

CHAIR HOLTZMAN: Any person whose records are about to be examined. And to -- what, trial and defense counsel.

MR. STONE: I think this thing is for appellate counsel.

CHAIR HOLTZMAN: All right.

MR. STONE: And the trial, they may be totally different people. They usually are.

CHAIR HOLTZMAN: Okay. Appellate counsel. All right. Do we have the language? Okay.

Prior to a decision to permit, please holler as they say in Brooklyn, if there's a problem here. I'm just sure there are.

Prior to a decision to permit defense counsel -- no. Prior to a decision to permit examination of material described in this subparagraph, notice and an opportunity to be heard shall be given to any person whose records are about to be examined or to be examined, and to appellate counsel.

We could circulate this.

VADM TRACEY: Yes, ma'am.

CHAIR HOLTZMAN: For any second thoughts or --

MR. STONE: Well, I don't know if we're going to run out of time. Are we going to run out of time if we wait until our next scheduled meeting?

CHAIR HOLTZMAN: No. We're going to do this by phone. Because this is just going to be --

MR. STONE: Okay.

CHAIR HOLTZMAN: This is not substantive. This is just --

MR. STONE: Okay. Okay.

CHAIR HOLTZMAN: Just clarifying or if there's a mistake here.

MR. STONE: And then our Executive Director can transmit it?

CAPT TIDESWELL: Yes, sir.

MR. STONE: Okay.

CHAIR HOLTZMAN: Is that okay with everybody? Noting the -- right. Noting the basic opposition to -- let me just ask you, how do you feel about adding the notice requirement?

JUDGE JONES: I'm against it entirely.

So, that's my position.

CHAIR HOLTZMAN: Okay. All right. So, okay. Well, maybe -- so let's vote on this additional language just so that we have a record on that.

So, let's vote on this language subject to obviously having it distributed and an opportunity to correct any language errors, not substance.

All in favor say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

(Chorus of no.)

CHAIR HOLTZMAN: Okay. The ayes have it. All right. Now what? We take a break? Yes. Let's take a break. We finally got through this.

Okay. So we'll take a lunch break and then we'll return. Thank you again members of the Panel for being so patient with us.

(Whereupon, the above-entitled matter went off the record at 12:17 p.m. and resumed at

1:09 p.m.)

CHAIR HOLTZMAN: Thank you very much. I just want to say that we're going to divert slightly from our agenda this afternoon. We haven't finished the Victims' Rights on Appeal, but I do think that we should hear from our Subcommittee first and then go back to that issue later.

So, I'm very pleased to welcome Members of the Subcommittee, Brigadier General James Schwenk, Ms. Laurie Kepros, Ms. Jill Wine-Banks.

What tab are we on, Captain?

CAPT TIDESWELL: Tab 13, ma'am.

CHAIR HOLTZMAN: Tab 13. So --

BG SCHWENK: Can we get a different number? Thirteen is not a lucky number.

CHAIR HOLTZMAN: It's not a lucky number for you, but it's a real lucky number for us. So, we're going -- sorry.

So, I guess we are going to receive your report and, General, we're very pleased to

have you here. Thank you for taking the time and for the work of the Subcommittee.

And, you may proceed.

BG SCHWENK: Thank you.

Thank you for the opportunity to be with you today. I'm delighted to be joined by two of my colleagues on the Subcommittee, Laurie Kepros on my right and Jill Wine-Banks on my left.

After my comments, Jill, Laurie and I will be happy to try to answer any questions that you all may have on our report.

I'm deeply honored to have the opportunity to summarize for you the third report from your Subcommittee stemming from our visits to more than a dozen installations from all the Services during the summer of 2016.

At each installation, we had candid, non-attribution discussions with groups involved in the sexual assault response investigation and accountability process.

Commanders, staff judge advocates,

criminal investigators, trial counsel, defense counsel, special victims' counsel, special assault response coordinators, victim advocates and victim witness assistance personnel, we spoke with more than 280 individuals.

The Subcommittee previously has presented reports to you on the defense function and criminal investigations. Both reports contained recommendations.

Today's report is different. It makes no recommendations, but instead, summarizes what we heard for your consideration in three areas.

Area 1, the withholding of initial disposition authority.

Area 2, two Military Rules of Evidence, M.R.E. 412, the Military's Rape Shield Evidentiary Rule and M.R.E. 513, the Military's Psychotherapist-Patient Privilege.

And, Area 3, the training and experience of trial counsel and special victims' counsel. We previously reported on training and experience of defense counsel.

So, Area 1, withholding of initial disposition authority. The Uniform Code of Military Justice authorizes all commanders to make initial decisions on the disposition of criminal allegations.

It also authorizes commanders to withhold that authority from their subordinates.

In 2012, the Secretary of Defense withheld the authority to make an initial decision on the disposition of certain sex-related allegations.

This was withheld to commanders who were two things, one, Special Court-Martial Convening Authorities; and two, in the grade of 0-6 or above.

The sex-related allegations covered by this withholding are rape and sexual assault under Article 120 of the UCMJ and forcible sodomy under Article 125 and attempts to commit those offenses under Article 80.

The Subcommittee was asked to inquire during our field visits about the effect, if any,

of this withholding on the military justice process.

The response across the board was that the withholding had little, if any, effect.

Some of those we interviewed said they thought it was helpful that more senior and experienced commanders were handling these sensitive cases, both in terms of the quality of the initial disposition decision and in terms of the public's perception of the military justice process.

Others indicated that it took a little longer to move a case administratively to a more senior officer. But, noted that the delay was minimal when considered against the total delays encountered in most cases.

No one expressed a desire to see the withholding ended and no one expressed any concern that the withholding resulted in an adverse impact on military justice.

And, as a note, that included Lieutenant Colonel Commanders that we talked to

who did not assert their responsibility as a commander and bemoan the fact that their authority had been withheld from them. They also agreed with the withholding.

So, as a result of this testimony and the fact that no one in the field thought there was a problem with the withholding, the Subcommittee decided not to make any recommendations in this area.

All right, Area 2, M.R.E. 412 and M.R.E. 513. The Subcommittee was also asked to look into M.R.E. 412 and M.R.E. 513.

Regarding M.R.E. 412, the Subcommittee was told that litigation practice under 412 has not changed significantly in the recent past. Most counsel seemed satisfied with the rule and the procedures the military judges used to resolve issues under the rule.

One area of concern raised by many trial counsel, defense counsel and special victims' counsel is that there are different procedures in place among the judges in each

Service and across the Services regarding the procedures for a special victims' counsel to use when objecting to evidence during trial.

An example is when a judge rules certain evidence inadmissible before trial, but that evidence is inadvertently introduced at trial.

Some judges require the special victims' counsel to be seated in the gallery and to raise his or her hand in order to object, risking the judge failing to note a raised hand.

Other judges permit special victims' counsel to sit in the well of the courtroom and object immediately without having to raise his or her hand.

Everyone seemed to agree that standardized procedures would be helpful.

M.R.E. 513, the Military Psychotherapist Patient Privilege. In the NDAA, the National Defense Authorization Act for fiscal year 2015, Congress amended M.R.E. 513.

One of the changes was to set forth

specific requirements that must be met before a military judge may make an in camera review of a mental health record.

One of those requirements is that the judge determines that there exists, quote, a specific factual basis demonstrating a reasonable likelihood that the records of communication would yield evidence admissible under and exception to the privilege.

Defense counsel universally noted that this requirement is almost impossible to meet in most cases without having access to the mental health record they seek and that judges almost always deny M.R.E. 412 requests on this basis.

Many Trial Counsel and special victims' counsel agreed and commented that they think this change makes the rule work the way it should, keeping a victim's mental health records privileged.

Before this change to the rule, the trial counsel indicated they felt an in camera review was almost inevitable if defense counsel

made a 513 request. And, defense counsel almost always made 513 requests, they told us.

Now, after the change, trial counsel note that defense counsel make far fewer 513 requests because of the burden of coming up with a specific factual basis to support their motion.

Another change made by Congress was to remove the constitutionally required exception previously a part of the rule.

Trial counsel, defense counsel and special victims' counsel told the Subcommittee that judges have ruled differently on whether Congress has the illegal authority to remove an exception, quote, required by the Constitution, unquote, from the rule.

They are waiting for the Appellate Courts to provide further guidance.

In light of this testimony, and in light of the work that the JPP has done previously on 412 and 513, the Subcommittee decided to inform you of what we heard in the field, but not to make any further

recommendations on those two rules.

Area 3, training and experience of trial counsel and special victims', victims' legal counsel.

The Subcommittee discussed defense counsel training and experience in a previous report to the Panel. This report addresses the training and experience of trial counsel and special victims' counsel.

Training, I'll lump them both together because the results are about the same.

Those we spoke with regarding trial counsel training and special victims' counsel training indicated that the training they received was appropriate and adequate. It assisted them in performing their duties. It was well-constructed and delivered. And, it should be continued.

Of note, the Army and Air Force runs certification courses for judge advocates from all the Services who receive orders to become special victims' counsel.

The only negative comments we received were that some individuals did not receive this special victims' counsel certification training before assuming their duties, but did so at some time shortly thereafter.

Experience, I'll break this down between the two.

Regarding trial counsel experience, the Subcommittee was told that experience levels vary widely for trial counsel. The Services recognize that fact and the Services have developed programs to mitigate the effect of having an inexperienced trial counsel detailed to sexual assault cases.

Examples of programs the Services have in place to mitigate the effect of having inexperienced trial counsel include the Army, has 25 special victims' prosecutors to be lead trial counsel in sexual assault cases.

The Air Force has 16 senior trial counsel, of whom ten are Special Victims' Unit qualified to lead trial -- to be lead trial

counsel in sexual assault cases.

The Navy has a Military Justice Litigation Career Track and nine regionally based senior trial counsel to prosecute sexual assault cases.

And, the Marine Corps has special victim qualified trial counsel to provide prosecutorial expertise.

The only criticism we heard of these Services programs is that, on occasion, these more experienced trial counsel do not become deeply involved in a case until a relatively short time before trial, sometimes leaving the inexperienced to detailed trial counsel to handle the bulk of the pretrial preparation.

But, that criticism was mitigated, we were told, by testimony we heard repeatedly of the assistance provided within each trial counsel office by more experience counsel to the less experienced.

Regarding the special victims' counsel experience, the Subcommittee was told that almost

all judge advocates had military justice experience as trial counsel, defense counsel or both before assuming duty as special victims' counsel.

Everyone who spoke with us thought that prior military justice experience was important. In fact, a number of criminal investigators and trial counsel told us that inexperienced special victims' counsel sometimes jeopardized prosecutions by limiting access to the victims and advising victims not to make evidence such as cell phones available to investigators.

Based on the testimony that the Subcommittee received, the Subcommittee decided not to make any recommendations regarding the training and experience of trial counsel because of the programs in place and the fact that they seemed to be operating well.

And, regarding special victims' counsel, because of the fact that the Services seemed to be assigning people who have prior

experience to those billets.

Now, this concludes my summary of the Subcommittee's third report. Thank you for your attention. And, Ms. Wine-Banks and Ms. Kepros and I are happy to try to answer any questions you may have.

CHAIR HOLTZMAN: Thank you very much, General.

I'll turn to the Panel for any questions. Mr. Taylor?

PROF. TAYLOR: Yes, well, thanks to each of you for this work that you've done.

I was curious about whether, in terms of courtroom procedure, within the same Service, there is discrepancy or difference in where and how the SVCs are allowed to participate or not participate?

That is to say, does each Service have a set of standards and do they differ from Service to Service or within the same Service do you have differences in how this works out?

BG SCHWENK: We were told that within

a Service there can be differences from one judge to another. Like I said, we didn't do any additional research into this to call a panel of witnesses to go into it in any detail.

So, I don't know about the scope and extent of any internal Service policies on that issue. But we were definitely told last summer that there were differences, not just across the Services but even within a Service from one judge to another.

PROF. TAYLOR: So, a second question I had has to do with your comments that you just made about the SVCs and VLCs.

Three observations that you shared, one was that they were not always trained before they were certified.

The second was, that they didn't stay in their jobs very long, that a few have stayed in their jobs 12 months or less and, therefore, didn't gain much experience or establish very long relationships.

And, the third, that they sometimes

don't have adequate prior litigation experience and that hinders the overall due process that takes place in the courtroom.

So, I guess, in light of that, why do you think you shouldn't make some sort of recommendation about the SVCs and VLCs?

MS. KEPROS: I think that's a really important question.

I think the biggest thing we observed is that because the SVC and VLC programs are relatively new and have been rolled out in different time frames across the Services, those who have had the programs longer have more sophisticated policies around them.

And, they seem to be learning from each other. There are more inter-Service trainings happening. There are now Service trainings that include, for example, specialized training in the medical wards and how to help their clients access services through those programs.

And, so, things are already changing

and it's probably something that would be appropriate to continue to monitor. But, it's hard to say, at this moment, that there's a reason to intervene when there's already an evolution in the programs.

There are certainly, you know, VLCs and SVCs we spoke with who have had entire criminal justice careers prior to going to that billet and seemed to really be able to serve their clients better as a consequence of that.

But, some of the newer programs were just, you know, figuring out those things. Things we didn't look into, things we didn't address, we didn't talk to people who assigned billets. We didn't talk to people who determined the length of tours.

So, there's a whole universe of research we have not even begun to undertake. But, if things don't sort themselves out, that might be appropriate for another entity to do.

MS. WINE-BANKS: I think that's the exact correct answer is that it will probably

sort itself out because they seem to be interacting in a way that each will pick the best practices from the other.

But I do think that a future panel should look at this maybe a year from now and see if these consistencies have resolved or if there are still inconsistent behaviors.

And, if the sitting in the gallery isn't working, if judges are missing raised hands, that would be a problem.

But it wasn't appropriate for us to do that kind of investigation right now until the system has time to work.

PROF. TAYLOR: Okay, thank you very much.

CHAIR HOLTZMAN: Mr. Stone?

MR. STONE: Yes, I'd like to go back to those questions, but starting in reverse order because I have, in civilian courts, been a victims' counsel.

I've never been asked by a judge to sit in the gallery and raise my hand. I've

always been permitted to do what they describe as the alternate practice, which is sit in the well of the court and either make an objection or, if there was a fact-finder in place, ask the judge may I approach the bench.

Typically, whatever the victim has to say, doesn't mean -- does not need to be made in front of the fact-finder. They're not asking questions of the fact-finder, they're not, you know, conducting cross examination. It's usually a legal issue.

And, so, you know, I'm a little disturbed to hear that victims' counsel, lawyers who are qualified in a particular court, are asked to sit in the gallery.

I mean, maybe I could see a judge saying, okay, you can sit in the well and raise your hand. I mean, I think that's up a to judge whether they want you to stand up, raise your hand or ask to approach the bench.

But, I do find having to sit in the gallery and, therefore, sometimes be missed,

frankly, to convey all the wrong messages even if it's meant well. It tells -- it's exactly the opposite of what Article 6b indicates in terms of respecting the victim's rights.

I mean, it may be that the victims' counsel never has to get up and say anything, but -- or they may choose to sit in the gallery because they want to sit next to their client. That's something else.

But not to be allowed to sit in the well of the court is, to me, almost unheard of. I think if a judge told me that, I would be writing a letter to the judicial counsel of that court asking what's going on. I'm a member of the bar.

So, I wondered if you'd done anymore either follow-up, where have objections been made? Is there a proposal before -- in the Judges' Benchbook?

I thought from a prior hearing, they said something about the Judges' Benchbook was going to -- which the judges use -- was going to

take into account where victim counsel have to sit and whether they get a chair, whether they get a table, how they make their objections, but to give the judges some uniform guidance without necessarily us having to specify it.

But did you look at that and do you have some thoughts about it? And did any of those counsel tell you, you know, what they might have done since then?

Because it just doesn't sound like a very organized way of proceeding that's going to help anything to have a victim's counsel say, after the judge has moved along, wait a second, judge, you didn't see my hand raised and I need you to go back two steps. And the judge might have to say, oh, okay, so and so, disregard what we just heard. Okay, you know what I mean?

It's just -- it's not efficient and it's not -- it seems to me in terms of good order of the Service, the way one would want to proceed if you have an objection to make.

So, I just -- I just wondered, did you

get any other feedback or should we ask for somebody, you know, who's an expert on the Judges' Benchbook to come here and see where their progress is?

BG SCHWENK: One, our comments are based on last summer's talking to people around the world.

Two, for the exact reasons you gave, the special victims' counsel who told us about being in the gallery, who were frustrated about it. They had raised it on the record. They've raised it through their -- they have independent commands, their chain of command, to try to get that, in their view, resolved the correct way, put them in the well.

Everybody we talked to said there ought to be consistent procedures across the Services and within each Service.

We did not do anything further ourselves. And, you're exactly right, had we chosen to do that, we would have done what you said, is bring a panel of people in and said, why

is it inconsistent? How can you make it consistent? What should the consistent answer be, in the well or what and why?

And, then, we could have reported to you on that. But, we didn't. And, one of the reasons that we haven't discussed that we didn't is, when we came back last summer, we had all these issues.

And, so, we tried to prioritize them top to bottom with the time that we had. And, this one, because it looked like it was getting resolved and people all agreed that we talked to there ought to be standard procedures. And, we assumed people are working on standard procedures. And, I don't know if they have completed or not.

We prioritized it low enough that, as we're running out of time, we still have other things to do, we didn't get to it.

So, to us, I think it's an open issue. If we had more time, we would have looked at it, but we didn't. So, I can't offer you anything

more than that, I think.

MR. STONE: Okay. But, it might be a valid issue for us to look at more --

BG SCHWENK: Absolutely, sure.

MR. STONE: -- one of our information things.

BG SCHWENK: And, either --

MR. STONE: And ask for this Committee is on the Benchbook to give us an update of where they are just so we know that it's not left to going in ten different directions which is what it sounds like now.

BG. SCHWENK: Yes, I mean, to me, your options are always, do nothing, tell us to do something or do it yourself. So, whatever you want to do. We're here at your beck and call.

MR. STONE: And, I guess the second question that Mr. Taylor brought up that also seems to me to be worthwhile and it's something that came up at the last meeting that I raised, but it wasn't timely then is, just like suggesting that defense counsel needs to have

more experience and more training, I find it upsetting to hear that SVCs may be making a mistake in how they're advising their clients because they're new SVCs.

I mean, it sounds to me like maybe there's a slightly more nuanced recommendation that we could ask you to make from looking at your notes that might be something that says, where an SVC has not had two prior years of experience, trial experience in the military or civilian realms, we'll leave it that way, the courts, those cases, those SVC need to have a minimum of, I don't know, you know, one training course every year until they've reached the two year point or something like that or to be second chair.

Because, I don't think anybody wants them to be doing things that don't help the whole system and that are more experienced SVC would say, you didn't think out all the consequences. You know, you didn't realize this rule has exceptions.

You know, and I think that's typically where you get a young attorney, they don't know the rule, but they haven't experienced yet that there are quite a few exceptions to the rule. And, you need someone to point out to you that every rule has exceptions and you want to think about them before you jump.

And, so, I'm just wondering whether a slightly more nuanced training or experience recommendation is something you might want to come back to us on, and I'd like to hear your feelings about that.

MS. KEPROS: I think it's something we'd be more than happy to look into. The caveat I guess I would offer is, we heard that there were perceived problems with SVCs when it comes to, for example, what advice might they be giving a client about turning over information that may be inculpatory to that victim or something along those lines.

The difficulty is, when outsiders have that perception, it's hard to know what really

was the basis for the legal advice. Whatever was the legal advice. We're talking about privilege communications between an attorney and a client.

So, we are coming to let you know, these were some concerns that were voiced to us and that certainly may warrant further investigation.

And, we certainly can see the value in having, especially prior military criminal justice experience to inform the advice you're going to give. I mean, how can you help someone navigate the system if you don't know how the system works, for example.

The moving target is that the pulses are changing already. And, so, I guess that's where we're a little bit uncertain where to focus that energy.

But, you know, the reason we're talking about it today is we thought it was important to put on your radar.

BG SCHWENK: The one thing I'd say is, I got the distinct -- I went to three trips of

six installations and I got the distinct impression every place from the criminal investigators and the trial counsel when I'd ask them about, how's your relationship with special victims' counsel?

I got the distinct impression they all thought it was better last summer than it had been the year before or the year before. That the special victims' counsel matured, and as the assignments reflected, not just grabbing people to get it started, but people who had the background and experience to do the job well, that the special victims' counsel was becoming an important part of the program and was accepted by both the criminal investigators and the trial counsel as better to have than not have.

And, so, I think when you put it in perspective, things, from their view, were getting better. Things are better. And, the question then becomes, what can we do to make it a little bit better?

But, again, if y'all would like us to

look into that, we can rumble up some experts to come and talk to us and report back to you.

MR. STONE: Well, I'm thinking just like last time, that if we're going to bring in some experts, maybe that's another topic for another one of our meetings that we're doing that we should ask them --

BG SCHWENK: Sure.

MR. STONE: -- the higher level officials and the SVC and VLC groups to have a panel on their views about us putting a little more training requirement or experience requirement, whether they think that will get in the way of that or help them do their job and help the whole system.

So, I think maybe that's a helpful observation that I have based on what you've told us.

Because, I mean, we knew that the Navy's training and experience was getting better and that some of those others, defense, prosecutorial services were getting better, but

we still said, well, okay, they're getting better, but we see that there's been a problem and we want certain minimums for experience and training.

And, then, it sounds to me like this falls along somewhere along that continuum. It may not be as extreme, it may be a lot less, but I can tell you from my experience because I attended the SVC training course, the five day course at Charlottesville when I first came on this Panel as an observer, that it was a very helpful course, that they brought in all kinds of people to talk, including experienced victims' counsel.

But, also, experienced prosecutors, defense investigators and they had some mock sessions going on for all the people involved.

And, so, it seems to me that we ought to see what the SVC and VLC higher up officials, if they think more than that initial training would be a good idea for people with only so much experience.

So, I think that your comments on that score are helpful.

MS. WINE-BANKS: Mr. Stone, to your point, I think the focus of the issue was really on experience, not on training. I think everybody agreed that the training was a really good training.

And, if they weren't certified before they got on base, they were very shortly thereafter. But, the issue was they had great training, they were certified, but they hadn't had the years of experience always.

So, if I were focusing a future look, it would be focused on the experience and whether having more experience would be really a helpful addition.

MR. STONE: That's an excellent observation and I think that is one of the points we might put to the SVL, VLC supervisors whether they think even more training is not going to overcome them also having two years of trial experience. Because, maybe that's -- or one and

a half in their case, or one, but some minimum so they don't get very many people.

I think that's a very good question to put in their training. It's not the cure-all for that problem.

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: No questions.

CHAIR HOLTZMAN: Admiral Tracey?

VADM TRACEY: Only one. Did you see any evidence, interest or intent to sort of cross train all of these skill sets that have undergone significant change over the last several years or exposing special victims' counsel to, you know, what the prosecutor is trying to accomplish? You know, those sorts of, you know, orienting all the players in this scenario to what the objective are and how they each play a role?

MS. KEPROS: Off the top of my head, the only thing I can think of is there have been some lawyers on different sides of the system who have gone to, for example, national trainings on sexual assault, right, legal trainings.

And, so, in that sense, they were, I think exposed to a common vocabulary, some of the frequent issues in litigation, some of the kinds of experts that arise, some of the, you know, mental health and trauma issues.

So, I think some of that is happening. I can't say that we saw that there was a specific strategic effort to set up a formal program like that. But, some of it seemed to be happening organically.

And, obviously, as JPP members move from one position to another, they're bringing the benefit of that experience to their next assignment.

MS. WINE-BANKS: But, I think to your specific question, I might answer it slightly differently.

We saw evidence of cross-Service activity and communication to improve the program and make it more consistent.

But, I think your concept, I didn't see any evidence they were making a plan for

that. And, I think that might be a very helpful part of the training is, if everybody understood.

I know as a defense lawyer, I was better for having been a prosecutor. And, of course, the same is true in the military. And the same would be true if the SVCs, VLCs had the experience of the defense and prosecution. So, that could be a very good addition.

BG SCHWENK: But, we didn't look at the internal training programs to see the content. And, so, to that extent, we can't answer that part of things.

MR. STONE: I might add on that part. I think that Ms. Wine-Banks is exactly right when you even look at, in the civilian practice, having had cross experience is terrific because you stood in those shoes, so you understand a little better the whole system.

But, cross training doesn't happen even in the civilian aspect. There are defense counsel training programs nationwide and they do their thing. And, there are prosecution program

training programs nationwide and they do their thing.

And, there are some, a few, I know one victims training program nationwide and they do their thing.

And, they do invite a speaker here and there. But, they recognize that they're looking at the, I guess the Earth from different satellites, from different perspectives.

And, so, it's kind of hard to train them all in the same unit. They don't typically do it even in state training programs or nationwide ones that I'm aware of.

VADM TRACEY: Only I'm sure that one of the unique powers of the U.S. military is the ability to overcome lack of experience by creative ways of training people.

CHAIR HOLTZMAN: I just want to say that, with regard to the issue of lack of experience or lack of perspective on the part of special victims' counsel or victims' legal counsel with regard to when the appropriateness

of turning over possibly exculpatory evidence. That's a problem that was pointed out in the Subcommittee's report on sexual assault investigations in the military.

I mean, investigators, we heard many, many complaints. As a member of that Subcommittee, I heard them, too. Many, many complaints about the problem.

And, as you pointed out, General, the comments were also that the problems were somewhat being ameliorated because the whole -- I mean, because SVCs were -- and VLCs were just more experienced themselves.

So, but, it was a serious issue and how to overcome it is another point.

But, I just want to say, thank you on behalf of the Panel and thank you for your excellent work on this. And, we appreciate the time you spent.

Thank you for sharing your observations with us and enjoy the rest of the day.

BG SCHWENK: Thank you.

MS. WINE-BANKS: Thank you.

MR. STONE: I might add, just before we break for a moment, that that last comment makes me think that maybe we should have a cross training program with the investigative agents and the SVCs and VLCs.

Because I don't think the investigative agents understand that the world has changed some and that those SVCs and VLCs have obligations to their clients the way defense counsel do that a little different than the prosecutors they're used to dealing with.

So, I think -- that makes me think it would be a good idea to include more of them so they can ask the questions and hear some of the answers because I think some of those answers are somewhat naive because they don't recognize that some sexual assault victims, well, lots of them, and that's where -- how we got to where we are, didn't want to report, didn't want to testify, didn't want to have their records out there

because they saw their career being adversely affected and it was a big deal.

So, I think that that discussion is a great discussion that the investigator -- this comment makes me think the investigative agents need to attend some of these conferences so they can do.

And, Ms. Wine-Banks, you seem to be shaking your head and so it sounds like your interviews sort of confirmed some of that and that's sounds great to me, too.

MS. WINE-BANKS: Well, I think when they're really are participants in the justice system to understand the other perspective, it's going to improve the outcome of justice.

MR. STONE: I agree.

CHAIR HOLTZMAN: Thank you very much.

I think we'll take about a three minute break and then come back and try to finish our agenda.

Thanks.

(Whereupon, the above-entitled matter

went off the record at 1:45 p.m. and resumed at 1:51 p.m.)

CHAIR HOLTZMAN: I think we can go forward.

I think what we need to finish in terms of our agenda is the victims' rights issue which we didn't finish this morning. We have a victims' appellate rights report.

So, Ms. Gupta, where is the material that we're looking at?

MS. GUPTA: Tab 9 is the JPP report and we've finished working through recommendation 39. So, we're now on recommendation 40 which is on page 6.

MR. STONE: That's going to have new numbers, right? Because we've already used 39 and 40.

MS. GUPTA: That's correct.

MR. STONE: Okay. So, you're going to have new numbers.

CHAIR HOLTZMAN: So, page 6, okay.

Now, what is it we have to do on page

6? What do you --

MS. GUPTA: The Panel voted on recommendation 40 in November and approved it 5-0. The staff has drafted the language to reflect the Panel's recommendation.

However, Mr. Taylor did suggest an amendment to recommendation 40. So, I'll read out what the -- what the staff adjusted it and Mr. Taylor's recommendation.

So, recommendation 40 states the Services formalize procedures to, one, provide victims with notice of significant appellate matters including, but not limited to, the date and time of any appellate courtroom proceedings and the final decision of any appellate court, if requested. And, two, provide victims with a means to receive appellate pleadings or briefs, if requested.

Mr. Taylor suggested adding language to limit what notice goes to victims. So, his recommendation would be, the Services formalize procedures to, one, provide victims with notice

of significant appellate matters that reasonably implicate the victim's privacy interest, including, but not limited to, the date and time of any appellate courtroom proceedings and --

CHAIR HOLTZMAN: So, the issue before us now is whether to adopt Mr. Taylor's proposal?

MS. GUPTA: That's correct.

PROF. TAYLOR: Madam Chair, if I could just explain. I meant for this to be a friendly amendment, not something that changed in any significant way --

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: -- the thrust of the amendment.

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: So, if anyone thinks this is a bad idea for any reason, I'm certainly willing to concede just because it was an intent to satisfy the criticism that, somehow, if you have multiple victims in the same case, you would end up proliferating the notices in a way that would not be useful or helpful. So, that was the

idea behind it.

But, since I'm not a practitioner in this area, I am willing to stand corrected by anybody who says, no, this is a dumb idea.

CHAIR HOLTZMAN: Mr. Stone, do you have an objection?

MR. STONE: I don't want to call it an objection, but I want to tell you I have a concern.

The concern is the following, that sometimes the victim issue, and this is just the notice, sometimes the victim issue is not the reason that the victim wants to hear and know about the case.

They want to know about the case and the stages of the case even when there's no victim issue. They may want to know, because if the appeal was done or reversed, whether or not they're going to sign up and continue their enlistment for another term.

They may want to know whether -- in other words, they want to know about the outcome

of the case. And, some of these cases, I know it's a small number, either at the appellate level, and could be at the CAAF and it even could be further, it could be in the Federal District Court, they may be in oral argument and the victim, even though there's no victim issue, may want to request permission, if there's an oral argument, to sit there and listen to it.

And, so, in the federal system, in terms of notice, to get notice of all of this, doesn't mean they can do anything in their case, but to get notice of it, so that they know what's going on.

And, I think that that's kind of important. That's why I think that they should get notice of all the important stages.

I just think that when they hear the case is finally disposed of, some of them can sleep at night and they may not hear that if there's no victim privacy interest that was raised in the case.

So, I think if they're going to get

notice, and it sounds like the various Services are on their way to providing electronic notice, that's easier.

And, the second thing is, by putting that qualifier in there, we actually make it harder for the people administratively who are doing it because they miss a case that they didn't realize has the victim's privacy interest side to it.

Or they may give one that didn't have it and then sort of asking them to do something other than simply do the same thing you do for the prosecution and the defense counsel, put them on the distribution list and, you know, I think is all going to be taken care of as soon as the statutory requirement gets implemented that they have a national system, which is what posting a notice, which is on the boards to be implemented, I believe, by statute within two years.

It's similar to the federal system where all the -- and all you've got to do is tell somebody, if you want to know the status of this,

all you've got to do is go on the web and type in blah, blah, blah and it just shows you the status of the court docket sheet.

So, you know, that's why I'm concerned that reasonably implicates victims' privacy interest is a tough burden on the clerk's office. It's a determination someone's got to make correctly. It can be mistaken.

And I don't think it serves some of those purposes where the victims just want to know, whew, the case is finally over. I'm going to stay in the military, it's done. I don't have to worry if there's going to be a new trial and I'm going through this again.

I mean, I think that's part of what goes on here.

So, for those reasons, I'm inclined, if it's a friendly amendment, not to want to support it.

PROF. TAYLOR: In light of that, I'll be glad to recede and withdraw my suggestion.

MS. GUPTA: Okay.

CHAIR HOLTZMAN: Can I just ask a question here, because I think I agree with the point you made, Mr. Stone.

But, I wonder whether our recommendation is a little too narrow in the sense that, at some point, I mean, this requires providing notice.

It may be if they have a website that allows you to obtain notice, that you may not need to be actually notified in the specific sense of having either electronic or a mail letter.

MR. STONE: So, do you want to clarify -- or say provide a means for them to get notice?

CHAIR HOLTZMAN: Yes, something like that.

MR. STONE: Okay, me, too. When they say, you want notice, here's the website, go on to there and --

CHAIR HOLTZMAN: Yes, fine, okay. That's what I was just thinking to avoid any unnecessary administrative work, if that's

possible.

Okay, so we -- is everybody okay with that?

(No response.)

CHAIR HOLTZMAN: Okay, hearing no objections.

So, what's the next issue, Ms. Gupta?

MS. GUPTA: The next issue is recommendation 41 on page 7.

CHAIR HOLTZMAN: Okay.

MS. GUPTA: This recommendation reads, Congress not enact Section 547 of Senate Bill S2943 or any other statutory provision granting victims standing to file briefs or pleadings in post-conviction appellate proceedings under the Uniform Code of Military Justice.

This recommendation reflects the 3-2 vote on November 18th, 2016, with Ms. Holtzman and Mr. Stone dissenting.

If the Panel would like to reopen this discussion in light of its recommendation 39 because the Panel is now recommending that

victims receive notice when their sealed materials are about to be examined by appellate counsel is maybe at times too slow.

MR. STONE: Yes, and I don't think there's actually been a vote on the yellow version.

MS. GUPTA: That's right, I'm sorry. Sorry.

So, Mr. Stone also suggested -- Mr. Stone submitted a proposed recommendation, and that is, Congress enact Section 547 of Senate Bill S.2943 and broader statutory provisions granting victims standing to file briefs or pleadings in post-conviction appellate proceedings under the Uniform Code of Military Justice on all issues related to a crime victims' Article 6b rights, but limited to cases in which those issues have already been raised in the appellate proceeding.

This was submitted by Mr. Stone after we distributed the draft report and has not been included in that.

MR. STONE: And, just the same support. It's a much more limited version. It recognizes that victims aren't creating these appeals. They're not taking these appeals. They're not choosing to decide the issues that are raised.

It's simply that is their rights are at issue to get a chance to file a pleading because they're not the movant, they're always the respondent. And, in all of those cases, they would already be that issue in dispute raised by the defense counsel, obviously, and responded to by the prosecutor.

But, that would allow the victims -- and there was a perfect example in the Subcommittee report where they said, I can find the page here, that prosecutors don't -- that their interests don't always align with the victims, especially when they were thinking that some M.R.E. -- here it is.

It's in one, two, three, the fourth paragraph down, oh, the third paragraph down

where it says, SVCs and VLCs routinely represent clients on M.R.E. 412 issues and often take the position aligned with that of the prosecution.

At times, however, the position of the SVC or VLC diverges from the prosecution. Such divergence is most common when the prosecution believes that the admission of the M.R.E. 412 evidence will make the case stronger.

But, the victim opposes the presentation of any additional information concerning his or her sexual history.

That is exactly the circumstance that's there that's to be considered, that the victim wouldn't like have like their sex -- let's say parts of their sexual history not to have been admitted. Maybe it wasn't and now prosecution counsel's not going to vigorously defend that if it's challenged on appeal because it would have made their case before. And, if there's a remand stronger.

So, there's not always an alignment. This provision, by the way, as I proposed it,

does not mean that the victims will always file an additional brief. It just means that, if they wish to, if they see that what's being presented doesn't cover what they want, they'll have an opportunity.

And, it also doesn't say that they get a chance to orally argue it or anything else. It just says, if it's one of the issues as to which they had a right and somebody wants to challenge the ruling on that right up on appeal, they get a chance if they want to file an additional responsive pleading.

And, again, it doesn't set what the time limits are. It doesn't set the limits of pages. It doesn't set whether they would have to be oral argument. It doesn't say that they have to file.

And, a footnote to that that I think is really important, we've already heard several times that there are plenty of amicus briefs that are sought to be filed.

So, it doesn't mean that the courts

aren't reading extra briefs.

The problem with an amicus brief, and if somebody wants to correct me here, please be my guest, but an amicus brief is, by definition, filed by someone who does not have a stake in the current lawsuit. They don't have a right at issue.

An amicus is, by definition, a neutral who has a policy position. And, some of the objections, we heard that some of the amicus briefs are not allowed.

Some of those objections by defense counsel are, oh, by the way, the victim can't be an amicus to file a brief here because they do have a stake in that issue. They're not truly an outside party who wants to add a view. They're somebody with a stake in it.

So, this would get rid of that question about whether the courts have to examine are they really an amicus, are they not an amicus? They would have a right to file a brief and if the appellate courts want to make the page

length the same as an amicus brief, you know, they can do it.

So, it's not designed to add more paperwork that wouldn't already be there or to add any issues that wouldn't be there already, it's just designed to see, since they're getting notice now of the pleadings anyway, if they have counsel and counsel feels after the time deadlines, if they make sense, should be after the prosecution brief's filed because they may not want to file it.

But, if they want to file something in addition that adds something useful that defends their rights.

CHAIR HOLTZMAN: Okay. Can I just ask a question about this? The provision of Section 547 that, I think we spent some time on --

MS. GUPTA: Yes, ma'am.

CHAIR HOLTZMAN: -- doesn't it say the -- determine real party in interest --

MS. GUPTA: It does, yes. It is.

CHAIR HOLTZMAN: And, didn't we hear

testimony that the term real party in interest was confusing and a problem?

MS. GUPTA: Yes.

CHAIR HOLTZMAN: And problematic? Okay.

MS. GUPTA: And if anyone wants to look at that Section 547 --

CHAIR HOLTZMAN: Is there any further discussion of that? Let's take Mr. Stone's proposed recommendation.

VADM TRACEY: Do we need this recommendation in light of the language that we voted on earlier today?

CHAIR HOLTZMAN: Yes, this is much broader in the sense that it goes to other issues aside from the question of M.R.E. 413, right? It's not -- 513.

MR. STONE: This goes to 412.

CHAIR HOLTZMAN: 412 and then maybe another --

MR. STONE: Because 412 is being raised before but they can, if again, if they

lose a 412 thing, the current or lack of statutory basis allows them to take it in to interlocutory appeal which is disruptive to the court.

If they win a 412, in the ordinary course of the appeal, they're not hurt.

So, it doesn't make -- it's not parallel, it's not -- it's two sides of the same coin.

CHAIR HOLTZMAN: All right, let's go to a vote on this now. I mean, in favor of Mr. Stone's proposed recommendation 41 say aye.

(Chorus of aye.)

CHAIR HOLTZMAN: Opposed?

(Chorus of no.)

CHAIR HOLTZMAN: Mr. Taylor, do I hear your voice here?

PROF. TAYLOR: No, I have not voted on this because I am not -- there are parts of 547 that I think are helpful. But, when we say enact 547, the problem I have with it is the same problem that the Chair pointed out, that there

are some issues with the language.

If we're talking about the sense of 547, that would be different from saying enact 547. This language involving real party in interest, for example, people have pointed out in the past, then maybe someone can help me with that.

MR. STONE: Could we say, enact 547, but delete the phrase real party in interest and substitute --

CHAIR HOLTZMAN: We need the text of this statute in front of us if we're going to vote on this.

MS. GUPTA: It's tab 3.

PROF. TAYLOR: I think the other question that was discussed last time, which, again, caused a problem last time is the definition of victim, direct physical, emotional, materially harmed, then skip to which there was going to be some further explanation of that.

So, I guess my point, Madam Chair, is there are some things about this idea I like, but

--

CHAIR HOLTZMAN: Right, well, we're endorsing a whole statute, that's the problem I have with it, among other things.

MR. STONE: Is there a --

VADM TRACEY: Can we edit this provision?

MR. STONE: Yes, I was suggesting --

CHAIR HOLTZMAN: Can we do what?

VADM TRACEY: Can we edit the recommended?

CHAIR HOLTZMAN: I mean, you have a long statute with lots of different terminology in it.

VADM TRACEY: Can you simplify it to the Congress, enact statutory provisions granting victims standing to file briefs? If you took out the specific legislation.

CHAIR HOLTZMAN: What's the standing to file -- standing is a very --

VADM TRACEY: Term of art.

CHAIR HOLTZMAN: -- term of art. And,

you don't have standing to file a brief. A standing -- then you're a party in that action.

JUDGE JONES: I mean, that's my problem. I always equate standing with --

VADM TRACEY: Being a real party?

JUDGE JONES: I know we don't want to --

(Simultaneous speaking.)

JUDGE JONES: -- real party because that's not really the --

MR. STONE: I'm looking at the statute right now and it seems to me that if you strike the word as real party in the interest in the A title in -- underneath that F title, first line, in the body of F, those are the only places that real party in interest appear and it still reads perfectly fine, victim during appellate review, victim during appellate review, victim of an offense under this chapter may file pleading when the victim's --

CHAIR HOLTZMAN: As a real party in interest.

MR. STONE: So, I would just keep -- strike just say, that, you know, with the phrase with -- as real party in interest. That's actually the phrasing term.

CHAIR HOLTZMAN: Well, you see, and the problem is, we don't -- the victim isn't a party in the trial.

MR. STONE: Well, that's why I was striking it. In other words, they're filing a victim's brief, not a party brief. And, I think if we strike that language, it still reads --

CHAIR HOLTZMAN: I think we should have some change, really, to take a better look at it than to do it on the fly.

MR. STONE: Okay, then do you want the --

CHAIR HOLTZMAN: Because I think --

MR. STONE: Okay.

CHAIR HOLTZMAN: I think rewriting a Statute that the Senate spent some time on maybe, but they asked us to spend some time on it, you know, I think it deserves a little bit more than

just, you know, five minutes of examination.

Because, we've heard, you know, from many, many people who appear before us about how confusing this language was.

And, I think Mr. Taylor also brought up the question of what is a victim? Direct physical, emotional, whatever, as the result of the commission of an offense, blah, blah, blah.

I don't, you know, we haven't even looked at the definition and the appropriateness of it.

So, I mean, I think we have done something really important by suggesting that victims have a right -- have a notice when there's going to be a 513 determination and an opportunity to be heard on that. That's a big standing -- a big step forward.

You know, I think we need to take some more time if we're going to make a change such as Mr. Stone --

MR. STONE: Do you want to put this on the agenda for the next meeting and allow the

Panel Members to submit proposed language to look at?

CHAIR HOLTZMAN: Yes, I think that's -- yes, I think so and I think maybe we ought to have some people who had a chance to also to look at that language. I don't know if we can impose on our Panel or others again, but to look at that language and give us the benefit of their thoughts. But, I feel very uncomfortable about proceeding.

I think one of the reasons that our recommendations are sought after and are valued is because of the consideration, the due consideration, that we give them.

So, at the least, I would postpone this for --

MR. STONE: I'm fine with postponing it and getting some chance for us to look at different language.

CHAIR HOLTZMAN: What tab are we on, 9?

MS. GUPTA: Tab 9.

CHAIR HOLTZMAN: Well, how do other Members of the Panel feel about just how to proceed on this?

VADM TRACEY: I'm good with taking another look at the right recommendation language.

CHAIR HOLTZMAN: Mr. Taylor?

PROF. TAYLOR: Yes, I agree. I mean if I were going to vote on this, I would just say no.

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: Because of the problems I see.

CHAIR HOLTZMAN: Right, okay. All right, so we're postponing that. We're on tab 9, number what?

MS. GUPTA: Page 7, recommendation 42. So, if the Panel is ready, move on to the final recommendation that is 42.

CHAIR HOLTZMAN: Wait a minute. Oh, 42, yes, well, 41, we haven't really looked at. What are we going to do about 41?

VADM TRACEY: Well, we just decided to hold off.

CHAIR HOLTZMAN: Well, we're -- oh, yes, because we have an amendment to it. All right.

MR. STONE: That's the one we just did.

CHAIR HOLTZMAN: Well, we -- yes, but we also had an underlying 41 if your recommendation is rejected, Mr. Stone. So, I guess we'll postpone that as well, all of 41.

All right, recommendation 42.

MS. GUPTA: I can read that out-loud. It's Congress amend Article 6b of the Uniform Code of Military Justice to grant the Court of Appeals for the Armed Forces jurisdiction to hear a victim's appeal if the Service Court of Criminal Appeals denies the victim's petition for a writ of mandamus under Article 6b.

CHAIR HOLTZMAN: Did we vote on this yet?

MS. GUPTA: So, yes, this

recommendation reflects a vote from November with Judge Jones dissenting. As long as the Panel approves the language, I don't believe there's been any additional information that will affect this.

CHAIR HOLTZMAN: So maybe they don't have to leave the Service.

MS. GUPTA: That's right, as long as the language --

CHAIR HOLTZMAN: Does anybody have any concern with the language of the report?

MR. STONE: Well, I only have one question, whether or not, in light of the last two decisions by the CAAF in the EV, where it says denies the victim's petition for writ of mandamus, I'm wondering if it should say, petition for appellate review? Because it's not clear whether it's always going to be called a petition for mandamus.

Sometimes, it's from an interlocutory appeal that's actually decided on 513 or 412 issue, it may say, oh, that comes up here by

appeal, it doesn't come up by petition for mandamus.

Maybe Mr. Orr will tell us whether we should -- Judge Orr will tell us whether we should just broaden that language a tiny bit so that --

COL ORR: I don't think you need to broaden that. I think it's already there.

MR. STONE: You don't think we need broader language?

CHAIR HOLTZMAN: So, this is effective the way it's written?

COL ORR: I believe so.

CHAIR HOLTZMAN: Whether you like it or -- I mean whether the --

(Simultaneous speaking.)

CHAIR HOLTZMAN: -- or not. Okay, all right.

MR. STONE: Okay, well, that was my --

CHAIR HOLTZMAN: Then we're okay with recommendation 42. So, all that we're left with now, Panel, is 41. And, Mr. Stone, you're going

to submit proposed language? Okay, great.

And, so, well, that takes us past -- so, what's our next agenda item?

CAPT TIDESWELL: Yes, ma'am, the last item is for the strategic planning. Well, we might have for further discussion if you want M.R.E. 412 and 513.

Theresa Gallagher, Ms. Gallagher is prepared to brief you.

CHAIR HOLTZMAN: Okay. Thank you, Ms. Gupta, appreciate your help.

Well, we've moved far along, there's only one more thing to review on victim's appellate rights.

COL ORR: Yes, ma'am.

CHAIR HOLTZMAN: Okay, Members of the Panel, thank you so much, again, for your willingness to help us and for your patience. We really appreciate it. Thank you.

I don't know whether you're going to be willing to grant us the benefit of your thoughts in the future, but whatever we've been

able to glean, we appreciate that. Thank you.

COL ORR: We give just what we've got.

CHAIR HOLTZMAN: Okay, thank you.

Okay.

CAPT TIDESWELL: So, Panel, I'd like to introduce to you formally, this is Colonel, Retired, Theresa Gallagher of the United States Army. She's here to sort of layout a potential way ahead on M.R.E.s 412 and 513.

We're going to have the benefit of her being prior a trial and appellate judge at the Army.

CHAIR HOLTZMAN: Great, welcome, Ms. Gallagher, thank you very much.

Where do you want us to turn?

CAPT TIDESWELL: I think Tab 17, ma'am, would probably be your best bet.

CHAIR HOLTZMAN: Okay.

MS. GALLAGHER: Or, actually, if you want to start with Tab 16.

CHAIR HOLTZMAN: Okay.

And, by the way, let me thank the

staff for doing an excellent job in allowing us to navigate through our agenda. So, everybody here, thank you very much.

MS. GALLAGHER: Good afternoon.

Our next task is to reassess Military Rule of Evidence 412, rape shield, and Military Rule of Evidence 513, the psychotherapist-patient privilege in light of some substantial changes which went into effect in mid-2015, about 18 months ago.

First, I plan to explain the time lines at tab 16 in your read ahead.

Next, we'll look at the three issues identified for discussion at tab 17. These issues were developed after reviewing the testimony and material on M.R.E. 412 and 513 already received by this Panel, the initial report of this Panel and guidance from Chair Holtzman. These issues serve as a means to start discussions --

CHAIR HOLTZMAN: And, last but not least.

MS. GALLAGHER: -- on strategy for further review, but are not limitations on how to make this happen.

Finally, we'll review each of the issues individually to decide on whether you're interested in addressing the issues and, if so, how you would like to address the issues.

On the remaining pages of the document, in tab 17, you will find a chart to assist in your deliberations on the identified issues.

We will not be solving these issues today, more information is needed to seek resolution.

CHAIR HOLTZMAN: I heard a pessimist.

(Laughter.)

MS. GALLAGHER: Today, we'll be developing strategy for further review of M.R.E. 412 and 513 issues.

I do want to thank Laurie Kepros for agreeing to stay through the M.R.E. 513 discussion. Ms. Kepros testified as to her state

practice on the psychotherapist-patient privilege in late 2014 and will be here through discussions on issue three in case you have questions.

CHAIR HOLTZMAN: Do you want to come up and sit with us or you happy --

MS. KEPROS: Where ever you want me.

CHAIR HOLTZMAN: In the gallery?

MS. KEPROS: I'll sit at the table, but don't ask me any questions.

MS. GALLAGHER: All right, if you would turn to tab 16 in your read ahead, you'll see the time line.

Importantly, at the top of each page of your time lines, you see the specific tasks to review and assess M.R.E. 412 and 513 given to the JPP in the fiscal year '13 and fiscal year '15 NDAA.

The first page is specific to M.R.E. 412 at Article 32 hearings. The second page is specific to M.R.E. 412 at court-martial. And the last page is M.R.E. 513 at both Article 32 and court-martial.

If you look at the first time line, you see the most significant changes affecting M.R.E. 412 at Article 32 hearings set forth.

And, these changes, for the most part, have occurred since you last met and deliberated.

I direct your attention to the December 26, 2013 entry which sums up key Article 32 revisions which have a significant effect on M.R.E. 412 litigation practice.

Well, importantly, you have the probable cause determination, the disposition recommendation and the victim's right to refuse to testify.

Please also note the June 17, 2015 entry, the Executive Order that eliminated the constitutionally required exception to M.R.E. 412 at Article 32 hearings.

If you turn to the next page on court-martial, I want to point out two things. The December 19th, 2014 fiscal year NDAA amendment to Article 6b, the victim's right, which authorized victims to petition the Service Courts of Appeal

for a writ of mandamus.

This has been a significant event, clearly, for both the M.R.E. 412 and M.R.E. 513 practice. But, I do not plan to address this change in this set of deliberation as it has been addressed in victim appellate rights.

Second, other than the appellate rights changes, there have been no revisions to M.R.E. 412 since the initial JPP report addressing 412.

Finally, if you turn to the last page, M.R.E. 513 at the Article 32 hearing and court-martial, I wanted to point out two things.

First, in the middle of the page linked to the December 19th, 2014 date of enactment, you'll see where, in fiscal year '15 NDAA provisions, that were effective June 17th of 2015 and made significant modifications to M.R.E. 513, specifically, it eliminated the enumerated "constitutionally required" exception to M.R.E. 513 and increased the burden of proof on the party seeking production, which is greatly

affecting the ability to obtain an in camera review of psychotherapist-patient communications.

Second, also effective June 17th, 2015 is the Executive Order that prohibits the preliminary hearing officer from ordering production of M.R.E. 513 evidence.

So, if you will now turn to tab 17. Those are the issues that the staff has developed, but we're going to take them up individually, one by one, I think would be the best procedure to discuss them.

So, starting with the Issue 1 --

CHAIR HOLTZMAN: This is page 2?

MS. GALLAGHER: On page 2, right, this is the start of the chart.

Should victims have the right to receive Article 32 hearing evidence and reports to ensure compliance with M.R.E. 412?

In January, you heard testimony from two special victims' counsel. They discussed the importance of special victims' counsel receiving Article 32 documentary evidence and the reports

so they can ensure that the victim's Military Rule of Evidence 412 rights are being protected.

One SVC did not seem to be getting the documents and the other SVC was being provided the documents, but only as a matter of practice, not policy. Relying on practice can lead to inconsistencies and access to documents within and amongst the Services.

So, the staff has proposed three possible options for your --

CHAIR HOLTZMAN: I'm not sure I understand, what do you mean receive all Article 32 hearing evidence, what does that mean exactly?

MS. GALLAGHER: They alluded to the fact that these are -- in some cases, paper cases. And, so, they would like access to all the paper, all the exhibits, which -- I mean, they ask for them, they did not go into specifics because it's just --

CHAIR HOLTZMAN: Now, this is evidence produced at the Article 32 hearing by the prosecutor?

MS. GALLAGHER: Or the defense, any exhibits.

CHAIR HOLTZMAN: Any exhibits? And, they're not being seen by the victim's counsel?

MS. GALLAGHER: Well, and that's why I say, it can't be resolved today because what -- the testimony we took in January was just a come in and tell us what's going on in practice. We didn't dig down into questioning to the degree of all the different topics.

And, so, I don't know really, you know, how, really what Services have specific policies requiring access to which document.

I believe that we have some RFI responses that have come in that we have not yet assessed that may tell us that, but it's a matter of do we want to go and do a deep review of this?

CHAIR HOLTZMAN: Well, do we know that this is a problem? I mean I'm trying to like understand.

MR. STONE: In the past, it was a problem. Correct me if I'm wrong, what happened

was, in the past, some military trial judges did not permit SVC, VLC or their clients to have any participation or any knowledge what happened at Article 32. They just basically excluded them and excluded them from getting any paper.

I don't know if that's changing and I guess that's what you're saying, there's still some isolated, at least some isolated instances and maybe we should ask that supervising Services, SVC or VLC to tell us if that's still a problem?

MS. GALLAGHER: Well, I know that the SVCs and VLCs are receiving tremendous access. You know, some of them are receiving access to everything. But, it seems that some may not be. I don't know how widespread it is, but one would think that perhaps they should consider some kind of a uniform policy.

So, that the victim, perhaps in the Air Force may not receive as much in the way of evidence as a victims' counsel in the Army or something.

CHAIR HOLTZMAN: Can we find the facts first before we decide to go further in this? I mean, because if it's not a problem, why look at it?

MS. GALLAGHER: Well, the testimony was not all that specific.

CHAIR HOLTZMAN: So, maybe we should just get --

MS. GALLAGHER: -- everybody gets a copy of the victim's statement. But, if there is other witnesses, I'm not certain that they get copies of all of those witness statements that may contain 412 evidence, that may contain a foundation for 513 evidence.

CHAIR HOLTZMAN: That's what I'm saying, could we just be sure that this is a problem, that they're not getting this before we decide to go ahead and do an in depth study? I mean --

MR. STONE: You know, if we call some of the SVC and VLC supervisors to tell us about the business of how they make an objection in

court, maybe this is another inquiry that they can answer at the same time, that we can tell them we have -- it's on a different issue, but they're the same people who can respond to us whether this has gone away or is almost gone away or is still an active issue.

CHAIR HOLTZMAN: Okay. The only reason I say that is because, you know, we have a limited life span. If it's not really a problem, if it is a problem, of course, it should be looked at. But, if it's not --

CAPT TIDESWELL: Chair Holtzman, one of the options would be to send a Request for Information --

CHAIR HOLTZMAN: Yes, great.

CAPT TIDESWELL: -- something that says, what are the policies?

CHAIR HOLTZMAN: Sounds good.

CAPT TIDESWELL: What is the prevalence?

CHAIR HOLTZMAN: Yes.

MS. GALLAGHER: Right, and --

CHAIR HOLTZMAN: And, maybe also on the other issue that Mr. Stone raised, the same thing, we should find out what the practice is. Because maybe they --

MS. GALLAGHER: And, in fairness to the --

CHAIR HOLTZMAN: Sorry.

MS. GALLAGHER: All right, in fairness to the Services, I believe that they did respond to an RFI that requested their policies. We had a voluminous response.

(Simultaneous speaking.)

MS. GALLAGHER: Just to see if --

CHAIR HOLTZMAN: Great.

MS. GALLAGHER: -- we can get it answered.

CHAIR HOLTZMAN: That sounds okay.

PROF. TAYLOR: More facts.

CHAIR HOLTZMAN: Great.

MS. GALLAGHER: Or we'll do an RFI, whichever is necessary.

CHAIR HOLTZMAN: Okay, great.

CAPT TIDESWELL: We can just look and see how recent that was.

CHAIR HOLTZMAN: Yes, sure, absolutely, right.

CAPT TIDESWELL: Get some people --

CHAIR HOLTZMAN: This is something we've been charged with from the get-go and it's something we should be looking at. But, if it's not a problem --

MS. GALLAGHER: I know that they were, you know, the last time that they looked at it, it was a matter of policies were being developed. And, one had a policy and the rest were in the process of developing their policies.

I know that there is so much cross coordination amongst the VLCs and SVCs of the Services right now, that they make it uniform. I just know that all we have is this two-person anecdotal testimony representing that they may not have --

CHAIR HOLTZMAN: Well, you didn't really hear this, but there are some people who

represent the SVCs and VLCs in the room and it might be possible even after this proceeding to talk to them. I don't know if I'm allowed to make such a suggestion, but you might be able to do that.

MR. GALLAGHER: Yes, ma'am.

MR. STONE: I don't think we have all the Services here, though. So, you probably -- requesting information is probably a little more uniform across the whole Services.

CHAIR HOLTZMAN: Yes, but you might have enough -- but you might know pretty much whether it's a problem because they talk to each other. One of the few areas where the Services are really interconnecting.

Okay, Ms. Gallagher.

MS. GALLAGHER: We'll rally some information on that one.

CHAIR HOLTZMAN: Great, thank you.

MS. GALLAGHER: All right, if you turn to page 3, you'll see Issue 2 which is the first Military Rule of Evidence 513 issue.

CHAIR HOLTZMAN: Page 3? Page 4?

MS. GALLAGHER: I'm sorry, it is page 4.

CHAIR HOLTZMAN: Oh, yes, right.

MS. GALLAGHER: M.R.E. 513 does not address whether the scope of the psychotherapist-patient privilege covers psychiatric diagnosis, prescribed medications, durations prescribed medications were to be taken, types of therapy used and the resolution of the diagnosed psychiatric condition.

Should M.R.E. 513 be amended to clarify whether the privilege is limited to patient communications or extends to the psychotherapist conclusions or diagnosis and resulting treatment?

The light blue shaded area of the chart contains the relevant provisions of M.R.E. 513.

Tab 15 in your read ahead contains a complete copy of M.R.E. 513 with the portions containing the relevant definitions highlighted.

CHAIR HOLTZMAN: So, what you're saying, Ms. Gallagher, if I can be -- try to clarify in my mind, is that what could happen now is that you could have a diagnosis by the psychotherapist saying that the person has such and such mental condition, maybe even the basis of which he or she forms that.

And, that could be released? That would not be covered by the privilege.

Or is it unclear whether that's covered by the privilege now?

MS. GALLAGHER: It's being interpreted in different ways. As you see, you know, in the cases, you see that a military judge interpreted it just that way, that the diagnosis, treatment, medications were not privileged and ordered them to be disclosed.

And, then, the Coast Guard Court of Criminal Appeals overturned that and said that it would remain confidential or protected and --

CHAIR HOLTZMAN: Do we know that this is a problem aside from this case?

MS. GALLAGHER: Yes, we had testimony from a variety of speakers that it is not necessarily being uniformly applied.

I think we had -- it might have been one of the trial -- former trial judge testified that they're working with the special victim's counsel to get letters from the psychotherapist that would set forth just the diagnosis or the medications, if the issue happened.

And, so, it seems that there may be practitioners accessing the diagnosis in ways that may not consider it privileged.

CHAIR HOLTZMAN: And, how does it work with the doctor-patient privilege? Is the diagnosis also not considered to be privileged?

MS. GALLAGHER: I don't -- I will tell you, I have not looked at that specifically.

CHAIR HOLTZMAN: But, here we have a guru.

MS. KEPROS: There is no doctor-patient privilege in the military, that's what I was going to say.

CHAIR HOLTZMAN: Oh, okay.

MS. KEPROS: But, yes --

CHAIR HOLTZMAN: But, in general --

MR. STONE: Right, but in most military stations or maybe we want to compile them, even the fact that you went to a psychiatrist, psychologist, whatever, is psychotherapist, is a privileged matter. That's not allowed in because that opens the whole door to the speculation.

But I noticed that the issue was presented to CAAF, here we go again, and they didn't allow you a cert petition, they denied 3-2 dismissed the petition for lack of jurisdiction.

So, maybe this will get resurrected without telling them that they have jurisdiction now in the future so that, if a victim loses, a victim can go up and get it decided. I would rather have CAAF decide the merits before we weigh in when they've already had some, you know, military authority on it and they recognize it's a military issue, then us either imposing what

the states do or not do, or divergent.

I kind of feel like they should -- what do you think, Ms. Gallagher, should we, in light of the fact that we're urging CAAF to have broader -- accept broader jurisdiction, that we can get it resolved there? Do you think that that's --

MS. GALLAGHER: Well, I think that that would be listed under Option 1, there's arguments in favor and arguments against. And, some would think that this is a change that should occur through the legislation and Executive Order.

And, some, we think, that it's best resolved judicially.

MR. STONE: Well, by meaning it's resolved judicially, is the Executive Order or people don't like the way it's resolved, they can change -- that's really a sequential thing as to whether, first, you allow CAAF, since it's clearly a legal issue, to take the first crack at it. It seems to me that -- I don't think that's exclusively going to the other steps later.

But, I guess what I'm asking is, and maybe it's anybody on the Panel whether they think us having just recommend it that CAAF try to address some of these issues and have a little more jurisdiction that we not then jump over that hurdle and weigh in ourselves to what's essentially a legal decision.

I think the cases from the various states and the federal government and look at what the standard rules -- I mean, I think it's that you do not even disclose -- the doctor won't even disclose that you had an appointment with him, no less all this other data.

But, if CAAF wants to rule the other way, they should have the freedom to take a crack at it.

MS. GALLAGHER: Well, the current state, the current update was that the name of the provider, the appointments and the duration of the appointments was not privileged.

CHAIR HOLTZMAN: But the diagnosis was privileged?

MS. GALLAGHER: Yes, that's the way the Coast Guard Court left it, but of course, again, that's not precedent for perhaps anyone. I mean, it's persuasive to have --

CHAIR HOLTZMAN: May I -- I have a couple of questions. One is, how long -- first of all, you'd have to have the rules changed. Congress would have to probably change the rules so that CAAF would take this matter up. So, that's -- we're talking about a time line here.

So, Congress would have to change the rules. When's the next NDAA? A year from now more or less?

MS. GALLAGHER: Yes, ma'am, it's a lengthy process also.

CHAIR HOLTZMAN: But, the President -- and the President would sign it?

PROF. TAYLOR: Well, the last was signed in December.

CHAIR HOLTZMAN: Yes, okay, right.

PROF. TAYLOR: Because usually they're marking it up by August.

CHAIR HOLTZMAN: Okay, so that, right. So, it would take a while and then the case would have to come up to the CAAF for them to decide it.

MS. GALLAGHER: Right. I mean, it could. I mean, currently, as far as I know, there is no current case pending.

And, I will say that, you know, this case, it took over a year to get to CAAF stage. And, it initially wasn't -- you know, the victim got resolution through the Coast Guard Court and it was suppressed.

And, it -- then the accused went to CAAF seeking the disclosure in accordance with the military judge and asked for jurisdiction and it was turned down.

But to have the issue arise again before the CAAF, you would have to have a victim whose records are being ordered disclosed go to the Service Court and not receive relief there, and then take it up to CAAF under, you know, the rule if --

(Simultaneous speaking.)

MS. GALLAGHER: And, so, you're looking at a lengthy process there either way. And, then it comes up to do you want them doing just a strict statutory interpretation analysis or do you want to go with the let's make an informed recommendation based on the literature in the field, that the assessment of --

CHAIR HOLTZMAN: Well, how does it work elsewhere? I mean, do you know, Ms. Kepros, any idea?

MS. KEPROS: Well, here is the challenge. I don't think you can take much from civilian practice to apply to this situation.

CHAIR HOLTZMAN: Okay.

MS. KEPROS: In the civilian world, records are governed by HIPAA, records are governed by state Statute. You know, your employer doesn't get access to your medical or psychiatric records in the civilian world, that's not true necessarily in the military.

And, so, I think it's a really

different -- it's kind of an apples and oranges comparison in terms of even the way privacy's understood when it comes to that domain of information.

CHAIR HOLTZMAN: All right, well, so then, the question is, do people feel that we should be exploring this issue more, making some -- in order to try to make a recommendation in the limited amount of time we have?

Mr. Stone?

MR. STONE: I think that, just like when you go to the U.S. Supreme Court and they don't grant cert, if they don't bench cert the decision below is the one that is the current law because they don't think it's so incorrect that they want to change it.

CHAIR HOLTZMAN: But, this is probably not on that basis. There's very limited rules of jurisdiction for CAAF, isn't that it? And, is that an issue?

MR. STONE: Well --

CHAIR HOLTZMAN: Isn't that the basis

of it? They said they had no jurisdiction?

MR. STONE: I think that --

MS. GALLAGHER: Right.

CHAIR HOLTZMAN: So, it's a legislative issue, am I right? It's not just a cert -- denial of cert.

MR. STONE: Well, if I can I just finish the thought, it says here in a 3-2 decision, do we know if they wrote something on that 3-2 decision that before the next meeting we can get distributed so that we can read and see what they said about why they dissented?

MS. GALLAGHER: Right. If you look under tab 18, the second case in there, about the sixth sheet of paper starts the Court's decision.

And, in that, the two of the judges would have granted jurisdiction and decided on the merits and three of them determined their court did not have jurisdiction.

CHAIR HOLTZMAN: On what basis?

MS. GALLAGHER: On -- well, they essentially said it's the same basis as, you

know, it's really a 6b in disguise and they said they were not going to hear this issue.

CHAIR HOLTZMAN: Because we don't have the power to do that.

MS. GALLAGHER: I think so, yes.

CHAIR HOLTZMAN: Okay, so that's what I'm trying to say, this is not a discretionary issue like denial of cert, this is we do not have the power to make a determination in this case.

PROF. TAYLOR: Well, it seems to me, though, Madam Chair, that since the M.R.E.'s themselves are the creature of Executive Order --

CHAIR HOLTZMAN: Right.

PROF. TAYLOR: -- it wouldn't be -- it would not be a hard fix to simply go back to the definition of what you mean by confidential communications.

CHAIR HOLTZMAN: Correct.

PROF. TAYLOR: And, expand it to include all those items that we think should be protected.

CHAIR HOLTZMAN: Correct, right,

that's what I think, too. But, the question is, in order to do that in a responsible way, we had to have some -- we had to have a hearing. I mean, we'd have to have presenters and so forth.

This is of the magnitude and can we get this resolved before our deadline on September 17th?

CAPT TIDESWELL: September 30th of this year.

CHAIR HOLTZMAN: Thirtieth, wow. Who was worried about 13? You know, okay.

MR. STONE: Do we have a full agenda for the next meeting? Put that definition on the next agenda?

CAPT TIDESWELL: Yes, sir. The next meeting is dedicated to data.

CHAIR HOLTZMAN: Yes, after that, we have a responsibility to review data issues. Well, that could be, you know, we'd have to put together a group of people because, I agree with you, Mr. Taylor, it's more easily resolvable, assuming we think it should be changed. And,

then, a lot of other issues.

PROF. TAYLOR: I would not try to resolve the jurisdiction issue, I agree with that, too. Just concentrate on the whole fix.

CHAIR HOLTZMAN: Right.

MS. GALLAGHER: And, that was the proposal, concentrate on the language.

CHAIR HOLTZMAN: So, how do the rest of you feel?

VADM TRACEY: I think that works.

CHAIR HOLTZMAN: You're okay? Everybody okay with that.

MR. STONE: We look at that definition in the future?

CHAIR HOLTZMAN: Judge Jones?

JUDGE JONES: Yes.

CHAIR HOLTZMAN: Okay, great. All right, what's next, Ms. Gallagher?

MS. GALLAGHER: The next is actually the final issue.

JUDGE JONES: Who gave you this job, Ms. Gallagher?

MS. GALLAGHER: I'm very grateful of the opportunity to be here.

All right, on the page 6, you'll see the final issue, Issue 3 pursuant to M.R.E. 513. A military judge is required to make a determination that requested evidence fits within an enumerated exception.

At tab 15, you can find a copy of M.R.E. 513(d) with the highlighted list of the enumerated exceptions and M.R.E. 513(e) with select procedural rules for production and admission highlighted.

The most relevant portions of the procedures to determine admissibility are also contained in the light blue portion of the chart on page 6.

Prior to the rule change in mid-2015, counsel used the enumerated constitutionally required evidence exceptions to admit evidence bearing on credibility, perception, ability to recall, and motive.

In January of 2017, you heard

testimony from former trial judges, trial counsel, defense counsel and SVCs, VLCs from each Service and generally noted that M.R.E. 513 evidence rarely is an issue in Article 32 hearings because the defense may not be aware of the existence of mental health records yet. And, even if they were, the preliminary hearing officer does not have the authority to order production of mental health records.

As to courts-martial, the presenters testified that M.R.E. 513 evidence is sought in the majority of cases. However, the defense is rarely able to meet the factual burden to trigger production for an in camera review.

The presenters also testified that there is an inconsistency among practitioners in how the rule is being applied.

According to the testimony presented in January, the practice among military judges ranges from allowing relevant mental health evidence based on constitutional due process and confrontation rights to not allowing any evidence

unless it's relevant to one of the enumerated exceptions.

And, that is consistent with the presentation from the sub-panel earlier today.

In October of 2014, you heard testimony from Ms. Kepros and other presenters about different state practices with regards to psychotherapist-patient privilege when the evidence reaches constitution confrontation and due process concerns.

The testimony from both 2014 and the recent 2017 provides the basis to ask whether now that the enumerated exception for constitutionally required evidence has been eliminated, should additional enumerated exceptions be added to M.R.E. 513 in order to allow evidence bearing on the credibility, perception, ability to recall or a motive.

And, again, we propose three options for your consideration. And, the first is to determine whether additional enumerated exceptions are needed.

The second is to consider the issue of recommending no changes to M.R.E. 513.

And, third, the possible option is to recommend the DAC-IPAD, the defense advisory committee on the investigation, and prosecution and defense of sexual assault to review and continue to assess this issue.

JUDGE JONES: Can you point me to the exceptions again?

MS. GALLAGHER: Yes, the exceptions are at tab 15 and it's the second page of the --

CHAIR HOLTZMAN: Fifteen has only one page.

MS. GALLAGHER: Tab 15 has --

MR. STONE: Is that under (d)?

MS. GALLAGHER: Yes, it's 15, Rule 513(d).

CHAIR HOLTZMAN: I don't know, is my tab --

So, if I can see if I understand this correctly, what you're saying is that because the constitutionally required exception is gone, it's

questionable whether standards that were used in the past still apply to getting M.R.E. information, in other words, exceptions, such as it would bear on credibility? It would bear on perception, ability to call motive?

Have those -- those have been recognized exceptions in the past?

MS. GALLAGHER: Yes, ma'am, because there was --

CHAIR HOLTZMAN: A standard operating procedure kind of thing?

MS. GALLAGHER: It was specifically in the constitutionally required enumerated exceptions. And, now, you have procedural rules that specifically say, the evidence being proffered by the defense has to be relevant to an enumerated exception.

CHAIR HOLTZMAN: Okay.

MS. GALLAGHER: And, we don't have an enumerated exception that would allow for any evidence in by this, all of that, because the constitutionally required exception is gone.

But, I believe most states have some provision for or mechanism by which that evidence comes in or is allowed to be disclosed or reviewed in camera.

MR. STONE: Page 7, you say at least one state, you don't say most states, you say one state.

MS. GALLAGHER: Well, I think maybe Ms. Kepros can --

MS. KEPROS: I can answer that a little bit. I mean, I've read a few law review articles that collect the national standards. The majority rule, it's differently characterized certainly from one state to another.

And, some of them are from case law, some of them are Statutes at the state level.

And, you will see terminology such as exculpatory evidence. You'll see language such as relevant to guilt or innocence. You will see, you know, there's different ways to describe that, although the lens I guess I see it through and as I understood the military was prior to the

NDAA in 2015, is that constitutionally required was largely falling into the kind of due process right that the United States Supreme Court recognized in Pennsylvania v. Ritchie in, you know, the '80s where they say there is a point where for there to be a fair trial, certain information is going to come to bear.

So, that's described in different ways and I think it's a function of sort of the collision of common law practice, the codification of a bunch of things in the 1970s, evolving concepts of therapy even as a part of American society.

You know, so it's things have kind of evolved at different tracks. But, you will see most places some sort of pathway where the relevancy of that information is acknowledged even in my state, which is among the more strict, there's a waiver analysis when it comes to privilege and they say there is a point where, you know, that personal information does become of enough consequence to the litigation that it

is appropriate for it to be shared.

JUDGE JONES: So, this is all -- is this currently before the court in the military? Even a Service Court? Have Service Courts -- I don't know that it's gone to --

MS. GALLAGHER: I do not believe -- well, I am not aware if there is a case on which this directly relates.

JUDGE JONES: I think I remember the debate a couple of years ago. Or many of us, including myself thought why would you ever have to say that there's not an exception, you know, if it was constitutionally required?

If this is being read to mean that this is it, and maybe literally, that's what you're telling us.

MS. GALLAGHER: That's what the testimony in January seemed to indicate. I believe that's what the Subcommittee findings were as well.

And, so, it seems that there is confusion about the practice and, you know, is

there a mechanism to clear up this without the language of the rule that you will find an enumerated exception that's going to be relevant to or you're not willing to do the in camera review.

And, you know, how it's supposed to work out, like I said, this was not the thing I have an answer to today what the best option is and that's why --

JUDGE JONES: That's why it's here, basically.

MR. STONE: Isn't this matter before CAAF? I was under the impression that at least in one of the Services, the defense counsel have taken up to CAAF the breadth of the constitutional exception and I shouldn't say that I see some heads nodding out in the audience, but I do.

I was under the impression that this is an issue that they are likely to decide. And, so, I'm, again, inclined not to, if you want to check and get back to us after this, but I'm

inclined not to get in the middle of the fray, get in the fray here, when that's exactly what they're looking at in terms of what the legal extent of it ought to be in the military, which is, we just heard is different formulations in different states.

I think no state purely allows you to invade a privilege for simply impeachment purposes and that hawks back to the testimony we heard from Mr. Christensen earlier today and whether that privilege is a husband-wife, priest-penitent, whatever it is, but or even attorney-client.

But, I think if this question is before the Court of Appeals for the Armed Forces, I'm certainly not inclined to get in the middle. Am I right that in some law material in the last meeting or this one that was in there? I'm sure this --

MS. GALLAGHER: I'm not aware of any CAAF grants on an issue like this. But, I'm just not aware of any.

CHAIR HOLTZMAN: Well, let's assume for a minute that it's not because she hasn't found any. You may be right, Mr. Stone, but let's assume for a minute that this is not before CAAF.

I guess I'm with Barbara here. I mean, I always thought the constitutionally required language was just superfluous because --

JUDGE JONES: And, that's why most of us voted to take it out.

CHAIR HOLTZMAN: Right. And, we -- I don't know that we voted on 513, but certainly 412.

JUDGE JONES: Yes.

CHAIR HOLTZMAN: I mean, and I know why it was thrown in there, it was just a fig leaf and nobody ever -- I mean, I don't know that's pretty much what I thought it was for and I never thought it made any difference because it was required by the Constitution, judges were going to find a way to get it in and if it wasn't, they weren't.

So, I don't understand --

JUDGE JONES: I think that's going to have to be -- that's going to be the issue to argue because that was the debate we had when it was in front of us.

CHAIR HOLTZMAN: Right, so I guess the problem I'm having is the Court's taking this literally that if the -- I mean, it has to be in a Statute that the Constitution requires it for them to recognize that there's a constitutional issue?

MS. GALLAGHER: Perhaps.

VADM TRACEY: Wasn't that the testimony that we heard that the fact that it had been there and then it was removed was being read as an intentional deletion of --

MS. GALLAGHER: Yes, that's --

CHAIR HOLTZMAN: But, you can't delete the Constitution. Just because you take it out of a Statute isn't going to --

VADM TRACEY: But, that's the testimony that we heard was that that was what was happening.

CHAIR HOLTZMAN: I know, so how do we deal with --

JUDGE JONES: We just abolish the Constitution.

PROF. TAYLOR: If you look at the exceptions, you can see why we are where we are.

JUDGE JONES: Yes.

PROF. TAYLOR: And, that was the policy choice that was made.

MR. STONE: And, each of these proposed different bases that we might put in really is going to determine -- be based on -- be determined as facts of that case. And, so, that's why I think that I'm perfectly happy to encourage defense counsel to try and get it in.

And some judge is going to say, oh, motive, yes, that goes in or they're going to say, no, it wouldn't be a 513. We think this is a motive in every case.

But, I mean, I think that on the facts of their case, you're going to make the objections. Sometimes they're going to succeed,

sometimes they're not going to succeed. Sometimes, based on what they have, the appellate court for that Service is going to uphold them, sometimes going to reverse them.

And, that's going to get us to a case that CAAF is going to take which is going to spell out more if you need more.

But, I think these are all individual determinations based on the facts of the case, almost like that Chisum case. Again, that's another one where there's a 513 question and I think that the appellate court there would have said, well, because of the pendency of that other case, it's -- actually they did.

They said because of the other case and what we've seen, it was a harmless error.

So, I mean, it seems to me that it's determined on the facts and that we're wading into something where Congress has decided what the language should be and we might not like the language, but I think they decided that.

So, I don't understand how you could

cover a whole new set of perceptions.

CHAIR HOLTZMAN: Congress wasn't deciding not to have these exceptions, it just decided that it was going to take out the "constitutionally required" because they said it was unnecessary. And, maybe they thought it was confusing and it's not clear what Congress ever has in mind.

But if the courts are viewing the removal of that "constitutionally required" exception as a means to avoid all these issues and say, "Well, if it's not there, it's not written out for me, then forget it." I don't have to look any further than that.

I don't have to look further to see if there's a due process issue or if there some other kind of issue here that is a concern.

The question for me is really whether this is something that we can tackle in relatively short period of time that we have.

I think the other issue that we mentioned about the -- you know, what's covered

by the definition of patient psychiatric communication, I think that's pretty narrow and we could probably get something done.

But, this seems to be sort of amorphous and hard to get your hand around and this is really, I mean, and what's the solution? Is it judicial training or is the solution something else? I don't know. So, maybe --

MS. GALLAGHER: Yes, ma'am, and we don't have the data at this time to fully define the problem. I don't know if it's that we have increased the specificity of the factual showing that had to be made. I don't know, you know, it may be that they're determining it, we just haven't raised any facts. It's not that there's no exception to link that to, we just haven't even raised the facts in the first place.

But, without looking at, you know, some specific data and some specific cases, we don't have a real feel for what the problem is and whether it can be fixed by training or whether it's something that's a language fix.

CHAIR HOLTZMAN: Well, so maybe this is a good issue to send to the succeeding Panel.

MS. GALLAGHER: I think it's a very worthy issue.

CHAIR HOLTZMAN: What do you all say?

CAPT TIDESWELL: They're very receptive, ma'am. They've already met, they met in January and they've asked --

CHAIR HOLTZMAN: Okay, that sounds like one that -- because it'll take some time to get your hands around that.

CAPT TIDESWELL: Yes, ma'am.

CHAIR HOLTZMAN: Okay, great.

MS. GALLAGHER: Ma'am, I have nothing further.

(Simultaneous speaking.)

CHAIR HOLTZMAN: So, what's next on our -- that's it?

CAPT TIDESWELL: That's it, yes, ma'am. There's no further comment.

CHAIR HOLTZMAN: Wonderful. Well, Panel Members, thank you very much. And we are

finished at exactly 3:00.

MR. STONE: Will we be --

CHAIR HOLTZMAN: Thank you, Ms. Kepros.

MR. STONE: Will be establishing our future dates by email?

CHAIR HOLTZMAN: I think we have dates in May.

CAPT TIDESWELL: We have dates in April and May, yes, ma'am.

CHAIR HOLTZMAN: Okay, and then beyond that, we need to do that.

MR. STONE: Yes.

CAPT TIDESWELL: We'll talk about how far we want to.

CHAIR HOLTZMAN: Great, thank you very much everybody. Thanks to the audience and thanks again to the Panel Members who assisted us and Ms. Kepros, too, thank you.

MS. FRIED: Thank you. The meeting's closed.

(Whereupon, the above-entitled matter went off the record at 3:01 p.m.)

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This is to certify that the foregoing transcript

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Before: US Department of Defense

Date: 03-10-17

Place: Arlington, VA

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R Gross

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Court Reporter