UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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PUBLIC MEETING

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FRIDAY
MAY 19, 2017

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

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

JPP SUBCOMMITTEE MEMBERS
Ms. Laurie Rose Kepros
Dean Lisa Schenck, Colonel(R), U.S. Army
Ms. Jill Wine-Banks

STAFF
Captain Tammy Tideswell, Navy Staff Director
Ms. Meghan Peters
Ms. Theresa Gallagher
Ms. Terri Saunders

DESIGNATED FEDERAL OFFICIAL
Ms. Maria Fried
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9:06 a.m.

CHAIR HOLTZMAN: Good morning, everyone.

MS. FRIED: Ms. Holtzman, thank you. Good morning, everyone. Welcome to the Judicial Proceedings Since Fiscal Year 2012 Amendments Public Meeting. I am Maria Fried, the Designated Federal Official for the JPP. Captain Tammy Tideswell, United States Navy, is the Staff Director.

This Panel was established by Congress in Section 541 of the NDAA for FY 2013 as amended. The JPP was tasked to, among other things, conduct an assessment of judicial proceedings conducted under the UCMJ involving adult sexual assault and related offenses since the NDAA for 2012 amendments, and to make recommendations to the Secretary of Defense and Congress.

The following distinguished individuals have been appointed to the Panel: the
Honorable Elizabeth Holtzman, who serves as the Chair to the JPP; the Honorable Barbara S. Jones; Vice Admiral (Retired) Patricia Tracey; Professor Tom Taylor; and Mr. Victor Stone. The Members' biographies are available at the JPP website at http://jpp.whs.mil/

This Panel is a Federal Advisory Committee panel and must comply with the Federal Advisory Committee Act and the Sunshine Act. Publicly available information provided to the JPP is posted on its website, to include transcripts of meetings. Any information provided by the public to the Panel Members is available to the public.

As you will hear from Madam Chair, the first presentation is from the JPP Subcommittee. The Subcommittee reports to the parent Panel, the JPP. Additionally, the findings and recommendations of the Subcommittee are based on the Subcommittee's site visits to 25 installations and testimony received by the JPP during public meetings. More information on the
The methodology used by the Subcommittee is further described in the report. The recommendations of the Subcommittee are directed to the JPP, and the JPP is free to adopt, modify, or reject the recommendations and findings of the Subcommittee.

I would also like to welcome Ms. Martha Bashford, who is Chair of the Defense Advisory Committee on Investigations, Prosecutions, and Defense of Sexual Assault in the Armed Forces. She is a chair to that panel and was invited to attend this meeting. Madam Chair?

CHAIR HOLTZMAN: Thank you very much, Ms. Fried, and good morning everyone, again. I would like to welcome the participants and everyone in attendance today to the 30th meeting of the Judicial Proceedings Panel. Only four of the five Members are present today. Unfortunately -- excuse me -- Judge Jones couldn't be present, although she planned to do so.
Today's meeting is being transcribed, and the full written transcript will be posted on the JPP website. The Judicial Proceedings Panel was created by the National Defense Authorization Act for Fiscal Year 2013, as amended by the National Defense Authorization Act for Fiscal Years 2014 and 2015. Our mandate is to conduct an independent review and assessment of judicial proceedings conducted under the Uniform Code of Military Justice involving adult sexual assault and related offenses since the most recent amendment to Article 120 of the UCMJ in 2012.

Today's meeting will begin with a presentation from Members of the JPP Subcommittee on their report on barriers to the fair administration of military justice in sexual abuse -- sexual assault cases. Following deliberations on the Subcommittee report, the Panel will deliberate on the -- excuse me -- JPP sexual assault adjudication data for Fiscal Year 2015. Next, the Panel will deliberate on two JPP reports that report on military sexual assault
investigations and the Victims' Appellate Rights Report.

Each public meeting of the Judicial Proceedings Panel includes time to receive input from the public. The JPP received no requests for public comment in today's meeting. Thank you very much for joining us today. We are ready to begin the meeting. Our first presenters are JPP Subcommittee Members Ms. Laurie Kepros, Director of Sexual Litigation for the Colorado Office of the State Public Defender; Dean Lisa Schenck, Retired Army Colonel and Associate Dean of Academic Affairs at George Washington Law School; and Ms. Jill Wine-Banks, former General Counsel of the Army. I would also note that Judge Barbara Jones and I both serve on the JPP Subcommittee. Thank you for appearing before us today, and we look forward to hearing from each of you.

I just want to say that I personally feel very fortunate, and I think the other Panel Members do too, that you have been so willing,
each of you Members of the Subcommittee have been
willing to put in so much time and effort, not
just to making the site visits, but to preparing
these reports and sharing those reports with us,
so on that note, I would like to ask you to
begin, and again, thank you very much for the
efforts you have made. And I don't know who is
going to -- who is -- oh, Dean Schenck, okay.

DEAN SCHENCK: Okay. Thank you. Good
morning, Panel Members. Thank you for this
opportunity to testify this morning and for the
opportunity for the past two years to serve on
your Subcommittee.

Before we get started, I would like to
tell you a little bit about my involvement in the
ongoing review of sexual assault in the Military
Services so you may better understand my
perspective regarding this very important issue.
As you know, I am a retired Army colonel and
served as an appellate judge on the Army Court of
Criminal Appeals for nearly six years. Once I
retired in 2008, I served as the Senior Advisor
to the Defense Task Force on Sexual Assault in
the Military Services.

After my appointment as the Associate
Dean for Academic Affairs at GW Law School in
2009, I have continued to participate in the DoD
and congressional efforts studying sexual assault
in the Military Services, serving as a
Subcommittee Member for the Response Systems
Panel; as a consultant for the Secretary of the
Air Force Scientific Advisory Board in its study
on the combating of sexual assault; and serving
as one of two civilian members on the Uniform
Code of Military Justice, DoD's Code Committee,
since January 2014.

Additionally, I try to stay on top of
the changes in the military justice system, as I
have co-authored a cases and materials book on
military justice, which is currently in its
second edition, and due to the changes that are
forthcoming, soon to be the third edition to that
textbook. I also have published a number of
articles on -- pertaining to sexual assault in
the Military Services, as well as provided some
op eds on the issue.

I am also joined today with two
esteemed colleagues: Ms. Laurie Kepros, the
Director of Sexual Litigation for the Colorado
Office of the State Public Defender, where she
trains and advises over 700 lawyers and other
staff statewide in their representation of adults
and juveniles accused or convicted of sexual
crimes. She has tried and consulted on thousands
of sexual offense cases across the State of
Colorado. She has served on dozens of
subcommittees of the Colorado Sex Offender
Management Board and as a member of both the Sex
Offense Task Force and Sex Offense Working Group
of the Sentencing Task Force of the Colorado
Commission on Criminal and Juvenile Justice.

And I am also joined by Ms. Jill Wine-
Banks. Among her many accomplishments, she
served as a Department of Justice prosecutor
prosecuting organized crime and labor
racketeering cases, and then as an assistant
special prosecutor, she played a crucial role in investigating and trying the Watergate obstruction of justice case. Ms. Wine-Banks is very familiar with the military justice process. She also served as the General Counsel of the United States Army and was also a litigation partner at Jenner & Block and the Solicitor General and Deputy Attorney General of Illinois.

As Congresswoman Holtzman indicated, I am also proud and privileged to -- to serve with these Members as well as the Members that are unavailable to testify today. Today, we will provide you with our final report to assist this Panel in its review and assessment of the UCMJ judicial proceedings involving adult sexual assault since the amendments made to the UCMJ by the NDAA Fiscal Year 2012.

As you know, from July–September 2016, at your request, our Subcommittee conducted site visits to gather information, and during those site visits, we spoke to more than 280 individuals involved in the military justice
process, from all the Services, from 25 installations in the United States and Asia. Our discussions with prosecutors, defense counsel, Special Victims' Counsel, Victims' Legal Counsel, paralegals, investigators, commanders, sexual assault response coordinators, victim advocates, and victim witness liaisons from all the Services were held without attribution. Those discussions focused on the investigation, prosecution, and defense of sexual assault -- assault offenses.

After conducting site visits, we determined that before reporting to your Panel, we needed to analyze, discuss, and develop further information. Accordingly, we held 13 meetings or teleconferences from September 2016 through this very month. Drawing on site visit data as well as our additional discussions and research, we -- we subsequently provided you with several reports regarding various subjects.

In December 2016, we reported on military defense counsel resources and experience in sexual assault cases. Our February 2017
report focused on sexual assault investigations in the military, and in March, we issued three short reports on DoD's initial withholding policy, Military Rules of Evidence 412 and 513, and the training and experience of trial counsel and Special Victims' Counsel and Victims' Legal Counsel.

Today's report builds on the observations and conclusions provided in those previous reports. The report we present you with today describes some of the changes made to the military justice process in recent years, as well as the perceived pressure on convening authorities and judge advocates to refer sexual assault cases to trial, regardless of the likelihood of conviction. Further, drawing from our discussions with counsel from every Service and information gathered, this report highlights how the implementation of recent reforms has in essence created barriers to the fair administration of military justice in sexual assault cases.
I will address the changes to the Article 32 hearing, and I will be followed by Ms. Laurie Kepros, who will discuss issues involving referral decisions and prosecutorial discretion. Ms. Jill Wine-Banks will then discuss additional issues as well as present our conclusions and recommendations. Because each part of the report and corresponding presentations are intertwined, we respectfully would ask you to please hold your questions until we have completed our presentations.

So with that, I will provide you with some background. Just to set the stage and provide a brief background, as you know, in the past, high-profile sexual assault cases have led to public criticism regarding prosecution and punishment for sexual assault in the Military Services. The public has demanded accountability and justice, and several DoD and congressionally appointed panels reviewed the military's sexual assault prevention -- prevention, victim care, investigation, and prosecution in the military,
and those panels issued reports and recommendations on those topics.

Congress, the President, and DoD have implemented procedural changes and modified how sexual assault cases are processed. More than 100 statutory reforms and numerous policy changes have been instituted in just the past five years. Two major changes included the implementation of the Special Victims' Counsel/Victims' Legal Counsel SVC/VLC program, providing attorneys to sexual assault victims at all pre-trial and trial stages of the case processing. Another major change involved the Article 32 pre-trial hearing, allowing victims to decline to testify and changing the hearing from a pre-trial investigation to a probable cause hearing.

Reforms such as these were prompted by past failures, and they have empowered sexual assault victims, but these reforms have also had unintended consequences. Some we will point out today.

So first, the referral process: once
a sexual assault is reported, if it is an
unrestricted report, the military criminal
investigative organizations, the MCIOs, will
investigate. Prosecutors will then discuss the
case with the appropriate commander, who
determines whether to prefer charges or take
other disciplinary actions against the alleged
perpetrator.

Rule for Courts-Martial 306(b)
provides that allegations should be disposed of
in a timely manner at the lowest appropriate
level. The non-binding discussion to that rule
provides several factors to consider when making
the disposition decision, and those are reflected
in our report, I believe on page 8. These
factors include but are not limited to the nature
of the offenses, subordinate commander
recommendations, and the victim's views as to
disposition.

Rule 306 also requires the convening
authority to consider a sexual assault victim's
views as to whether the case should be processed
by the military or it should be processed by a
civilian court with jurisdiction over the
offense. If charges are preferred and the
special court-martial convening authority decides
that trial by general court-martial is
appropriate, he or she must direct the case to a
preliminary Article 32 hearing.

The NDAA Fiscal Year '14 included
extensive changes to the Uniform Code of Military
Justice Article 32. These changes revised the
Article 32 hearing from a pre-trial investigation
and mechanism for pre-trial discovery to a
preliminary hearing to determine whether probable
cause exists to believe an offense was committed
and to believe the accused committed the offense.
Under the new format, the preliminary hearing
officer still provides a pro forma verification
of court-martial jurisdiction and considers the
form of the charges, and the hearing officer
still makes a non-binding recommendation to the
convening authority regarding charging and
disposition.
The Article 32 officer -- hearing officer, however, can no longer compel a military victim to testify, and a victim now may decide not to testify at the Article 32 hearing. Furthermore, the corresponding new Rule for Courts-Martial 405 from NDAA Fiscal Year '14 specifically states that the Article 32 hearing "is not intended as a means of discovery," and although it is too early to tell the impact, the NDAA Fiscal Year '17 has modified an accused's ability to present evidence, defense and mitigation evidence. An accused will be limited to presenting evidence relevant to the issues of probable cause and the hearing officer's recommendation as to disposition. We don't know what the impact of that is going to be.

Site visit information and testimony at the JPP public meeting in January confirmed that due to these changes, the new Article 32 hearing is no longer a meaningful process to evaluate the strength of the case. Unless information is now being provided to the
convening authorities prior to making the
referral decisions, sexual assault victims do not
have to testify, and we heard from the -- from
the site visits that frequently, the victims
decide not to testify. Oftentimes, these victims
are testifying and are cross-examined for the
first time at trial. Some SVCs and VLCs are
limiting trial counsel's access to the victims,
and these factors and others may be causing
victims to be unprepared for trial and testifying
-- and -- and result in testifying poorly.

Counsel informed us that probable
cause can be easily established now at the
Article 32 hearing, so in many cases, the Article
32 hearing has become a paper drill or rubber
stamp based on documentary information and
completed without any witness testimony, and many
noted that they waived the hearing. This means
they merely provide the victim's statement and
minor documentary evidence to go forward to the
convening authority -- for the convening
authority to determine whether or not to refer
the case to trial.

In comparison, the pre-December-2014 Article 32 hearing was used to identify weak cases and prevent them from going to court-martial. Convensing authorities often used that hearing to vet cases, especially with sexual assault cases. Counsel pointed out that because the Article 32 investigating -- the Article 32 preliminary officer's recommendations are not binding, convening authorities in some cases are referring cases when hearing officers are recommending not to do so. They are either recommending not to do so because there is no probable cause or because there is no reasonable -- there is no reasonable likelihood that they will succeed at trial.

In fact, case information provided from the Services indicated that in Fiscal Year 2015, of the 416 sexual assault cases that were tried at general court-martial involved 32 -- 54 of those cases, the 32 hearing officer recommended against referring one or more sexual
offense charge, and the convening authority referred those charges nevertheless in 54 of those cases. The staff judge advocate in those cases also recommended referring those charges despite the Article 32 hearing officer's recommendation not to go forward with the sexual assault offense. Of those 54 cases, 46, the accused in 46 of those cases was ultimately acquitted of those charges.

This concludes my portion of the presentation regarding our report, and I will now be followed by Ms. Laurie Kepros, who will discuss referral and prosecution decisions. Ms. Kepros?

MS. KEPROS: Thank you. Thank you, Dean.

After the Article 32 preliminary hearing, the report of the preliminary hearing officer, the case file, the disposition recommendation all go to the general court-martial convening authority for disposition. At that time, the staff judge advocate provides
written pre-trial advice to the convening authority, and that has to include advice on whether each specification states an offense under the UCMJ, whether the allegations are warranted by the evidence that's in the preliminary hearing report, whether the court-martial would have jurisdiction over the accused and the crime, as well as a recommendation about what action should be taken by the convening authority.

A copy of that pre-trial advice that is prepared by the staff judge advocate must go to the defense counsel if the case is referred to court-martial, and in this process, the convening authority decides whether to refer some or all of the charges to a general court-martial. So procedurally, this is where the case is in the hands of the convening authority about next steps after the Article 32 has occurred.

In Fiscal Year '17 NDAA, there was a new Article 33 created, and that directs the Secretary of Defense to issue non-binding
guidance to be considered by convening authorities and judge advocates in exercising their duties concerning the disposition of these charges. In that guidance, the statute provides that they should take into account "principles contained in official guidance of the Attorney General to attorneys for the government with respect to disposition of federal criminal cases."

The official guidance that is referenced is contained in the United States Attorneys' Manual, and although that manual also recognizes probable cause as a threshold consideration, it doesn't necessarily warrant prosecution that probable cause is present. Rather, the manual advises attorneys that they need to also consider whether there is admissible evidence that will probably be sufficient to obtain and sustain a conviction.

Among the information in that earlier guidance in the report for the preliminary hearing officer, there can be consideration of
hearsay and other evidence that might not be admissible at trial, so this is kind of a different threshold in terms of the nature of the evidence that would be recommended for consideration.

The U.S. Attorneys' Manual further offers the guidance that prosecutions should be declined when there is no substantial federal interest in prosecution, the person is subject to prosecution in another state, or there is an adequate non-criminal alternative. The discussion to that section of the U.S. Attorneys' Manual further advises that no prosecution should be initiated against any person unless the government believes the person probably will be found guilty by an unbiased trier of fact.

The American Bar Association has also issued criminal justice standards for the prosecution function that speaks to what the standard should be for prosecution of a criminal charge, and in the ABA standards, the guidance is that beyond probable cause, the prosecutor should
consider "whether admissible evidence will be
sufficient to support a conviction beyond a
reasonable doubt as well as whether the decision
to charge is in the interest of justice." The
standard does note that a prosecutor may file
charges even if juries may be generally -- have
had a tendency to acquit people for those kinds
of crimes, so that caveat is there.

The Air Force has chosen to implement
a modified version of the ABA standard, and the
Air Force rule instructs that there must be not
only probable cause, but also that a trial
counsel should not institute or permit the
continued pendency of criminal charges in the
absence of admissible evidence to support a
conviction. Although it has not been formally
implemented through a Subcommittee presentation,
we were also advised that the Coast Guard and
Navy informally use a similar version of the
standard.

In Fiscal Year '14 NDAA, there was a
requirement that a convening authority's decision
not to refer certain sexual assault cases be reviewed either by a higher general court-martial convening authority or by the Service Secretary. There was a further amendment in the Fiscal Year '15 NDAA to require the convening authority's decision not to refer certain sexual assault cases be reviewed by the Service Secretary when the chief prosecutor of the Service requests such review, and just to be clear, it is the non-referral only that triggers those kinds of review.

We have done some additional investigation into that matter, surveyed the Services, and learned that since December 26th of 2013, there have been zero instances in which a Service Secretary reviewed a convening authority's decision not to refer a qualifying sex-related crime to court-martial. Since the 2014 change, there have been zero instances in which the chief prosecutor requested the Service Secretary review a convening authority's decision not to refer to court-martial.
In addition, since 2013, we gathered some information about how often the decision not to refer was forwarded for review to the next superior commander when the general court-martial convening authority decided not to refer the case to court-martial, and that was a total of 59 cases across the Services. In 58 of the 59 cases, the next superior commander agreed with the convening authority's non-referral decision, leaving only one case where there was a disagreement and the next superior commander elected to refer the charges.

Another issue that has come up in the site visits and in our investigation is the issue of pressure on convening authorities to refer sexual assault cases to court-martial. We spoke with many, many trial and defense counsel, and they overwhelmingly reported a perception that convening authorities feel pressure to refer sexual assault cases to courts-martial, due in large part to public and congressional pressure on the issue and the way that it is being
discussed within the Services.

Within our report, the Staff have collected a few high-profile examples. These are examples that have also been cited in some litigation brought by defense counsel who are alleging unlawful command influence in the handling of sexual assault cases. There have been instances cited in our report and in the media of members of Congress seeking to have individuals removed from command or blocking their appointment apparently in response to decisions to dismiss or reject the preferral of sexual assault charges, and there was even an article in the last week that, I believe is in your materials that references an admiral who is retired and prepared an affidavit concerning pressure that was brought to bear and led to what is reported as his pressured and unjust response to the situation, where he did not reverse a conviction that he felt was not warranted.

In our site visits, there was a consensus among the numerous people we spoke to
that the probable cause standard alone is too low and needs to be countenanced by other factors, such as the credibility of the victim, the likelihood of obtaining a conviction at trial. There are codes of ethics required of these lawyers within the JAG Corps because they are members of state bars, and many of these ethical codes do include these kinds of higher standards for the prosecution of criminal cases.

Several counsel expressed concern to us that they may be violating their state bar’s ethical rules by prosecuting cases in which they feel there is no reasonable likelihood of proving the charges at trial. They reported a perceived pressure on convening authorities to refer sexual assault cases without regard to the merit of the evidence in the cases, and they cited examples of weak cases that civilian jurisdictions either would not file or had already rejected for prosecution.

The vast majority of the counsel that we spoke with shared an impression that the
pressure is causing convening authorities to favor referral rather than deal with potential adverse consequences from not referring a sexual assault case such as career setbacks, media scrutiny, the possibility of their non-referral decisions being subjected to an elevated review, or questions about why the case was not referred. The lawyers' suspicion was that commanders may feel that sending a case to trial is the safe move, that it is going to trigger less scrutiny of their decision.

We did in our site visits also have the opportunity to speak with some commanders. One commander told the Subcommittee he forwards every sex assault case to the next general officer in the chain of command, "because I would not want to get it wrong and have someone get away, so I send it forward to let the system sort it out." One commander reported that he felt the need to do something immediately or face harm in his career. One commander felt that there was pressure to be transparent, although he
highlighted that transparency as the thing that was being expected as opposed to a pressure to send every case to court-martial.

Rule 306(b) that was mentioned earlier, and it is excerpted at page 8 of the report, does indicate that one of the factors a commander should consider is the views of the victim in deciding how to dispose of the case or what the next step should be. Many of the attorneys, both trial and defense counsel, reported that the merits of the case seem to have become less important than the victim's wishes when it comes to how the case is handled, and some prosecutors and commanders expressed a belief that allowing the victim, what was referred to as his or her "day in court" was itself a laudable end and was a -- justified the case proceeding to court-martial regardless of the merits of a case or the likelihood of conviction.

One commander noted there is pressure to go to trial if the victim wants to go to
trial, regardless of the merits of the case.
Additionally, counsel noted that guilty plea
agreements in their experience will not be
approved by commanders if the victim does not
support the disposition. There is a common
perception that the victim has veto power over
whether the commander will dispose of a case
through a court-martial or through an alternate
disposition.

The JPP has heard testimony obviously
from some of the same kinds of stakeholders that
we spoke to without attribution in the site
visits, and that testimony I think largely
corroborates the reports that we heard: for
example, testimony about cases being referred
when there was no chance for conviction, an
outcome that was identified as causing both the
accused and victim to suffer needlessly. The JPP
heard testimony that no convening authority wants
to fail to refer a sexual assault case to court
only to have it determined later that there was
additional evidence and that the case should have
been tried by court-martial.

In January of 2017, the Subcommittee conducted its own hearing on the standards that are currently being applied by military prosecutors and ethics officers across the Services, and although they noted there are certainly differences between the military and civilian justice systems -- for example, the military system's obligation to maintain good order and discipline as well as promoting justice -- there is also obviously a significant difference, in that prosecutorial discretion is vested in convening authorities rather than prosecutors.

All of the Services at this point have adopted a probable cause standard, but that was explained to us as being inadequate for some of the situations that present themselves to counsel. For example, sometimes a prosecutor cannot establish probable cause, but the victim believes she was sexually assaulted and tells the convening authority that she wants the case to go
to trial.

In some cases, the convening authority can rely in making decisions on the prosecutorial merits memo that is prepared by some trial counsel and may take into account some of those Rule 306 factors that we mentioned, and in some instances, that has been persuasive to convening authorities when the issue is whether the evidence is supported by probable cause.

Additionally, Article 34 of the UCMJ states that the convening authority cannot refer a charge to a general court-martial if advised in writing by the staff judge advocate that the specification is not warranted by the evidence.

There was testimony to the Subcommittee from a Navy representative that prosecutors in the Navy, because they are using that other standard, look at not only probable cause, but also whether there is a reasonable probability of success at trial. However, in the same meeting, we heard from a Marine Corps lawyer that, once probable cause is established, counsel are compelled to go
forward even if they do not believe there is a reasonable likelihood of success at trial, and several counsel spoke about their sense that sometimes going forward was just the right thing to do, even when the likelihood of conviction was low.

The perception that cases are being referred despite a low probability of conviction is buttressed by additional data that is already being considered by the JPP, has been analyzed by Dr. Cassia Spohn. And just to pull out some of, I think the more significant findings, in the data for Fiscal Year 2015, Dr. Spohn calculated for penetrative offenses that proceeded to court-martial -- and in the military, this is both cases that went to a trial and also involved a guilty plea -- that of those cases, 40 percent resulted in a conviction of any type of sexual offense, so the vast majority either was not even a sex offense conviction, and in 30 percent of the cases, the accused was acquitted of all charges. And of those cases where the sexual
crime alleged was a contact offense, only 25 percent of those cases resulted in any kind of sexual offense conviction.

Those conclude my introductory remarks, and I am going to turn the microphone over to my colleague Jill Wine-Banks to address additional issues.

CHAIR HOLTZMAN: Thank you very much, Ms. Kepros. Ms. Wine-Banks?

MS. WINE-BANKS: Thank you. I want to start by saying that it has been a distinct honor to serve on this Subcommittee and to have the opportunity to present our findings to the Panel, so thank you all for that opportunity and for listening to us. My colleagues have set a high bar for me in finishing up this presentation, but I will try not to let them down.

I will be addressing some of the additional issues that didn't quite fit into those two categories. The first one, you have already heard about the reforms that created the Special Victims' Counsel/Victims' Legal Counsel,
which greatly benefitted victims, and it has been
a good thing, but it has had some unintended
consequences that were brought to our attention
in our site visits.

One of those was that the existence of
Special Victims' Counsels/Victims' Legal Counsels
has reduced the prosecutor's access to the
victim. This was something we heard consistently
from the trial counsel and from investigators as
well. The victims who have Special Victims'
Counsel/Victims' Legal Counsel have fewer
interviews with the prosecutors as a result of
advice from their -- their counsel, perfectly
legitimate advice, but it does have an impact on
the outcome of the case because there isn't the
rapport that is developed with the prosecutor,
and the knowledge is not often garnered.

So in addition, we heard reports that
the interviews that do happen are limited in
scope because of advice from counsel, and so the
prosecution ends up with less information for
prosecuting the case. One specific piece of
evidence that was brought to our attention that
is not being given anymore or is limited now
because of this are the personal cell phones of
the victim, and while we recognize all the rights
of the victim not to provide it, we also
recognize the rights of justice if a case is
going to be pursued on behalf of the victim that
the prosecution have a full story. And the
prosecutors felt that they were not always able
to prepare the victim to combat what the defense
might have from the cell phone of the victim
because they didn't have it. And they -- they
felt in general that their rapport with the
victim had been hurt by this, although they
appreciated having the advice being given to
victims.

The second additional issue has to do
with the SAPRO training, and that is that there
is a serious and pervasive problem about the
consumption of alcohol and a misunderstanding
about what that means in terms of consent. And
it is attributed to this training, although
everybody we spoke to who is involved in the training said we do not say that one beer means you cannot consent. Nonetheless, I don't think we heard from any single member of the military in any level in any capacity that did not say that that is what they believed, and as a result of that belief, as this total misperception, it was sometimes hard to even pick a panel because panel members would say that is what they believed, and they could not set that aside. And that is because in part the training has led them to that and because the training is so pervasive and so often that they just can't set it aside.

So the staff judge advocates we have heard are starting to review the training materials and to try to ensure that the information communicated about consent and alcohol are more accurate. The Subcommittee views that as a very positive step and encourages its widespread adoption as a way of dealing with this, but we heard so many reports where the misperception just couldn't be overcome and
jurors -- panel members could not be selected
that we think that that needs to be addressed.

The other part of training which is
mentioned actually earlier than this third issue
is training fatigue, and that is because there is
so much training that there is a fear that
Servicemembers are starting to tune it out, and
that is something that is being addressed on some
bases and needs to be looked at.

Finally, the third additional issue
was the expedited transfer rule, which I am sure
you all are aware, it's a policy that allows
sexual assault victims who file an unrestricted
report to be transferred almost immediately at
their own request. Usually, the request is
submitted by their -- their victims' counsel, and
they can be transferred to any installation, and
they can even specify the installation. The
purpose of course is to put the victim out of the
reach of the perpetrator, to put the victim where
no one knows about the assault and the victim
does not have to deal with their -- their
colleagues knowing about it, and also to put them in places where there is good counseling, family, and other support, friends, family.

The problem that has arisen is that some commanders and even victims' counsel and defense counsel are believing that this policy is being abused and that some are reporting sexual assaults to get transferred from unfavorable locations to a more favorable location. Frequently, they request Hawaii or San Diego. And as a consequence of this transfer, there are several consequences. The victim is not available to the prosecution for -- and investigators for the kind of interviews that are necessary, and the victim often will say, well, I am not there, I don't have to deal with this, and they don't want to pursue the trial anymore.

And so that has presented a problem, and the defense counsel have used this transfer to challenge the credibility of victims who do pursue the case, arguing that they have filed false allegations just to get a transfer. And
that has been an issue in several trials.

So we then have a section which I am not going to address because it is very self-evident about what are some of the -- the summary of consequences of all of the issues that have been raised by the three of us today? And I am going to go right to our conclusion and recommendations.

The conclusions are underlaid by all the facts and all the evidence that we heard throughout our site visits and subsequent investigation. They show that recent legislative and policy changes have definitely benefitted assault victims, sexual assault victims, and they have also had some negative consequences, and not just in sexual assault cases, but apparently for the entire military justice system, because they have led to a higher acquittal rate and there is some lack of trust in the system as a result. These are issues that we think have to be addressed.

So for example, the Article 32 changes
that Dean Schenck has addressed have eliminated
the hearing as a source of discovery for the
defense, but there has been no compensating
offset to give any investigative tools to the
defense. Another example is that victims benefit
from Victims' Legal Counsel and give them a voice
in the case, but the defense views it as tipping
the scale. They frequently feel that when they
enter the courtroom, arrayed against them is a
victim advocate, a Victims' Legal Counsel, and
the trial counsel, and all they have is
themselves. And also, during the investigative
stages, they feel that they have limited access
to the victim, and this is trial counsel now
feeling this, and the limited cell phone. And
the other consequence is that they believe weak
cases are being referred because there is the
less robust 32 and because of the perceived
pressure, which has been addressed.

Another conclusion we drew is that
often, Article 32 officers, PHOs, as they are now
called, recommend against referral of charges,
but that recommendation is not followed. It is not a binding recommendation, and it is often ignored. 54 cases were referred by a convening authority in 2015 where the PHO had recommended that there was no probable cause or advised for some other reason against pursuing the case. Of those 54 cases, 45, or 80 percent, were acquitted at trial. So there may be some reason to think that we should have some rule that gives the PHOs a more robust voice in this process.

We need a way to get the convening authority to understand all the strengths and weaknesses of a case before he or she decides on referral. We need the guidelines which have been addressed, and we need the evidence that used to come from an Article 32. We note that good order and discipline and a belief that the assault occurred may justify referral even when conviction on admissible evidence may not be likely, but I want to go to page 29, where we talk about the need for guidance, and there -- despite these good reasons, a convening authority
should not be forced to make the critical
decision which has life-changing impact on the
victim and the defendant without clear guidelines
and a better sense of the evidence strength.
Convening authorities must be corrected if they
erroneously believe that a decision to refer a
case will have few consequences because the
consequences are great and severe.

Recent legislation directing the
Secretary of Defense to issue the non-binding
guidance to be considered by convening
authorities is about to happen. The formal
disposition guidance in written form we hope will
provide convening authorities with additional
considerations beyond whether the charges are
supported by probable cause in their decision
process.

Several prosecutors discussed their
practice in sexual assault cases of the
prosecution merits memo laying out the evidence
in the case, both good and bad, and the
likelihood of conviction, to aid the decision,
but while this seems like a useful tool to fill
the void that used to exist in the Article 32, it
is worth noting that under Article 34, the SJA
pre-trial advice is something that the defense
automatically gets, and therefore, the advice may
be parsed in ways that don't give the convening
authority as much information as they should.
And you will hear our recommendation on that.
There is no parallel in civilian jurisdiction
where information provided by a prosecutor to his
or her superiors would have to be provided, other
than of course exculpatory evidence, which of
course must be provided.

On site visits, counsel also discussed
their perception that there is a severe pressure
on convening authorities to refer cases, and that
has been addressed here, so I am not going to go
too much into that. And the perception of a high
acquittal rate is one that seems to be borne out
by the data, as Laurie has set forth. And
although our Subcommittee did not have time to
continue investigating the potential causes of
the high acquittal rate, we felt that it needs further exploration. We note that the authorizing legislation for our successor panel, the DAC-IPAD, may be able to conduct an ongoing review of cases to determine whether this is a serious problem.

The inherent difficulties in evaluating sexual assault case evidence combined with the widespread perception that convening authorities are referring weak cases have led to the belief by many of the Subcommittee's interviewees that the military justice system is weighted against the accused in sexual assault cases and that such one-sidedness, particularly in light of the catastrophic consequences of -- to an accused, needs to be addressed. The high rate of acquittal can feed into this perception and lead to a general mistrust of the military justice system.

The public may view the high acquittal rate as a result of a more aggressive approach to sexual prosecution, which in the sense that we
are bringing cases, then that would be a good
thing, but it also could be viewed as the
military's indifference to sexual assault that
we're not convicting people, and public loss of
confidence would be a terrible thing and has the
potential to harm the military enlistment and
officer accession rates as well as retention
rates. So we think there has to be a balance, a
system that treats sexual assault victims fairly
and compassionately and that also provides
defendants with due process.

That is the background for our
recommendations, which follow from all of the
problems that we have seen. Our first
recommendation is that the JPP Subcommittee
recommends that the Defense Advisory Committee on
Investigation, Prosecution, and Defense of Sexual
Assaults in the Armed Forces continue the review
of the new Article 32 preliminary hearing process
which in the view of so many counsel interviewed
during our installation site visits and according
to information presented to the JPP no longer
serves a useful purpose.

Such a review should look at whether preliminary hearing officers in sexual assault cases should be military judges or other senior judge advocates with military justice experience and whether a recommendation of the PHO against referral based on a lack of probable cause should be binding on the convening authority. This review should evaluate data on how often the recommendations of preliminary hearing officers regarding case disposition are followed by convening authorities and determine whether further changes to the process are required.

In addition, because Article 32 no longer serves as a discovery mechanism for the defense, the JPP Subcommittee reiterates its prior recommendation presented in its report on military defense counsel resources and experience in sexual assault cases and adopted by you, the JPP, that the defense be provided with independent investigators.

Recommendation 2: the JPP Subcommittee
recommends that Article 33 of the UCMJ case
disposition guidance for convening authorities
and staff judge advocates require the following
standard for referral to court-martial, and that
standard that we're recommending is that the
charges are supported by probable cause and that
there is reasonable likelihood of proving the
elements of each offense beyond a reasonable
doubt using only evidence likely to be found
admissible at trial.

The JPP Subcommittee further
recommends that the disposition guidance require
the staff judge advocate and convening authority
to consider all the prescribed guideline factors
in making a disposition determination, though
they should of course retain discretion regarding
the weight they assign each factor. These
factors should be considered in their totality,
with no single factor determining the outcome.

Recommendation 3: the JPP Subcommittee
recommends that after case disposition guidance
under Article 33 UCMJ is promulgated, the DAC-
IPAD conduct both military installation site
visits and further research to determine whether
convening authorities and staff judge advocates
are making effective use of this guidance in
deciding case dispositions. They should also
determine what effect, if any, this guidance has
had on the number of sexual assault cases being
referred to courts-martial and on the acquittal
rate, and the reason we mention the site visits
is that we found that the off-the-record
discussions on how the rules that we heard about
in Washington are being perceived and used in the
field was very helpful.

Recommendation 4: the JPP Subcommittee
recommends that the DAC-IPAD review whether
Article 34 of the UCMJ and Rules for Court-
Martial 406 should be amended to remove the
requirement that the staff judge advocate’s pre-
trial advice to the convening authority, except
for exculpatory information contained in that
advice, be released to the defense upon referral
of charges to court-martial. The DAC-IPAD should
determine whether any memo from trial counsel that is appended should also be shielded from disclosure to the defense. This review should consider whether such a change would allow the staff judge advocate to provide more fully developed, candid written advice to the convening authority regarding the strengths and weaknesses of the charges so that the convening authority can make a better-informed disposition decision.

Recommendation 5: the JPP Subcommittee recommends that Congress repeal provisions from the National Defense Authorization Act for 2014 and 2015, Sections 1744 and 541, respectively, that require non-referral decisions in certain sexual assault cases to be forwarded to a higher general court-martial convening authority or to the Service Secretary. The perception of pressure on convening authorities to refer sexual assault cases to court-martial created by these provisions and the consequent negative effect on the military justice system are more harmful than the problems that such provisions were originally
intended to address. It is one way of dealing with some of the perceived pressures on convening authorities.

Recommendation 6: the JPP Subcommittee recommends that the DAC-IPAD continue to gather data and other evidence on disposition decisions and conviction rates of sexual assault court-martials to supplement information provided to the JPP Subcommittee during military installation site visits and to determine future recommendations for improvements to the military justice system.

Recommendation 7: the JPP Subcommittee recommends that the Secretary of Defense ensure that SVCs/VLCs receive the necessary training on the importance of allowing full access by prosecutors to sexual assault victims prior to courts-martial. Such training will ensure that SVCs/VLCs are considering the value of a meaningful victim/prosecutor relationship in the advice they provide their victim clients and assist prosecutors in sufficiently developing the
rapport with the victim needed to fully prepare for trial.

Our final Recommendation, number 8, the JPP Subcommittee recommends that the Department of Defense Sexual Assault Prevention and Response Office ensure that sexual assault training conducted by the Military Services provide accurate information to military members regarding a person's ability to consent to sexual contact after consuming alcohol and the legal definition of impairment in this context, and that the training be timed and conducted so as to avoid training fatigue. The JPP further recommends that the DAC-IPAD monitor whether misperceptions regarding alcohol consumption and consent continue to affect court-martial panel members.

I am sorry. That was not our final Recommendation. Our final Recommendation, number 9, the JPP Subcommittee recommends that the Secretary of Defense review the policy on expedited transfer of sexual assault victims and
consider whether it should change -- it should be changed to state that, when possible, sexual assault victims should be transferred to another unit on the same installation or to a nearby installation. This change will help ensure that prosecutors have access to victims in preparing for courts-martial, will satisfy the need to separate the victim from the accused, and will maintain the victim's access to support systems while combating the perception that the ability to ask for these transfers has encouraged fraudulent claims of sexual assault.

Commanders and SVC/VLCs should also receive training on how relocating victims from less desirable to more desirable locations can foster the perception among military members that the expedited transfer system is being abused and on how such transfers can be used by defense counsel to cast doubt on the victim's credibility, possibly leading to more acquittals at courts-martial. The JPP further recommends that the DAC-IPAD review data on expedited
transfers to determine the locations from which
and to which victims are requesting expedited
transfers and to review their stated reasons.

Thank you very much, again, for the
privilege of having had this opportunity to
investigate this important issue and to report
back to you, and we look forward to your
questions.

CHAIR HOLTZMAN: Thank you very much.

Before we -- I ask my Panel Members to commence
the questioning, just because not everybody is a
lawyer on this Panel, and also because some of us
may not have vast experience with criminal law,
would you just somebody here take a stab at
defining probable cause for us?

MS. WINE-BANKS: Oh, gosh. Dean,
you're an academic.

(Laughter.)

DEAN SCHENCK: We were talking about
this the other day.

MS. WINE-BANKS: Yes.

DEAN SCHENCK: I like to say it's a
reasonable belief that the crime was committed and this guy likely did it. That is the layman's perception. When you're looking for probable cause for evidence, it is the same: probable cause, belief that the evidence is in this location. But the Uniform Code -- the Manual for Courts-Martial I believe has a different definitions. They will use probable cause in some places, so I can't confirm that that is the solid response under the Manual.

MS. WINE-BANKS: I think maybe it helps to compare it to the other standard, which is beyond a reasonable doubt, and I think just the language of those two, probable cause is, well, it probably happened. Beyond a reasonable doubt is that you're pretty well convinced that it happened, and the standard of course for conviction is beyond a reasonable doubt. So the question is is it -- you know, at what level in between those two do you bring charges?

Do you have an obligation -- I of course operated under the federal rules, and that
-- we had a pretty high standard for whether we would ever bring evidence to a grand jury and ask for an indictment, which is the closest I can come to how cases get to court-martial. We would not go on just probable cause without thinking about do we have sufficient admissible evidence and will a jury likely convict, because there is no point in going through this process if it isn't, and that is -- I think that is the importance of where we're going with what we think should be the standard for referral.

MS. KEPROS: Actually, I would like to just provide an example of how I think this might play out. I think you can meet a probable cause standard if an accuser says this person did this thing to me, and it constitutes a crime. The distinction becomes what if there is more to the situation beyond what is provided in that probable cause analysis? So the person made this report, but there are text messages that show that claim is questionable. There are bizarre motives or biases that are not made clear in that
initial report. The report may not paint the
full picture of the situation or what is
ultimately going to be considered credible to a
fact-finder at trial.

And coming from a state where we have
a very low-bar probable cause preliminary
hearing, I can tell you, you don't get into the
kind of things that often become determinative in
what happens at trial when you are solely looking
at probable cause.

CHAIR HOLTZMAN: Okay. Admiral?

VADM(R) TRACEY: So I'm the non-lawyer
here. I have lots of questions on this. So
what's the difference practically in what the
outcomes were of the old Article 32 investigatory
and discovery process and this probable cause
threshold? How much more insight did the -- I
know they got a lot more material, but how much
more effective insight did the convening
authority have from that old process compared to
this probable cause threshold?

DEAN SCHENCK: I can answer that since
I lived through the old process. The convening authority would -- the government would provide a list of witnesses to the hearing officer, and witnesses were called, including victims. The hearing officer could also call witnesses to make a determination. The accused was also given a right to make a statement, written or through counsel or sworn. There were a lot of opportunities for the defense to provide mitigation and defense information and evidence at those hearings.

The convening authority would receive the recommendations as to disposition and a summary of the transcript at that hearing, and the evidence, and that would go to the convening authority. So in past Article 32 hearings, all the -- all the witnesses testified, so you knew who saw what and who did what to whom. And I think I have said in the past, many of these sexual assault offenses occur when there is alcohol involved and other unit members, so the 32 involved everybody from the unit testifying,
so you knew everybody who was there, everything
that happened.

And so the convening authorities would
actually just say send these cases to the 32 and
sort it out. And then the DNA would come later.
But you would get factual information on which to
draw conclusions whether or not to refer, and the
hearing officers could also tell -- recommend to
the convening authority that they add additional
charges to the charge sheet. There were all
sorts of things that would happen after that 32
occurred because of that additional information
provided to the convening authority.

And when we say convening authority,
we mean the special court-martial convening
authority. The special court-martial convening
authority would appoint the 32. The 32 would do
this rigorous investigative hearing, very very
time-consuming in many of these cases, with lots
of evidence, and then the transcript was
provided. When the victim testified, they
sometimes in many cases did verbatim transcripts
so you could get exactly what was said. Then that, with the recommendations as to disposition, would go to the special court-martial convening authority -- that is the O-6 -- to take a look at it, and in many of those cases, the O-6 would say I think this is a BCD special, I don't think it's a general court-martial, or I think we need to dismiss this charge or that charge.

And so actions could be taken at a lower level, or, again, charges could be added, and then it would go to the staff judge advocate to provide pre-trial advice, and that pre-trial advice would go to the convening authority, the general court-martial convening authority. Lots of activity prior to these cases going to referral at a general court-martial in the past.

MS. WINE-BANKS: I think one of the things that you got in the Article 32 was an ability to evaluate credibility because you had actual witnesses, as opposed to an investigator saying through hearsay this is what I heard, this is what I was told. And you also did have the
opportunity for the defense to counter, which is something of course that doesn't happen in the grand jury federal process, where it is one-sided. The prosecution witnesses, including a victim, you would never not have the victim testify at the grand jury -- or, I shouldn't say never, but you would likely have the victim testify.

VADM(R) TRACEY: Do changes to Article 32 apply to more than Article 120 cases?

DEAN SCHENCK: Oh yes. Article 32 has changed for all offenses.

VADM(R) TRACEY: All cases, yes. So it would be possible -- I know it was not your mandate -- but it would be possible to compare and contrast whether there are similar effects being felt in non-Article 120 cases?

DEAN SCHENCK: Sure. I mean, we could look at the -- I think so, absolutely.

MS. KEPROS: Although Admiral, I will tell you it was reported to us, and it seems to be borne out by some of the statistics, that the
vast majority of cases that are actually going to trial are sexual assault cases.

VADM(R) TRACEY: Understood. But still, it would be worthwhile to look at that comparison.

MS. KEPROS: Yes.

VADM(R) TRACEY: What can you know about the probability of success at trial given the changes in the way that Article 32 is? Who -- anybody in this organization, even if you put a judge into the PHO seat, what could they know about the probability of success given the way that the process has changed?

MS. WINE-BANKS: Well, from my perspective, I think trained lawyers, trained prosecutors, trained judges, part of what we get in our experience is an ability to predict is this a good case or a bad case? It is something that is -- not just as a prosecutor, but as a defense lawyer, I would tell my client maybe this isn't worth your money to bring this case because here is why, legal issues or factual issues.
And if you have any experience at all, to some extent, you can predict. You can always be wrong. I mean, many cases are convicted where you go whoa, how did that happen? But it is -- it is a -- it's a professional skill. So I think there is some ability to predict. I don't think that is changed by the Article 132 in particular because the question applies no matter what: how do you ever predict?

VADM(R) TRACEY: But I think we have heard that in most cases, or a large majority of cases, the -- it's a paper exercise now, and you would get that from -- it's an MCIO investigator's report consuming that is the major content of that sort of a paper report, and you think that the right skill set sitting in the PHO chair could make some determination on --

MS. WINE-BANKS: If we don't change the standard in some way, maybe not, but it is a more experienced person who has a better ability, but the issue about the Article 32 and the lack of -- the PHO can't judge credibility. The PHO
is -- we did hear consistently, it's a paper, rubber-stamp exercise that many defense counsel are waiving now, but some say they still do it just because. I don't think -- did either of you hear on any of our site visits anybody say I still do it because I gain X? I didn't --

MS. KEPROS: I heard some reports like that. I would say the vast majority --

MS. WINE-BANKS: With a specific gain?

MS. KEPROS: Yes. The vast majority of defense counsel were not participating across the Services in the Article 32 in any meaningful way, but there were times that they said we do actually want to show some of our case because we think there is perhaps exculpatory evidence that we think could be meaningful in what happens next. There could be perhaps a text message again that might undercut the credibility.

And I keep referring to text messages because it seemed to come up in pretty much every case, and I can tell you, in civilian practice, it seems to these days, too. But I think
although I definitely have the concern that was
shared with us that the less robust 32 that we
now have probably isn't going to allow decisions
to be as of -- as informed or as of the same
level of quality as maybe they have been if there
had been a, you know, thorough vetting of all of
the evidence, I do agree with what Ms. Wine-Banks
is saying that experienced trial lawyers who have
run into comparable evidence start to get a sense
for where are there going to be problems with the
jury? Where are there going to be problems with
the fact-finder?

What kind of -- you know, they may get
the packet, and they say, well, here are 15
unanswered questions in this interview. Any good
defense attorney is going to be able to do
something with that. And maybe they can answer
those questions through interviews with the
victim off the record or not. You know, that is
obviously an open question. But I do think when
it comes to probability, nobody has a crystal
ball.
It was very impactful to me, that
statistic that both of my colleagues referenced
that there were 54 no probable cause findings by
PHOs. Well, they were right 80 percent of the
time, so obviously, they had a pretty good --
they were a pretty good predictor in their role
of where was there going to be an acquittal of
these charges, even with the narrower scope of
the hearing.

DEAN SCHENCK: I want to put one
correction on the record. So of the 54 cases
there were, as Ms. Wine-Banks said, 45 of them
were acquittals on those sexual offense charges.
I think I said 46.

But nevertheless, there's two things
I wanted to point out that -- that I have noticed
that are in the military justice system that are
not -- that the civilian sector has that we don't
have in the military justice system that the 32
would benefit, why it would benefit the military.

One is this -- defense investigators,
you know? So if we had defense investigators,
defense investigator information would be
provided to the 32 officer, right? And if you
had a military judge, the military judge could
sort it out, or senior military justice experts,
judge advocates, not environmental law judge
advocates that may be sitting as the 32 officer.
So that -- that is one distinction.

The other distinction is this Special
Victims' Counsel factor, and -- and I -- you
know, Laurie can correct me if I am wrong, but
the Special Victims' Counsel is -- is such a -- a
factor to consider in this process, this military
justice process, now. That Special Victims'
Counsel is appointed immediately, immediately.
They get to submit paperwork. There is -- so
there's really three parties, even though that is
not supported by the case law.

But, you know, when you think about
it, there's three parties involved. So if the 32
officer is just looking at probable cause and the
defense doesn't have an investigator and there is
another lawyer representing the victims' counsel,
that 32 officer is just going to say, okay, probable cause, I think it is -- I think it is met, you know? I've got a statement, it's reasonable belief a crime was committed. Is this a crime? The cops say this is a crime. The investigators have investigated it. They say that this possibly is a crime. Okay. Now I am just going to go forward.

So in the civilian sector, I don't know how it works, but I think those are the two things in the military that we -- this process has -- has caused a change in the impacts of the 32 hearing.

VADM(R) TRACEY: How long ago did the Air Force adopt the ABA standard, do you know?

MS. SAUNDERS: July of 2013.

VADM(R) TRACEY: So there's at least some history to look at as to whether they are having a different outcome than Services who have not formally adopted that?

MS. KEPROS: Yes. I think that would be a great thing to do.
VADM(R) TRACEY: Yes. And I have one last question. I don't know that you had the opportunity to do this in any of the many incarnations that you had for this Panel: do we know what, if anything, has changed in the convening authority's preparation for their responsibilities since all of these changes were made to the UCMJ?

DEAN SCHENCK: I mean, so one thing that has changed was the -- in -- they changed the rule for what the commanders could consider. They used to be able to consider the performance of the Servicemember, the character of service. That was one of the factors that could be considered. That was removed --

VADM(R) TRACEY: I am actually asking about, I know that there is training fatigue, but are the court-martial convening authorities subject to the same training fatigue, or have they sort of been left to figure this out on their own?

DEAN SCHENCK: No. I believe they
have required training. Also, they go to -- the
JAG school conducts the pre-command training
course that provides them with training before
they even become convening authorities.

VADM(R) TRACEY: So you could look at
how that content is targeting these kinds of
issues for convening authorities?

DEAN SCHENCK: And its impact on their
perceptions regarding command influence --

VADM(R) TRACEY: As well as how
frequently people step into these roles because
they are doing it under such circumstances they
skip over that training en route to that goal.

MS. KEPROS: Yes. We did not
investigate that. I think that might be worth
looking into. We heard glancing references to
some of their training in various, you know,
contexts and various hearings, but I definitely
don't think I have any kind of big-picture view
of how it has been working.

VADM(R) TRACEY: I have to tell you
guys, as a line officer, it would be hard not to
believe that you were being guided to refer
charges, that it was the policy intention that
you would refer rather than not refer charges.

   MS. KEPROS: Well, and I think that is
why our recommendation that a look at why are
only non-referrals subject to higher review? Why
-- you know, if there needs to be review, why are
you only picking one category? It sends a pretty
clear message the other path is the wrong thing
to do, at least in the eyes of Congress and the
superior, you know, authorities within the
military.

   MS. WINE-BANKS: Admiral, I think you
have really hit on one of the key consistent
pervasive findings that we had, which was we have
really only addressed this one part of the
pressure, which is the referral, which is a
policy that clearly puts some pressure on. But
there was an absolute -- everybody felt, at every
level, from the commander convening authorities
down to the lowest-level person we spoke to, that
there was political pressure and public pressure
to proceed, and that careers would be negatively
affected and that there would be -- commanders
would say, well, if I refer it, it's not going to
hurt my promotion chances, and the system will
sort it out. If they are innocent, they will be
acquitted.

But particularly because of the high
volume of cases now, cases are taking two years,
and in the meantime, everybody's career is on
hold and may never recover from having been on
hold. So there are very serious consequences,
and there were some that we talked to who said it
is the convening authority's responsibility to
make that hard decision. And we are finding that
that is not happening. I think you are
absolutely right that the pressure is just
blatant and evident.

CHAIR HOLTZMAN: When you said
political, you are not talking partisan politics?

MS. WINE-BANKS: No, no --

CHAIR HOLTZMAN: Okay. I just wanted
to clarify that for the record.
MS. WINE-BANKS: No, no, no. It was a feeling that Congress in general supports a stronger stance on prosecuting rape allegations, sexual assault allegations, within the military.

VADM(R) TRACEY: And in fact the authority of the military to manage this issue was threatened --

MS. WINE-BANKS: Yes.

VADM(R) TRACEY: -- and so for even less self-serving issues than my career is at risk, the convening authorities may perceive that it is important to demonstrate that they are acting in accordance with the spirit of what the Congress clearly signaled.

A tactical question, if I may? And this is my last question. You may not have had an opportunity, but I think that you said there were 59 cases that were reviewed at the next higher level as to whether -- do you know whether they were exceptional in terms of how weak the cases were, or were they consistent with -- did we see an example of people who did have the --
the strength of character to exercise the leader's responsibilities, or are these just really weak cases that stood out as --

MS. KEPROS: We just have the numbers. We don't have the qualitative data. I don't know if the Staff maybe could access any examples, but, you know, the high percentage of agreement I thought was very striking because obviously, it shows that there were convening authorities who had the courage not to refer in some cases, and, you know, senior officers agree with them.

VADM(R) TRACEY: But it would be good to know whether the 58 that were agreed to, sort of if you lined them up against the majority of cases that were referred, they would look a lot like them, or do they just stick out as exceptionally weak?

MS. KEPROS: Absolutely --

VADM(R) TRACEY: That would be a very interesting --

MS. KEPROS: What made the difference?

VADM(R) TRACEY: Yes.
MS. KEPROS: Right.

CHAIR HOLTZMAN: Thank you. Mr. Taylor?

MR. TAYLOR: Madam Chair, since we're about halfway through the morning session, could we have a short recess, please?

CHAIR HOLTZMAN: Yes, that would be a great idea. We will recess for ten minutes.

(Whereupon, the above-entitled matter went off the record at 10:29 a.m. and resumed at 10:40 a.m.)

MR. TAYLOR: Yes, I'd like to start by adding my thanks to that of the Chair, to this subcommittee, and specifically to you three who have been stalwart and persistent and patient. Not only in seeking good solutions to hard challenges, but also to your unfailingly good sense of humor as you have tolerated our questions. So you really have my gratitude as does of course Judge Jones for chairing the effort over the last nearly three years. I'd like to follow up with some point
of information to the question that Admiral Tracey asked. It's been my pleasure for the last seven years almost to be the capstone lecturer for the Senior Officer Legal Orientation course at the Army's Legal Center and School. And that course is attended by colonels and lieutenant colonels going into command. Some have already started command. But I have monitored the progress of that course over the years.

This year, for example, it's been expanded by about three extra sessions in order to fulfill a requirement now for all Army colonels going into command and all the reserve components. That is the National Guard and Army Reserve, as well as active duty. So for the last two months, and I will next Friday be in Charlottesville once again delivering the capstone lecture to eighty-five colonels and lieutenant colonels. So the Army has taken this training issue very seriously.

One of the things that General Odierno pointed out in hearings regarding the future of
command relationships and whether commanders
should still be in the driver's seat on this
issue, is that the Army is so serious about it
that it's making every effort to be sure that
when commanders assume these responsibilities,
they understand what's at stake. And they
understand what the issues are. And I have
monitored the program of instruction as I go down
on a nearly monthly basis for the last seven
years, at least for seven to eight months of the
year, to see exactly what they're teaching. And
the content of that course that's devoted to the
kinds of issues that we have been discussing.

Really from soup to nuts has risen
dramatically over the years. So I would commend
to our follow on, as I said to the new Chair, we
are filling up her inbox very quickly.

(Laughter.)

MR. TAYLOR: But I would commend to
them that they take a look at what the Army's
legal corps is doing in this regard, because I
think it will be helpful. I don't know what the
other Services are doing. But the percentage of
the instruction, the required instruction, that
is devoted to these topics is significant. Now
there are other optional topics that they can
take as well. But everyone must learn all these
basics. So I just mention that, Admiral, in
response to your question.

So I'd like to start by asking Dean
Schenck just a couple of questions about the
current state of the law and how much flexibility
in Article 32 PHO has to actually go beyond
making a probable cause look. Taking a probable
cause look. If the PHO wants to, for example,
can they receive additional evidence if it's out
there?

In other words - let me, while you're
thinking about that let me ask the question in
another way. If you have a defense counsel, as
Ms. Kepros pointed out, who wanted to get
information before the PHO, thinking it might
make a difference in what kind of recommendation
the PHO would make to the convening authority.
Can that occur? Is it just a question of whether or not - it wouldn't be ruled inadmissible as irrelevant because the rules of evidence don't apply.

MS. KEPROS: Could I address that?

MR. TAYLOR: Sure.

MS. KEPROS: Only because the rule has just changed, we don't know the answer to that question. They have taken out, in the rule, reference to defense mitigation explicitly. But it is unclear if the remaining language refers to relevancy would still allow it to come into evidence. And because the rule has just changed, we don't have any practical view of what that is going to look like. How PHOs will interpret that rule change. So we're a little on the fence about what it means.

MR. TAYLOR: I see.

DEAN SCHENCK: Right. And as I understand it, well at least the Army had a DA PAM which provided a script to the Article 32 Hearing Officers. And it would provide the
script, you have the right to make a statement. You have a right to call witnesses. Those rights in that script. And when I questioned the folks in the field since there was no guidance to the field, I was wondering whether they were still following the script.

In other words, when they actually hold the hearing, is the accused told they have all these rights? And many counsel told me, yes they were being told they had all these rights. So in other words, the hearing officer reads the script, you have all these rights. But then nobody would testify. You get the rights read to them, and then nobody would testify. And since defense counsel didn't want to show their cards, they wouldn't call anybody. They don't want to show their cards at that point.

And since the convening authority cannot consider the quality of Service, a characterization of Service, there's no reason to call anybody from a defense counsel perspective. Because I would show you my cards, right? And so
I found it troubling because the accused is sitting there, being told he has all these or she has all these rights. And then nobody is called, and everybody walks out of the room. I found that to be troubling. So I think Laurie is right.

There’s no structure out there. And so from a defense counsel perspective - let me just clarify. I was never a defense counsel. I never was a defense counsel. But from a defense counsel perspective, if you’re going to have a hearing and your client is going to be told he has all these rights and then everybody gets up and walks out of the room with no witnesses testifying, I’d be waiving that hearing too.

MR. TAYLOR: Well, I appreciate that. In my younger years, I actually was a defense counsel for the Army JAG Corps. I always viewed the Article 32 as an opportunity to find out all I could. And at the same time, to start in bits and pieces if strategically and tactically it made sense. Sort of laying the foundation for
what I hoped would be a better outcome for my
client.

So I'm just wondering, again, how
people are thinking about this if they are
pushing the limits a little bit. If they are
testing the waters to see what they can do. You
mentioned, for example, a text message that might
be instrumental in the issue of whether to refer
a case or not. So I guess we just don't know the
answer to that question right now.

DEAN SCHENCK: And I don't think the
hearing officers are going to try to make new law
by calling a bunch of people when the standard is
probable cause. And we heard that. Although
some of the Services did use reserve trial judges
as hearing officers. We heard other - I heard on
the site visits I went on, that the hearing
officers were like admin law attorneys. Or
environmental law attorneys. They were still
judge advocates, but they weren't military
justice focused or experts in military justice.
So those attorneys, I would imagine, are
definitely not going to start calling witnesses.

    MS. WINE-BANKS: We were concerned
    enough - I mean, we did mention at the bottom of
    page ten, top of page eleven, this change to the
    rule. And saying, because it hasn't been
    implemented, we're not sure whether a PHO will
    allow any defense information in. So that's
    something that needs to be monitored going
    forward. DAC-IPAD should definitely see how does
    this play out.

    MS. KEPROS: And I think interpreting
    that is also going to drive other choices. If
    you are the PHO, but your decision has no weight
    practically, why would you do a searching
    inquiry? What's the point of it if it's not
    going to matter in the end? If you're a defense
    counsel and you're not going to be presenting
    information to anybody who has a say in the
    outcome, why would you show your cards? Just
    from a tactical point of view.

    You know, in my system in Colorado,
credibility is not relevant at the probable cause hearing. So I just save it for trial. And I'm sure the prosecutors really wish I didn't. Because it can be very damaging.

DEAN SCHENCK: Not to mention the Special Victims' Counsel prior to any disposition, that Special Victims' Counsel is going to get to talk to the victim to determine what the victim would like to do. And you're the hearing officer and now you also have this other attorney who may complain about what you did. I don't know if I would be proactive in my hearing.

MR. TAYLOR: And so moving to the next step. You mentioned that in some cases, there were prosecution memos that were prepared. Do you have a sense of how often that happens? Is it fifty percent of the cases or rarely or most of the time?

DEAN SCHENCK: I think in one of the hearings, the Navy did it in almost every sexual assault case.

MR. TAYLOR: And that would go to the
Staff Judge Advocate? And then that's where it
would stop?

DEAN SCHENCK: Right. The Staff Judge
Advocate can present it to the convening
authority.

MR. TAYLOR: But if he does, then he
has to show it to the defense counsel.

DEAN SCHENCK: That's right. So they
weren't going to the convening authority. So I
think in the past we did do prosecutorial merits
memos for Staff Judge Advocates who weren't
criminal law experts. Right? So the SJA would
say, oh. Do a prosecutorial memo. I've got to
go see the convening authority about this case.
And so you would lay out your cards on that memo.

MR. TAYLOR: It seems to me that one
reason a prosecutor might do that would be if the
prosecutor felt that because of the ethical rules
governing that person's jurisdiction, they had
some ethical obligation to be sure that they had
it on the record.

MS. KEPROS: Exactly.
MR. TAYLOR: But they did not think
the case was strong.

MS. KEPROS: Exactly.

MR. TAYLOR: And that way, if it ever
came up again, then they would at least show that
they were able to present to the Staff Judge
Advocate their honest view of the case. Is that
about right?

MS. KEPROS: Exactly. And our
understanding is that does happen. That does
happen.

MR. TAYLOR: Right. So then once it
gets to the Staff Judge Advocate, did you get a
sense that the Staff Judge Advocates feel as if
they are having to pull their punches on these in
order to satisfy the convening authority's
desires to prosecute more of these cases? Or do
you think that in the conversations they have
with them that are not in the review itself, that
they are pretty candid about saying, you know,
boss? I don't know whether this will fly or not
but maybe we should try it.
MS. WINE-BANKS: I certainly heard from Staff Judge Advocates who said that they were honest. They weren't frequently listened to. But that they were, and I think I heard that more often than that - although it wasn't unheard of - that a Staff Judge Advocate said, I know what the outcome wanted was. And I geared my remarks to that. But I think more commonly it was that they were honest.

MS. KEPROS: And I don't think we spoke to a lot of Staff Judge Advocates, just to be very clear. We really did focus most of our interviews on lower level Staff. Although I do think it's notable that in that statistic that we were discussing about the 32, in those fifty-four cases where the PHO recommended against the referral that the SJA supported the referral in all of those cases. And so it shows that even that 32 officer's perspective was not tipping SJA away from recommending referral.

MR. TAYLOR: So then when you get to the next step, and that's the actual decision
process. You mentioned that there was at least someone who anecdotally provided evidence that maybe a victim deserves his or her day in court. Do you think that was a major factor in many cases? Let the victim's case be heard? Or do you think people were willing to take a more reasoned view of that and say, there's no way anyone will really believe this?

DEAN SCHENCK: I think it was - they have a paper case. They have a statement. The SJAs aren't speaking to the victims. They have the Victims' Legal Counsel and the Army working for them. Right? So they've got a paper case. I've got a statement. It could be credible. I haven't met with the victim. I don't know. So we don't have the 32 to vet that case. So we're going to take it to trial. You know? And the junior counsel that think they're going to lose? Well, that's what you do. You take the case to trial. Because I am not going to recommend that we not refer this case because I've got probable cause and no one has testified.
MS. KEPROS: And I don't think we can quantify that. Because we did just sort of do these snapshot visits to try to see if there was consensus around certain issues. But at the same time, I also have to wonder. Because we did hear mostly from trial counsel this value of the victim getting their day in court. Did that drive the decision to prosecute? Or is that a way to spare your morale after you are losing trial after trial after trial? And say, this must be for something because I'm losing all my cases and I'm working really hard.

And I want to feel like I am trying to get the victim the outcome that he or she wants. So, you know. That's sort of to me a chicken and egg question. I don't doubt their sincerity in those statements and I understand the value that is identified there. But, you know, I can see how it could flow from the outcome instead of causing the prosecution.

MR. TAYLOR: So I'd be interested in knowing each of your views on this question.
What do you think the right answer to that question is in terms of how much weight should be given to the day in court argument when you have a case that's otherwise pretty weak? So drawing back from where we are on the ground to the thirty thousand like a Google map, what do you think the better answer, the best practice, is to how much weight that reserves?

DEAN SCHENCK: I'm going to go off on a tangent with my response. Because I believe at least one Service is conducting and vetting the cases before preferral, working with the Special Victims' Counsel and the victim to figure out what's best for the victim and whether or not the case can win. Because that's the way you can deal with the case at the ground level. And you don't know - you can't ask that question unless you look at each and every case. Each and every victim is different. Each and every accused is different.

And so, there's got to be - to me, there should be a more hands on approach prior to
preferral. Boom. This occurred last night.

Last night? Special Victims' Counsel, meet with
the victim right now. Let's figure out where
we're going with this. Because I - back in the
old days, we didn't have Special Victims'
Counsel. We had victim witness liaisons. I was
the prosecutor, Chief of Justice, Special
Assistant U.S. Attorney, and the victim witness
liaison. I had to deal with the victim. I had
to talk to the victim about whether or not we
should go to trial.

And that didn't - I didn't have any
problems. I had cases where I could tell the
victim, this is a loser case. Here's what you
said at the time of penetration. You know? And
then you told me you didn't want to have
intercourse because you were in a dumpster.
These are the things that you need to consider.
But I can administratively separate this accused
because he also grabbed someone's arm or did
something else.

And work it at that level, because
those victims - they want - not necessarily -
they may not want to go to trial. They just want
- if the accused did something to them, maybe
they just want him to go away fast. And if you
vet that before preferral, or even right after
preferral - the problem with after preferral is
then you get the review process. And that seems
to me the difference between what used to happen
and what happens now.

MS. WINE-BANKS: I think the answer is
a very complex one. Because in the military,
there are special considerations that need to be
taken into account for good order and discipline.
Then you have the due process rights of the
defendant and you have the rights of the victim.
So it gets very complicated as to whether it is
right to just automatically weight the scales for
the victim and say, you get your day in court.

On a neutral - you know, not being on
the defense side or the prosecution side. I
would say it's not fair to any of the parties,
including the military Service, but both the
victim and the defendant, to automatically weight
the scales for one side or the other. I think
victims are frequently hurt when they go to
trial, they testify, and then they're not
believed. And there's an acquittal. That has to
take a toll on them. And they've publicly had to
talk about a horrible experience. So I think
there's a lot of factors that have to go into it.
And I don't think I could say yes or no. I would
have to say, like Lisa, that it depends on the
totality of factors.

MS. KEPROS: Professor Taylor, I think
your question is systemic sort of on the largest
possible scale. Because it's really asking the
question of should we have a disciplinary system
in the military that is like the criminal justice
system in the U.S.? Or should we have more of a
civil model legal system? As a defense attorney,
I have had the opportunity to represent clients
who come from other countries where their
criminal law system looks more like a civil
system. And cases are prosecuted, literally,
based on the wishes of the victim or not.

And I've had cases where the victims recanted and my client's saying to me, why are we even here? My case should be gone now. And I have to explain that the American criminal justice system contemplates the government taking an affirmative role in making decisions about what is proper for the society, and setting the standard for the society in setting some boundaries on what sort of resources that society is going to put into addressing that wrong.

At the same time, trying to assure the members of the society they will be treated fairly, that a bald allegation is not going to upend their lives in innumerable ways. So it's a very delicate balance. I can't say, is a civil remedy a better way to go? I don't have enough experience with it. I just know it's an alternate path. But it isn't the path that at least from the professional background I bring to this committee, I have any experience with.

I think it's important to remember
that an adversarial court process is punishing to
victims, to defendants, to every witness. I've
never met somebody who said, oh I was part of a
criminal case and it was great. You know?

(Laughter.)

MS. KEPROS: But then people don't
come to court with tremendous anxiety, that they
don't suffer trauma. I think those are real
things for everybody on every side of the case.
It's a very confrontational and sometimes brutal
process. As much as we try not to make it that.
So that is something I'm really sensitive to in
weighing the pros and cons of the case going to
trial.

On the other hand, I don't think it's
reasonable to expect prosecutors to have a
crystal ball, and to only bring cases that they
are certain they are going to win. Because we
all know unexpected things happen. Who's going
to be on the jury? It's a pretty important
factor. You can't know until you get there. But
there are certainly reasonable ways to make some
educated guesses about what a likely disposition is going to be.

And I think maybe it would be better to provide the kind of resources that Dean Schenck referenced, and make sure the victim is getting supported. And not making outcome of a criminal trial the end all and be all of whether there is any sort of relief or success in the process.

MR. TAYLOR: Thank you, all three of you. Madam Chair?

CHAIR HOLTZMAN: Thank you very much. Mr. Stone?

MR. STONE: Dean Schenck, let me start since you started, and I'll go in order. I guess first I have an information question. Before the Panel went out, the subcommittee went out, the JPP promulgated a bunch of questions. Did you get those questions before you went out? Do you remember that? For the site visits?

MS. WINE-BANKS: Yes, they were the basis of our site visits.
MR. STONE: Okay. What I thought I was going to see, because I thought you were collecting data for us, was a tabulation without names on it of the various Servicemembers that you interviewed. How many from each Service, and whether they were prosecuted as defense counsel, SVC, SJAs, commanding officers, and some kind of tabulation of their answers to their views. But I didn't see a tabulation. Is there a chart like that somewhere that we get?

DEAN SCHENCK: No. Actually right now the site visit reports are being finalized to make sure there's no way to identify or attribute the comments to locations.

MR. STONE: Right.

DEAN SCHENCK: I'm not sure if those reports are going to include that information that you're requesting. I would have to refer that to -

CAPT. TIDESWELL: Mr. Stone, sir? There were site visit reports that were signed off by the subcommittee members and weren't
finalized, in a sense. At the direction of Chair
Holtzman, the Staff was asked to sort of sanitize
those so you couldn't draw a line back to who may
have made a comment by name. So we do have a set
of sanitized site visit reports that Ms. Holtzman
and I are looking at. So it will say something
like, a trial counsel. It would not say
lieutenant so and so. So we tried to make them
as anonymous as possible. Because that's what we
promised the participants.

MR. STONE: That's not what I was
asking, though. I was asking whether they had
been tabulated. If you talked to two hundred and
eighty people, I'm trying to find out how many
trial counsel without names. How many senior
SJAs, how many defense counsel. Because the
comment was made here, which is what I assumed
from the tenor of the report, that a lot of these
people were lower level officers.

But I still want to know were they -
the second question was, and I don't know if
that's in there that relates to that, did they
have six months on the job or have they been a
trial counsel for two years? Or three years?
Because we ask every person up here so that we
can judge their input how much of the system they
have seen. And so that's why I was asking you
if we're going to get a tabulation that supports
-

DEAN SCHENCK: Right. I don't think
there's going to be specific numbers. But I
think in those different - each site report is
different. But each site report is going to tell
you whether we were speaking to investigators and
what training they received. I'm not sure about
the actual years of Service. I can't remember.
Because we signed up on those site reports awhile
back. I think you'll be able to garner the
information that you're looking for in those site
reports. When we filled out the - you know, we
did them by hand. And then we had minutes
transcribed.

MR. STONE: Right.

DEAN SCHENCK: We did annotate on the
forms that we took with us, the number of people,
whether they were defense counsel, their ranks,
that kind of stuff.

MR. STONE: Okay, good.

DEAN SCHENCK: So we did annotate. I
mean, that's not to say they made it to the final
reports. Because the final reports are only
maybe ten pages.

CAPT. TIDESWELL: So the Staff can
tabulate that for you. We don't have it now, but
we could do that.

MR. STONE: I guess the reason I'm
asking is because throughout the draft report
that you got and we're discussing, sometimes it
says some counsel, sometimes it says some defense
counsel, sometimes it says it says an
overwhelming majority of all counsel. Again, we
heard this as a snapshot and I agree. But I
don't feel comfortable making recommendations on
anecdotal evidence that may be an outlier. And
it sounds like, to the extent this is a snapshot,
that's what we're getting.
The reason I say that is let's go to the numbers that every member here on the Panel has heard you give us several times. About fifty-four cases where the PHO recommended against going forward and you said in forty-six of the cases, it was an acquittal.

DEAN SCHENCK: For that charge.

MR. STONE: Do we know how those numbers compare to what was done five years ago or ten years ago?

DEAN SCHENCK: No, sir. We do not.

MR. STONE: So maybe those are less or more, but we have no baseline?

DEAN SCHENCK: That's right. But I believe our recommendation pertaining to that data simply recommends that the DAC-IPAD go further with the anecdotal information we received.

MR. STONE: Okay.

DEAN SCHENCK: In other words, we are not drawing final conclusions, final recommendations for action to be taken. We are
recommending to the follow-on investigative Panel
to look at those issues. Because we did draw on
perceptions that we got from non-attribution
discussions in the field.

MR. STONE: Okay. Well, one page, and
I only saw it in one place. Tell me if I read it
wrong. It said that there were convictions in
those forty-six cases, but not on the most
serious sexual assault charge. So it's not like
those individuals were acquitted on all charges.
Isn't that correct?

CHAIR HOLTZMAN: I think the statement
was that they were not convicted on any sexual
assault charges, period. They might have been
convicted on other charges. That was my
understanding.

MR. STONE: Is that right?

CHAIR HOLTZMAN: Yes.

MR. STONE: So then they might have
decided to plead guilty to a straight assault
charge rather than a sexual assault charge in the
disposition. But I gather you didn't collect
those fifty-four cases and afterwards interview prosecutors and defense counsel. So we know whether that was a result of plea bargaining or a decision by counsel to offer to plead their guy guilty to something less in a difficult case.
Right?

MS. WINE-BANKS: That's absolutely correct. That was post-site visit research.

(Simultaneous speaking.)

MR. STONE: I mean, I was a prosecutor and I know that ninety-five percent of my cases pled out. And typically on a lesser included charge. But that didn't mean that I didn't have probable cause to go on the major charge. It's just that I wanted to dispose of the cases. All right. Let's go to the next part. Let's assume for a second -

MS. SAUNDERS: Mr. Stone, I have some clarity on that. I did gather the data for that and I can provide you more specific information after the meeting if you want. But in all of those fifty-four cases, they went to court on one
or more sexual assault charges. There may have been other charges with those charges, and they may have been convicted on some of those other charges. But on those where we talk about the acquittals, they were acquitted of the sexual offenses.

MR. STONE: I know, and maybe you can find out for us which of the other ones included the others.

MS. SAUNDERS: And very few of those were pleas.

MR. STONE: Now, the other thing I don't understand and maybe you'll clarify for me about those fifty-four cases is you keep saying that the PHO was proved correct. The PHO decided that he didn't think there was probable cause. The outcome of the trial was that there wasn't proof beyond a reasonable doubt, a much harder standard to prove. It seems to me it's entirely possible that the PHO was wrong in all fifty-four cases. And it's just that these were hard cases, which he recognized.
There was probable cause to go to trial. But the trier of fact was not convinced beyond a reasonable doubt. That doesn't mean that the PHO was proved right. And it doesn't mean in those forty-five cases where there were acquittals that there's an eighty percent rate to show that the PHO was right in those eighty percent cases. So maybe you can explain to me how those different standards are proved from different outcomes, why you draw the conclusion that the PHO was always right.

MS. KEPROS: I made that comment, so I'm happy to address that.

MR. STONE: Well I want to hear from Ms. Schenck. She presented that data.

DEAN SCHENCK: Well, my comment to you is I don't believe we said the PHO was right. I believe we said that this needs to be looked at further. And if you look - I'll draw your attention to our recommendation specifically. And it specifically says that we recommend the DAC-IPAD to look at the data and determine how
often these recommendations are not followed and see if there should be some modification to the process.

    We did not take the fifty-four cases and look at them individually and drive out to the sites and interview counsel. We absolutely did not. But we absolutely did not sit here and tell you that the PHO was correct. We just draw your attention to that potential issue regarding a non-binding recommendation by a hearing officer who determined that there was no probable cause.

    We're not saying he's right or wrong. We're just saying that the next Panel needs to look at that issue and do exactly what you're saying. Exactly what you're recommending. And that is to delve deep into the cases and determine, is there an actual issue regarding the thirty-two recommendations being non-binding in these cases. That's all we're saying.

    MR. STONE: Well -

    CHAIR HOLTZMAN: Excuse me, Ms. Kepros wanted to answer that question.
MR. STONE: Yes. Sure.

MS. KEPROS: Yes, thank you. I agree with you. The standards are not the same. But let's say we had a situation where the PHO had said no PC. And yet, at trial, there were convictions. There was evidence that the fact finder found substantiated proof beyond a reasonable doubt. Then I think we would say, oh. Well, what value is there in even having the PHO's opinion. Because they would be out to lunch in our assessment. And when you have a high correlation, and that's all it is. I can't say more than that because of the nature of evidence at trial and at the 32 is not identical as we discussed.

That's an eighty percent correlation. That, to me, is a — it's a signal that the PHO could provide some insight into assessing what cases are likely to be successful at trial or not. And your points on the burden are absolutely legitimate.

MR. STONE: But the PHO's job is not
to decide the likelihood of conviction. It's to
decide probable cause, right?

    MS. KEPROS: That's the current rule,
yes.

    MR. STONE: That's right. And in
twenty percent of those cases you cite, he would
have dismissed the prosecution and the individual
was convicted of the sexual assault offense,
right?

    MS. KEPROS: That appears to be the
case.

    MR. STONE: So he was flat wrong and
twenty percent of those defendants would have
walked away.

    MS. KEPROS: Well, and I don't know if
those twenty percent were wrongly convicted,
either. I mean, you know there are a lot of
variables and I'm not disputing that.

    DEAN SCHENCK: I also want to point
out the likelihood of success factor we're
talking about, that the hearing officer might use
in making a recommendation. That is because the
hearing officer has to make a recommendation regarding disposition. So that recommendation—we don't know—again, we don't know what we don't know. But that hearing officer may have recommended that that case be disposed of at an Article 15. Or a lower court-martial's level rather than the general court-martial. So we can't really armchair quarterback when we're talking about that twenty percent or the other percent.

MR. STONE: Or the eighty percent. I agree. That's why I don't find those numbers, just as numbers, help me get to any kind of conclusion. Because we also don't know whether those numbers have changed over the past five or ten years, since we know just like—we heard that forty percent of the cases result—only forty percent result in any kind of conviction. I think that that's been a pretty consistent number over many years. So we don't know that any of these changes have changed any of the numbers except that the recent numbers are in
All right, let's go for a moment to your recommendations on Article 32 and your observation that it's no longer used or able to be used as a discovery mechanism, and your new recommendation about that. That's your recommendation number one. In your report on the defense services, which we approved, you mentioned Article 32 and exactly this same problem. And we, based on that, agreed to recommend, as did the Response Systems Panel before us, that defense counsel ought to get some independent investigators and experts and more resources.

So I guess what I'm asking is, you brought that to us. We accepted that the rules have changed, and it means defense counsel get less discovery because of the way Article 32 proceedings have been changed. What exactly are you asking for us to do now when again, and we haven't really had that much time to see how it's developed. But they haven't even gotten more
resources yet, the defense counsel. So why
should we monkey with this again now? I have the
eyearly reports and the pages marked, where you
talk about Rule 32 being changed and that is the
justification for investigators and resources.
And we approved it.

MS. KEPROS: I don't know if that's a
question.

MR. STONE: Well, the question was
what more are you asking us to do right now?

DEAN SCHENCK: We are asking you to
recommend to the DAC-IPAD that they do further
investigation regarding the value of the 32. And
whether or not the 32 being a probable cause
hearing is a valid process, or needs some
modification. We are recommending to you that
you move our information that we are providing
you to the DAC-IPAD. That's what we are asking
regarding the Article 32.

And we are appreciative that you've
adopted our recommendation to give the defense
counsel resources for investigation. Because if
in fact no changes are made to the 32 process and it remains a probable cause hearing, I would be willing to bet that those defense investigators are going to provide valuable information to the probable cause assessment.

MR. STONE: Well, if they do that, doesn't that take care of the problem without further changing the Article 32?

DEAN SCHENCK: Again, we are not asking to change the Article 32. We are not recommending that you recommend to change the 32. We are merely recommending that you recommend to the follow-on Panel that some evaluation is done on the meaningful process - whether or not the Article 32 is a meaningful process or whether or not changes need to be made. And whether or not the 32 - exactly what you were referring to, the value of the non-binding recommendation in that process.

MR. STONE: Well, I mean I think that runs through quite a few of your recommendations. I wasn't - I didn't see in my commission when I
got appointed that I had a job to recommend what
the next committee can do. I'm pretty sure they
can handle that. And they have a scope that may
or may not include reviewing Article 32s. I
think they probably do. But I don't think that's
what I expected when we sent you out on to take
interviews that were not going to be either
public or available to the public and not
ascribable to individuals by name, that we were
planning to talk about what's going to happen to
the next Panel.

Let's go to recommendation three,
though. That you recommended that guidance about
acquittal rates be changed to the commanding
officers. If you didn't look at historical
acquittal rates, why should we be making
recommendations about them when we could compare
them with your snapshot evidence? Don't I need
to have the old rates and then some evidence
about what's happened in the last year in order
to be able to compare those?

DEAN SCHENCK: Again. I believe under
recommendation three, we are recommending that
the DAC - recommending to you that the DAC-IPAD
class conduct their own site visits and research to see
if the convening authorities and the SJAs are
making use of guidance. Modified guidance. We
recommend that the guidance be modified, but we
recommend that there's research regarding how
that's working in the field by conducting site
visits and further research.

MS. WINE-BANKS: If I could just
interject. I think in our assignment from you,
we did have the list of questions and we went
forth and I think the Staff can provide you with
how many people on each site visit fit into each
category. Because the reports will say, this is
the opinion of trial counsel. Because we met
with them all at once, not individually. But we
met with trial counsel, then we met with defense
counsel. And that the reason that we're making
recommendations for future is because some of
these things are so new that you cannot give a
conclusion as to whether it's working or not
working.

And we heard enough about possible issues with these, and we learned from the existence of other changes that have been made that have been interpreted in the field differently than perhaps intended in Washington. That we felt that these could fall into the same category and needed to be looked at as they are implemented. The Article 33, it says that after it's promulgated - because it isn't even promulgated yet. So how can we make a conclusion or recommendation that says, this is how it should be changed? It hasn't happened yet.

So that's the reason that we took this approach. We wish we could have made specific findings of how to solve all the problems that were identified. But we had a limited term, and some of it just wasn't implemented well enough or fully enough for us to make sensible recommendations.

MR. STONE: Let me ask you a couple questions about the items you mentioned when you
were giving your first statement. You talked
about, and the report talks about the importance
of the prosecutors developing rapport with the
victim needed to fully prepare for trial. It's
in your recommendation number seven. Part of the
reason we're here is because victims felt that
the relationship with prosecutors did not serve
them well because prosecutors - they are not the
prosecutors' client. And the victims have on the
line their emotional, social, and professional
career. And that is not the primary goal of the
prosecutor, which is why they moved to Victims'
Legal counsel and Special Victims' Counsel, and
special counselors.

So tell me why you think rapport with
the prosecutor should play any role at all? I
dismiss it totally. The prosecutor should be
independent, look at his evidence, and see
whether he's got it. And if the victim decides
for her own reasons not to be forthcoming to the
prosecutor because the victim, he or she, decides
it's going to ruin their career. And they would
just as soon swallow the problem. I don't really think that's any of the prosecutor's concern. He's not getting cooperation and he says, I don't have a case to go from.

One of your comments in here in this report is about whether - if I can find the page, here - whether a slap on the rear end or a kiss should be considered serious. We heard testimony, and I believe it was in our hearings at the U.S. District Court, from a victim, a male victim who was kissed on the mouth. Another male victim, I seem to recall, pinched on the butt and made fun of to the point where he practically had a nervous breakdown.

So, yes. I think each case does turn on its own facts. But the rapport with the prosecutor was not a crucial determination. That's why we gave these people counsel who were their counsel. So tell me more about this rapport question and why it should be important to us.

MS. WINE-BANKS: I think the role of
the SVC and VLCs is not at all in question. And we see that as a very separate distinct role in connection with the victim, and a very valuable role that helps them throughout many things. There's often collateral misconduct. They have a VLC who can say to them, if you pursue this case, you know, the fact that you were drunk and disorderly may cause an end to your career. So think about that. That's a very valuable role.

But I think to the extent that a victim wants to proceed, the victim will want to have a good outcome. If the victim chooses not to proceed, we know how much weight is given to that. Then the victim shouldn't proceed. But if the victim is wanting to proceed, then the victim needs to have a rapport with the prosecutor in order to enable a good outcome on that aspect of their life.

The Victims' Legal Counsel can deal with other issues. The Victims' Legal Counsel is not prosecuting the case, but the victim is choosing to continue the case and without having
the proper relationship and information to the prosecutor, it's likely to not turn out as well as the victim might want.

MR. STONE: What do you mean by rapport? I, as a prosecutor, have witnesses and I'm sure you did, who I hardly knew at all. And I called them, and they testified, and I knew what questions to ask. And they answered them. But I didn't have a real rapport with them. I don't know what you mean by rapport. Tell me more. I mean, other than them being a witness who shows up and asks the questions that are answered.

MS. WINE-BANKS: Well, it's a question of answering the questions that need to be answered, providing the evidence. And if they have reasons for not providing evidence, it may end up, as has happened in many cases that we heard about, where at trial the prosecutor is blindsided. The defense has actual explicit text messages or pictures that are contemporaneous with the alleged offense. And there's an
acquittal.

If the prosecutor knows about it, I've always said to any client either as a prosecutor or a defense lawyer, that you have to be honest with me and disclose everything. I can't handle things that I don't know about. But I can minimize the impact if I know about it. And I think what we're talking about in terms of rapport is really just the relationship of open and candid conversation between the two, and providing the information that's requested.

MR. STONE: But now that person has their own counsel. And if they're going to be open and have a rapport, presumably it's with their Victims' Legal Counsel. And so it seems to me the question should be between the prosecutor and the Victims' Legal Counsel, can you find out? Is there anything more I need to know? Is there anything that's going to come out that's going to embarrass the victim? You are the person who has a lawyer client relationship with them. Is there anything you want to tell me? And it will be up
to the victim.

Presumably they have the sense to tell
their counsel, their Victims' Legal Counsel, and
give them permission to pass it on to the
prosecution. But they may decide that they don't
want to. They may say to their Victims' Legal
Counsel, there's lots of text messages but I
don't think they're relevant. I don't think
they're relevant because they date from - I don't
know - a year ago. Or whatever. And so I'm not
going to turn them over. Or there's pictures and
I don't think they're relevant for the same
reason. They're so old or some other reason.

But the point is, isn't the
relationship supposed to be the rapport is
through counsel at that point? Just as if you
had any witness at trial who was represented by
counsel. You wouldn't go to them directly
anymore.

MS. WINE-BANKS: I don't want to
debate over the word rapport. And if there's
another word that would make you more
comfortable, I think you're quite right. That in some cases the victim may feel more comfortable talking to their own lawyer. And the question is whether that counsel will share that information or tell their client that sharing that information would help in the outcome of the case.

That would be a perfectly fine alternative to direct conversation. But it's a question of getting the information to the prosecutor. And that's where it's not happening. That's what the prosecutors are saying.

MR. STONE: Okay. Let's turn, for a minute, to the last recommendation, nine. When you went out, did the subcommittee talk to actual victims? Did you talk to victims?

MS. WINE-BANKS: No, we did not. And it was an issue I raised that I would have liked to talk to victims.

MR. STONE: Okay. The reason I ask that is because we did, as a Panel, hear victims. And I heard even more victims when this JPP sent
me to the training program in Charlottesville
that the SVCs all undergo. And I heard repeated
victims tell me that the most important change,
and the most important thing in their life was
the expedited transfer. And the reason was, as
you said, we just heard from even the Panel.
Sometimes what the victim wants is just to get
away from this.

MS. WINE-BANKS: Right.

MR. STONE: And if they can get an
expedited transfer their life can begin,
hopefully, again. And they explained how the
real problem with expedited transfers were that
they didn't get to specify where they were going.
And that they didn't even get to specify what
occupational specialty they were going to be in,
because it wasn't always easy to place them in
the same job for which they had been trained
somewhere else. And that also was complicated
sometimes. Because if the new job had an
arrangement or relationship with the old unit,
then they didn't gain much out of the expedited
transfer and how difficult it was on their lives
and on their spouses' lives. And if they had a
family, spouse's job, kids in school.

But that was still the most important
item. I think that a recommendation that
expedited transfers should go to the same
installation or nearby installation without
talking to victims, based on a snapshot, seems to
me a difficult one for me to place much store by.

I know, and defense counsel have an absolute
right to say to a victim on the stand, you've got
an expedited transfer out of this didn't you?
And if that impeaches their credibility, that's
something that the prosecution - everybody that
whoever puts the witness up there knows.

But that's also true if an expert
witness gets on, and they say, please tell us how
much you got paid for coming here today. That's
always something that's put before a witness. We
know that. But, you know. Knowing that a
victim's emotional, professional, and social life
is undergoing great trauma, I don't understand
why - and maybe you can tell me - what it is you
think is being done wrong with expedited
transfers?

MS. WINE-BANKS: Let me just take a
stab at that. When we were talking about this,
and if you read the underlying report, not just
the recommendation. It was, for example, at
bases that are fifty thousand people and huge
acreage. Where it is possible to transfer within
the same installation, and for the victim to
never see the perpetrator. For the victim's new
unit to never know about the ongoing case.

Then we felt that there was a reason
to say, maybe they shouldn't go to Hawaii. They
should go on the same base. And we took into
account, yes you would have to have the same - an
appropriate job in the new unit. You couldn't be
asked to take a lower level job or a different
MOS. That would all have to play into this.
We're just saying, look at whether this is having
a deleterious effect on the outcome because it's
hurting credibility.
I personally, if I were cross
examining a victim, wouldn't think that would
hurt their credibility much. Yes, I wanted to
get away from this horrible person who abused me.
And I was able to do that. I didn't see,
personally, that as such. But we heard that it
affected the perception of credibility and was
leading to acquittals. So if you want to have a
good outcome - I mean, if the victim is going to
go through the horrible process of having to
testify to a terrible thing that happened, and
having to delay their career in many ways because
of the pendency of this, then you want to have a
good outcome. And so if this hurts a good
outcome, we think it's worth looking at to
enhance the opportunity for a conviction on
behalf of the victim.

MR. STONE: I think that's a fairly
logical conclusion. But I can't imagine that an
SVC wouldn't run that by his victim before the
victim asks them to definitely ask for an
expedited transfer. So I find it sort of
confusing without speaking to victims that you'd want to make a recommendation about that. When we heard actual testimony from Servicemembers here as a Panel about how much difficulty they were having finding an appropriate job slot for expedited transfers. That normally when vacancies come up in the military, they come up on not an immediate schedule.

And to move somebody when you don't have an immediate opening that fits their skill - we heard, again, at that meeting in the - that was held in the Federal District Court about people that had been transferred. And they had to give up their skill in order to get the transfer. So I wondered about that.

There was one other topic - give me a second. I'm not sure I can recall what it is right now. I think it had to do with another one of these recommendations. Do we have any comparison, even subjectively from subjective data, about the pressure that Servicemembers think the high ranking officials are under to
bring criminal prosecutions and sexual assault
cases that date in the past and currently? Ten
years ago and now? Five years ago and now?
Because I think there's always been this
perception that they were under pressure to go
ahead and do these cases. Certainly since 2010.

DEAN SCHENCK: I think you would have
to look at records of trial at the voir dire for
Panel members. You would have to look at the
appellate opinions from the military courts, the
Service courts, the Court of Appeals of the Armed
Forces. I think you would have to look at
command influence motions that were granted at
the trial level based on this issue. And of
course, we did not do that.

MR. STONE: And I gather - also now,
I remember the other topic I wanted to get to.
You make some recommendations about making
victims available to prosecutors quickly and
investigators quickly. And to be sure that they
are - and this has to do with the transfers, I
guess - that they are available to be interviewed
more than once if need be. And the effect that
that will have. That they should be reporting -
you mentioned even here today - the night that it
happens, shouldn't the next day they be
recommending some kind of action be taken?

Without talking to victims, how do you
- how do we - balance what we've heard when
victims say and witnesses who aren't victims say
that their emotional trauma often leads them to
delay reporting, to delay being able to recall
what happened until they've calmed down, to feel
revictimized when they're interviewed more than
once. They don't mind one interview. They know
they have to give one interview. But they don't
really wish to be cross-examined more than one
time because it makes them emotionally undergo
the whole situation again. They know they're
going to have a second interview and be cross
examined at trial. Why do you think that those
concerns are not paramount, the victim's
interests?

DEAN SCHENCK: We're not saying the
victims' interests aren't paramount. I believe you are referring to recommendation seven, where we recommend to the Secretary of Defense that the Special Victims' Counsel and the Victims' Legal Counsel get training on the importance of allowing the trial counsel access to the sexual assault victims. That's all. We're not saying anything about the victims and their concerns.

MR. STONE: Right. And that's the one that - again - turns on rapport that I didn't understand. Okay. I think I've got it now.

CHAIR HOLTZMAN: Thank you. Let's just go to the question that the victim's interest is paramount. Isn't - doesn't the military and doesn't our society have a very strong interest in the conviction of people who have engaged in sexual assault? Isn't that a critical and paramount interest too?

DEAN SCHENCK: I think convictions are very important to justify the military justice system and the perception of the civilian society about the military justice system. Because if we
have cases going to trial where the victims are
testifying for the first time, and the accused is
acquitted, the perception may well be that our
system is rigged. That the Panel members don't
believe there is any such thing as sexual assault
in the military Services. I think it's a bad
perception of the military justice system.

I also think it's very bad for the
victims. I've had trial judges who have tried
these cases telling me that all they've been
trying are sexual assault cases. And the screams
when the accused is acquitted is unbearable.

CHAIR HOLTZMAN: Doesn't that happen
sometimes when the victim is not properly
questioned? Responding to Mr. Stone's point.
The first interview with the victim, the victim
may be very emotional. They may not be able to
get to the bottom of everything in that
interview. They may have to do it a second time.
If you come into trial unprepared, can't you lose
that case? Whereas if you had a second
interview, you might have been able to clarify
some of the holes and prepare for a response to that. Isn't that a desirable outcome or am I missing something here?

DEAN SCHENCK: Yes. And also,
evidence evolves. The trial counsel does not have all the evidence at the first time they are interviewing the victim.

CHAIR HOLTZMAN: So there's a legitimate reason to question a victim a second time or a third time.

DEAN SCHENCK: Absolutely.

CHAIR HOLTZMAN: In order to win the case. And there is a paramount interest in protecting, not just that one victim, but in protecting the society in the military against sexual assault. And the conviction sends a strong signal that sexual assault is intolerable and unacceptable. Is that correct?

DEAN SCHENCK: Absolutely.

CHAIR HOLTZMAN: Okay. I just wanted to get that clear. Let me ask about the issue of pressure to bring cases. And I think we were
getting to the corrosive impact of that. I think it's - I mean, I think maybe somebody or maybe you would elaborate a little bit more about what impact that has on - because it was mentioned in the report - on recruitment, on other issues, on morale and other issues in the military. The sense that somehow these cases are unjustified, or the convictions may be unjustified when the process is unjustified or unfair. What is the consequence of the view that the military justice system is systematically unfair?

MS. WINE-BANKS: Well, we heard all of the things that you've mentioned. We heard that it was impacting the overall view of the military justice system, not just the prosecution of these sexual assault cases. We heard that people were not re-enlisting because they felt that the system wasn't fair. So we heard all of - and we list a number of negative consequences in the report where we've - and what we heard, a lot of the pressure was sort of unidentified amorphous
from society. And so we couldn't come up with a
solution to say, let's remove the pressure by
doing X because it was not specific enough.

The only one we dealt with was the
review by a higher authority if you don't report
it. Because nothing happens if you set forward
with a case, it's fine. There's no higher
review. If you don't, you get a review. And
that has the impact of causing people to err on
the side of proceeding despite possible belief
that there is no adequate evidence to support a
case. And that's bad for the system, it's bad
for the victim, it's bad for the defendant.

MS. KEPROS: You're right. We did
enumerate some other consequences in our report.
There is a list on page twenty-seven of six
specific issues that we've pulled out. But it
isn't just the immediate participants in the case
who are suffering the impact. We heard that
there is skepticism sometimes among Panel members
because they've heard a lot of cases that don't
seem to have a lot of merit are going forward.
So then when they sit on a case, they are skeptical looking at that case.

Then they think that, well just anything can get to court these days. And so, I should be very concerned about the case that's being brought. I should be skeptical that this victim is trying to get an expedited transfer or whatever rationale is being put forth that they shouldn't find the allegation credible. So it really does have a corrosive effect. I can't imagine after - we heard in these site visits about some installations with one hundred percent acquittal rates. At least that's what was reported to us.

If you're a victim in that context, why bother? Why bother? We already know from the general victimology literature that victims are reluctant to report in the most - you know - slam dunk of cases where there's physical evidence, they don't even report. So I just - I think you can't put too fine a point on how, if nobody trusts the system, it's a problem. And if
you are a person considering enlisting in the military and joining a place where you are literally putting your life on the line, are you going to want to do that if you also feel like you will be treated unfairly if somebody makes a false accusation against you? Who would put someone in that position?

DEAN SCHENCK: It's bad for recruiting both ways. I've had people approach me and ask me if I thought their daughters should go in the military because of the sexual assaults occurring there. I've also had mothers of sons - as myself, I have a son who's adopted. He's at the Naval Academy. A midshipman. And his whole life, he's seen me work on this sexual assault in the military Services issue. Going to press conferences and I was afraid for him to go into the military and perhaps be the victim of a false report. Or perhaps engage in frat-like conduct, with alcohol involved, and then be charged. And then have to register as a sex offender. I mean, it's just bad for recruiting all around.
MS. WINE-BANKS: But it's also bad on the victim's side. Because if you know that there's a hundred percent, an eighty percent, even a sixty percent chance that it's going to be an acquittal, and you know the process is going to be painful and will re-traumatize you, I think it may lead to a conclusion of I'm not reporting this. I'm going to suck it up and I'm just going to live with it. And that's an unfortunate, terrible consequence of a high acquittal rate.

CHAIR HOLTZMAN: So what you're saying is that the calculation of what is good for any part of the system is much more complex. If you say oh, gee. This really helps the victim. They don't have to have a second interview. They don't have to tell anything more. They don't have to show themselves. All those things are good because that would traumatize the victim.

But if we have a situation where we can't get convictions, and victims don't feel they have a solution in the justice system, what kind of consequence is that? So one has to be a
little bit more nuanced and sophisticated and capable of thinking more complexly about this situation to try to address it. And it seems to me that we have to have all the parts working properly.

The prosecution has to be effective. Defense has to be effective. The victim has to be shown compassion. So that the system works credibly. And if we don't have - and as you said, Dean Schenck - convictions are extremely important from every point of view.

MS. WINE-BANKS: I think you said the convictions are an important outcome and element of this. And I would say yes, it is.

Convictions after due process to both the defendant and the victim. And in that situation, you're going to have the best outcomes. And you're right, that in order to do that when evidence changes and the prosecutor learns a new fact, they need to be able to ask the victim about that changed evidence. Otherwise, there will be too many acquittals.
CHAIR HOLTZMAN: And also with regard to the rapport with the victim. We heard in our subcommittee - I mean, it's not reproduced here. And she's not here today, unfortunately. Lisa Friel. But Lisa, and I'm probably understating her credentials, wasn't she twenty-eight years -

MS. WINE-BANKS: Yes, twenty-eight years as a Manhattan prosecutor.

CHAIR HOLTZMAN: She prosecuted sex crimes in the Manhattan DA's office for twenty-eight years.

MS. WINE-BANKS: And now she advises the NFL on sexual offenses.

CHAIR HOLTZMAN: Correct. Wasn't she particularly concerned about the issue of lack of rapport with the prosecutor?

MS. WINE-BANKS: Yes. She was. And you know maybe a word that would be less flashpoint would be just access. Just the ability to ask the questions and get answers to significant developments in the case.

CHAIR HOLTZMAN: And also it may be
that – well, we'll leave that for later. Can we
go, for a minute, to the consequences to the
defendant of this idea that all cases should be –
that all cases should go to trial? What did we
learn about that? I know, Ms. Kepros, you
probably have a good handle on that as well as
the other members of the Panel. But I'd like to
hear that. Because we need to know all the
consequences.

MS. KEPROS: The immediate effect of
being accused, it certainly stops somebody's
career. We heard that. You know, where they go
and how that works is going to vary pretty widely
because of the diversity of situations that are
going to arise. But we've heard about years to
get to trial. So in the fiscal year 2015 data
that we report on, there were 140 complete
acquittals. People that were not found guilty of
anything at court-martial. Having been charged
with a rape or with some kind of sexual assault.

CHAIR HOLTZMAN: A hundred fifty out of
how many?
MS. KEPROS: That was out of I think 520 or so. I'm sorry, I've got that number here somewhere. It was roughly a quarter where there was nothing. And I've already spoken about the percentages where there was some sort of sexual conviction. And of course in the remainder there was non-sexual convictions. We've heard sometimes there is a conviction for adultery, for example. Or some other kind of misconduct that wouldn't, in the civilian sector, maybe even necessarily constitute a crime.

So that just gets to the point of having your trial. In the meantime, people have tremendous anxiety. They know their careers are jeopardized. There were reports described in our report from defense counsel about Servicemembers who literally just give up and try to work out some kind of plea bargain. Because they cannot handle the uncertainty and distress of having this charge looming over them for this long period of time.

Losing track of their role - let's say
they're even ultimately acquitted. You know, they have lost years off their career. You don't get years back. You don't get your youth back. None of us get that. And that's just a loss they're not compensated for in any way when that acquittal comes down. So it's very life altering. Certainly, obviously, if someone is convicted of a sex crime, our broader society treats that very seriously.

And aside from the punishment that's inflicted, they are going to suffer collateral punishments from registration to now everyone in Missouri is wearing an ankle bracelet to residency restrictions. Whether they are allowed to live in certain towns. Whether they can ever go to their child's school. I mean, the litany of other consequences are seemingly always growing.

MS. HOLTZMAN: I guess I have one final area that I'd like to kind of address. Although I don't know that we have an answer to it. And that's contained in this news report.
It was put into our materials just recently about an admiral who was retired. Who, according to the news reports - I have no idea whether it's actually accurate. But the admiral said that he - I guess that was at a point when the convening authority still had clemency powers, which they don't have today. That he wanted to grant clemency because he didn't think the case amounted to a sexual assault.

And he was told by various people in the military, I guess they were - I don't know if they were superior to him or collaterally colleagues, I don't know - that his action would undermine the status of the Navy and would make Congress and the public feel that the Navy wasn't taking these cases seriously. So he decided, in the end, to do something that was against his conscious. And now he's coming forward with that.

Aren't we putting commanders in really a totally untenable position? When they have to choose between - I mean, he said it wasn't his
career. Because he was retiring. But one can imagine, easily, that a career is going to be jeopardized by a decision that's made. And how do we put people in a position where that happens? I mean, one of the reasons we have life tenure for federal judges is that they don't have to choose between putting bread on the table tomorrow and whether they're going to convict somebody who's innocent.

And yet, we're setting up this system here where there appears to be, from what was heard in these site visits and this most recent article which I find very troubling. I mean, I hope it's wrong. But if it's right, we're putting people in untenable positions where they have to make such a choice. And we can't always rely on - one, it's wrong to put people in that position. And two, we can't always rely on their making a decision in favor of what's just for another person. I know it's not one hundred percent addressed in this report, but how do we handle this additional information about the
pressures on the commander? Does that reinforce
the recommendations that the subcommittee has
made?

MS. WINE-BANKS: I think it does. I
mean, the only part of pressure that we addressed
was the referral of a decision not to proceed.

CHAIR HOLTZMAN: But that's not very
different from what I was alluding to in that
article.

MS. WINE-BANKS: Right. It is. And
the article is extremely distressing. The facts
are distressing. Although I have to say, out of
the blue, you get to the last paragraph and you
go, well wait a minute. It seems like there is a
lot of evidence. And that maybe he's totally
misperceiving it. I'm not sure. But even still,
it does not undo the fact that the TJAG and I
think the Deputy TJAG approached him and
allegedly said, do this for the good of the Navy.
And maybe other things. And that is a terrible -
it's a very dramatic example of what we've
routinely heard. That they are in this position
where they feel they have to refer it.

That it's just the best thing to do and that they are jeopardizing themselves and their Services by not doing it. And that they are doing no damage. And that's the part that maybe needs to be addressed. Is there damage if you're referring cases that are weak, and we've talked about that. Panel members become skeptical, and the next legitimate case is viewed through different eyes. Because they have seen and heard about so many acquittals and false accusations.

I'm not even going to say false. They've heard about so many acquittals. It may have been true, it may not have been. Somehow the evidence failed. But if the legitimate case is then dismissed and there's an acquittal where there shouldn't have been because of the skepticism. That's a serious, serious outcome. So they need to be made aware that there is a consequence to their decision to proceed on weak evidence.
DEAN SCHENCK: Especially now that Article 60 has been modified. So there cannot be any relief clemency granted after trial in a majority of these sexual assault cases. So if the accused is convicted at trial, and the record of trial comes forward and there's an issue regarding admissibility of evidence, that you can tell the accused shouldn't have been convicted - you have no authority to grant clemency.

So your decision at the referral point is extremely important, because you can't help them on the back end. You have to wait until it goes to the appellate courts or the accused has to do a petition for a writ to the appellate court. So that's not good. Because they'll be in confinement and we all know the appellate bench doesn't move that quickly. Having been there for awhile.

(Laughter.)

DEAN SCHENCK: Also, I want to point out the recommendation that we have that the DAC-IPAD review the Article 34 pre-trial advice and
RCM 406, it's our recommendation four. That would also help this pressure, I believe, to allow the convening authority to receive those prosecutorial merits memos. Because then they could make a better assessment. The 32 is not giving them any information. There is no transcript. There's nothing to be said that I can read, that I can look at. I can't look at the transcript of the victim's testimony. I can't do that. So - but if you had that prosecutorial memo, it would be a better - it would be a more educated decision-making process. So that's yet another way to help.

CHAIR HOLTZMAN: That's a very good point. I just wanted to say before I conclude that I think the military undertook some really important measures to deal with the actuality or the perception that sexual assault was not treated seriously. And it's true that they weren't because it was true in the civilian world. Just - we're not taking these cases seriously. They didn't believe that it happened.
It's in my lifetime that a woman's word, or a rape victim's word, was not taken as true and needed to be corroborated. So we're not talking that many years ago.

But on the other hand, we're seeing the other consequences of having addressed trying to rectify the problems of the past. You know, a commander taking away their authority to grant clemency because maybe they didn't really take these cases seriously. So we're going to take away the authority. But that has other consequences. And I think one of the important things of what you're saying here is that those consequences need to be really addressed.

Understood, addressed, and if possible, resolved.

MR. STONE: I have one follow-up question.

CHAIR HOLTZMAN: Okay.

MR. STONE: Again, this comes out of the last comment that was made about relief at the front end. I understood that there were in the neighborhood of 4,000 unrestricted sexual
assault complaints in the last year of which, as
we just heard, only about 500 wound up being
referred for trial. So I guess my question is -
there seems to me there's an awful lot of stuff
being done at the front end. And there's an
awful lot of vetting and weeding out going on.

And I'm just wondering whether that -
and also the comment about the length of
prosecution, which I think in the military is
much shorter than in the civilian world. We can
certainly compare those numbers and find out. Is
the issue that we don't have enough publicity
about what the military is doing right? That
ey they do have short trial lengths? That they do
do a lot of weeding out? Could that be why
you're getting comments like that anecdotally
when you go out? Nobody has a response. Okay.

MS. KEPROS: I guess that would just
be speculation, I don't know. I don't know.

CHAIR HOLTZMAN: Okay, thank you very
much to the Panel again, for the work that you
did and for your testimony here. We really
appreciate your having given us the benefit of your work. Thank you. We will stand in recess for forty-five minutes.

(Whereupon, the above entitled matter went off the record at 11:59 a.m. and resumed at 12:50 p.m.)

HON. HOLTZMAN: I guess we're going to proceed to the next item on the agenda, which is to follow up on the data materials that we had at the last -- we had at an earlier session.

So we will hear from Meghan Peters.

Meghan, welcome again. Thank you for your work.

MS. PETERS: Good afternoon, members of the panel. On the agenda, this is your deliberations session on court-martial data.

What I'd like to do is highlight the information, before you begin your deliberations, that Dr. Spohn and the staff have gathered for you supplemental to the information that you received on April 7th.

So the members had several questions in response to Dr. Spohn's data analysis, and she
has since supplemented the original report. And so if I could just briefly draw your attention to Tab 2 of the read-ahead materials.

In Tab 2, Dr. Spohn provided just a summary, a highlight, of the types of analysis that she conducted, and in response to your questions. In Tab 2, you'll see -- it's called the summary of additions to the report distributed prior to April 7, 2017, JPP meeting.

Based on questions that you had, Mr. Stone, Ms. Holtzman, and Admiral Tracey, one of the first things Dr. Spohn did was looked at the conviction rate data, and she -- in response to questions about how many of these cases involved a guilty plea versus a contested trial, she was able to go back and research that and provide that analysis.

So what you have in front of you in Tab 2 is a summary that says guilty pleas and contested trials. This is a summary of something that she has added to her report, and the report, for reference, has been supplemented, and it's in
your read-ahead materials in Tab 3.

In Tab 3, anything that she added that is referenced in Tab 2, anything that she added is highlighted in yellow, so you can see the distinction. But just to highlight the types of information that answered your questions, again, there was concern that the conviction rate and acquittal rate data could have been made clearer by understanding how things broke down along the lines of cases involving guilty pleas in contested trials.

Dr. Spohn undertook analysis that looked at that from a variety of perspectives. So it would be -- of all of the cases that went to trial, how many were guilty pleas versus contests? Another way to look at it is, of the convictions that resulted on penetrative offenses, how many of those convictions arose from guilty pleas versus contests?

So it is a heavy read, and it is a required slow read, I believe, but it provides that additional clarity. And we can go through
the highlighted statistics if you want, or I can
just draw your attention to the other topics.

HON. HOLTZMAN: If you can do it
quickly, why don't you just highlight what the
new material is.

MS. PETERS: Okay. The first thing
was to find out how many contested trials there
were, and I'm going to -- because I think the
percentages are the most significant, I think
that the items she highlighted can be I guess
discussed without reference to where they fall in
the full complete report. So you're really only
looking at the new numbers, and sort of the
bottom line of her research.

In the 262 trials in which the most
serious charge was a penetrative offense, 35.9
percent resulted in conviction for a penetrative
offense, and an additional 1.9, or really 2
percent, resulted in conviction for a contact
offense, meaning the chances of a contested trial
on a penetrative offense resulting in a
conviction for any sex assault offense was 38
percent. Another --

HON. HOLTZMAN: I don't get that.

MS. PETERS: I'm sorry. I'm estimating that 35 --

HON. HOLTZMAN: 36.9, 36.8 is what I get, 35.9 and 1.9. Maybe I'm wrong.

MS. PETERS: Oh, I'm sorry. You're right, 36.8. I think I --

HON. HOLTZMAN: Page 5?

MS. PETERS: I apologize. And it's 36.8 percent.

MR. STONE: 37.8.

MS. PETERS: The chances of conviction on a non-sex offense, out of those 262 trials involving a penetrative offense, was 19.1 percent, and another 43 percent of those contested trials resulted in an acquittal on all contested charges.

Of the contested trials in which the most serious charge was a contact offense, 30.8 percent resulted in conviction for a contact offense, 34.6 percent resulted in conviction of a
non-sex offense, and 34.6 resulted in an acquittal on all contested charges.

The other notes below these data were just her finding that guilty pleas were more common in cases involving charges of contact offenses as opposed to cases involving charges of penetrative offenses. And below that sort of, again, a breakdown of the -- when someone was convicted of a penetrative offense, what percent of those convictions are made up of guilty pleas and what percentage are made up of people who were found guilty contrary to their pleas.

HON. HOLTZMAN: But isn't that -- but that's information we already have. I think you just want to go through the new information that you --

MS. PETERS: Okay. Yes, ma'am. I think that she was not as clear on the plea data the last time.

HON. HOLTZMAN: Oh, okay.

MS. PETERS: And it's another way of looking at -- really, it's another way of looking
at the same information that we just discussed,
and it might be worth certainly the panel looking
at but not discussing in depth because it is
looking at the same issues.

MR. STONE: Which table are we looking
at now? Is this Table 2?

MS. PETERS: We're still on Tab 2.

We're in Tab 2 of the read-ahead materials, and
it's the first page of text. I thought for
simplicity's sake, to focus on the new material,
we're at Tab 2 because she has highlighted the
types of analysis that are new for the panel in
bold.

VADM(R) TRACEY: But if I could just
-- I just want to make sure I'm clear. So
originally she reported 137 convictions of
penetrative offenses out of those who were
charged with penetrative offenses. And of those,
94 went to trial. Is that how I should
understand the data? I'm on page 5 of Tab 3.

MS. PETERS: So I read that to be that
the highlighted portion at the bottom of page 5
has the outcomes for contested trials. Out of
the 262 contested, 94 were convicted, and that
amounts to 35.9 percent, which I believe is what
she highlights is the chance of conviction on a
penetrative offense in that narrative in Tab 2.
I think those are the same figures.

VADM(R) TRACEY: I'm just trying to --
but on that same table, if you scan up to
outcomes for cases reported to trial and accused
charged for penetrative offenses, there is 137
cases, right, charged?

MS. PETERS: Convicted.

VADM(R) TRACEY: Go with 137

MS. PETERS: Yes.

VADM(R) TRACEY: Then the difference
between those two numbers, the 94 and the 137,
are the cases that were pled. Is that what I
should understand?

MS. PETERS: Just one moment.

HON. HOLTZMAN: Or could they have

pleaded before being referred?
MS. PETERS: No, ma'am. I believe you're correct. And to supplement that information, and I think this would confirm it, the second -- if we were to go back to Tab 2, and I'm not sure if she put the percentage in there, but the -- I'll just read what she has written about how many pled guilty to a penetrative offense or a sex offense in a penetrative offense case, that the guilty plea rate -- I'm sorry, it looks like the second -- at the bottom of the summary -- individuals charged with penetrative offenses were substantially more likely to be convicted of a penetrative offense following a contested trial than as the result of a guilty plea, meaning guilty pleas were less likely in penetrative cases than contests.

And the breakdown of convictions on penetrative offenses were that 61 percent of the penetrative offense convictions resulted from a contested trial, and 37 percent pled guilty. So I think that -- I think that aligns.

The additional information that she
provided also includes trial forum information, meaning how did outcomes result when the forum selection was either trial by military judge versus a panel of military members.

And I'm still -- looking at Tab 2, the takeaways were that there was a significant difference in the conviction rate in military judge-alone trials versus cases tried by a panel of military members.

However, when Dr. Spohn subsequently looked at contested trials only, meaning removed the guilty pleas, with the understanding that only a military judge can hear a guilty plea, so these military judge cases she initially looked at are the ones handling guilty pleas.

When you take out the guilty pleas, the results show that the type of trial forum did not affect case outcomes for either penetrative or contact cases. So the conviction rate at a contested trials is relatively stable between judge-alone or panel. The conviction and acquittal rates were relatively equal.
The multivariate analysis that she undertook in response to questions from the April 7th meeting included additional analyses that compared each Service against one another, meaning in the April meeting she chose one service, the Marine Corps, as sort of a control group, a baseline, to say, how do the conviction and acquittal rates compare to that baseline, you know, in the other services? And there was this larger difference between the Army and the Marine Corps, and the panel members felt that it would be interesting to see how the rest of that information compares. She has --

HON. HOLTZMAN: So what did it show?

MS. PETERS: It showed that there is -- there are still only a few items -- there are only a few instances where the service of the accused had a consistent effect on the outcome of the case, and that was generally that conviction rates were still higher in the Army than the other services and that the Air Force had the lower -- I'm sorry, the Air Force had a higher
acquittal rate than the other services, no matter which control group it was.

But any other distinctions tended to blur a little bit more, so there was just really who set the high bar on conviction rate, who set the high bar or the low bar on acquittal rates, stayed constant.

HON. HOLTZMAN: Are you saying that the Army had the highest conviction rate and the Air Force had the lowest conviction rate?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: All right.

MS. PETERS: There are nuances, depending on whether you're looking at conviction for a penetrative offense versus overall, but that is the sum total of the service level, multivariate analysis, such that the distinctions aren't that great along a lot of different categories. There is only maybe two categories of information where --

HON. HOLTZMAN: You can go --

MS. PETERS: -- the service made a
difference.

HON. HOLTZMAN: You can move on.

MS. PETERS: Okay. Yes, ma'am.

So the other thing, Mr. Stone, you
asked that she exclude from her multivariate
analysis the cases involving spouses and intimate
partners because they are a unique set of cases.
She re-ran her multivariate analysis and found
that removing those cases did not change the
results in any meaningful way.

Lastly, I believe, she summarized some
of the qualitative information that may be useful
or where qualitative information would be useful
to better understand some of her multivariate
analysis, especially with regard to military --
cases involving military victims and cases
involving civilian victims.

So I think the information that she
has added to the report is really a summary of
the discussion that she had with you all in the
question and answer session from April 7th, and
that has been highlighted in her now final
VADM(R) TRACEY: I think one observation that we asked about that I didn't see reflected here was whether Army's numbers are proportionate to how much larger they are than the other services or if they are somehow out of --

MS. PETERS: Yes, ma'am. And the staff has done that additional research for you. So what I can do is supplement Dr. Spohn's statistical analysis with some of the research we have done. And I'd like to point out an item in your read-ahead folder that contains three PowerPoint slides, and I have it up here on the screen as well.

And so we are ready to move to a different item in your folder. It is a document with three boxes that are the PowerPoint slides. They are titled additional information regarding court-martial data and response to panel member questions. And this is going to be in your day of folder. It's not in your read-ahead
materials.

So a few of the things that the staff has done -- as, Mr. Stone, you asked us to look into the whereabouts of cases that were not provided to the JPP, meaning the staff had said the services identified over 900 cases to us as involving a sex assault trial or other disposition in 2015, and we only -- and we received somewhere in the ballpark of 700 of those. So you're missing roughly 200. And what was going on in each service.

When we went back and looked at -- each service was only missing, meaning didn't provide cases, in five or fewer instances, meaning most of the services, except for the Army, which I'll talk about in a minute, only failed to provide maybe five cases out of their total case list.

There were other anomalies that explained the delta between cases identified and cases that made it into the database. Aside from making sure documents were complete and whatnot,
you know, taking a closer look at things, the Navy gave us 15 cases that didn't involve a preferral. So there was -- if a case didn't involve preferral, we didn't analyze it, it didn't meet our criteria. It wouldn't be consistent.

So the Navy gave us more than we had asked for, so we just didn't analyze those cases.

The other issue we ran into, which was more significant in the Army, is that while they didn't -- while they had I think 39 missing cases, they weren't from any one location. They tend to be cases that were resolved earlier in the process. They were dismissed after preferral. They went to alternate disposition, or they resulted in a summary court-martial.

And so those are the types of cases where the recordkeeping is less stringent. The requirements are that those cases often -- you know, they're not sent up through an appellate court and archived the way a court-martial trial is, and it's typically harder to get those cases
in any instance.

What was more frequent for the Army cases was that cases we did not receive, it turned out, were not actually tried in 2015, so they didn't warrant analysis anyways. They had been reported in the SAPRO report in 2015, but that's not when they were tried, and so we excluded those from the analysis.

And to move on, if there are no questions about the types of cases or the types of missing cases we had, that the staff looked at the grade of the accused resolved by alternate disposition.

I believe, Admiral Tracey, this was one of your questions. Where do the alternate dispositions coalesce in terms of ranks of the individuals involved? It looked like, I'm sorry, 75 percent of the cases resolved by alternate disposition involved an accused in the grade of E3, E4, or E5. And only 2-1/2 percent of the alternate dispositions involved officers.

So there were really only a handful of
cases involving officers, and that is where I think the important distinctions were. There was an array of ranks in the remaining percentages, but that's I thought the higher points that would resolve your questions about alternate dispositions.

MR. TAYLOR: So just to clarify what you mean by that, do you mean this could be non-judicial punishment, administrative separations?

MS. PETERS: Yes, sir. Our alternate dispositions were discharge in lieu of trial primarily. And in maybe 15 or 17 cases in our whole FY15 database had a non-judicial punishment as an alternate disposition. Again, if a case was dismissed, we didn't count it. We didn't follow it from there because we don't know what could happen in the separation, in the non-judicial punishment process.

What we did primarily count was an alternate disposition that was a request for resignation or discharge in lieu of trial because that happens concurrent with the decision not to
go forward with the case. You have a document, you understand how they're separated, when they're separated, and what -- sometimes what they're separated for.

So when we say "alternate disposition," we essentially mean resignation or discharge in lieu of trial, which is a unique administrative separation process, as you know, and unique to typical misconduct separations or other separations. And it's not as -- it's very distinct from non-judicial punishment.

MR. TAYLOR: Thank you.

VADM(R) TRACEY: But if they were -- how did you count them if they went to NJP? What category were they --

MS. PETERS: What we know is that if a case was -- if a case was resolved with a discharge or resignation in lieu of trial, which is a specific type of separation, that we had -- we could obtain specific documents for, we counted all of those and we documented that and we kept the documents.
If a case was just dismissed, line through the charge sheet, and that's all we had, we did not pursue the jurisdiction and say, "Did you do anything else to this accused?" So I just hold out the possibility that person could have received a non-judicial punishment for something --

VADM(R) TRACEY: Some number of the dismissed cases may have gone to some other disposition.

MS. PETERS: They may have and we couldn't capture that for a number of reasons. And I think that caveat is important to our dismissed cases. But it makes it consistent in terms of what alternate dispositions we're looking at.

Lastly, if we can move on to the next slide. I shouldn't say lastly because I do have more information beyond this briefly. That the court-martial information, according to active duty population size, is reflected in Slide 2 of this presentation.
So this is according to the FY15 population for each service. What I've done in the first column is include the active duty population size, and the second column reflects numbers that were in this chart originally.

HON. HOLTZMAN: Can you try to condense this, so we can -- because we've got a long agenda.

MS. PETERS: Okay.

HON. HOLTZMAN: I don't think you need to explain all this. Maybe just give us the bottom line. Am I wrong? Is this something --

MR. STONE: Is this court-martial data only sexual assault offenses on this chart we're looking at?

MS. PETERS: Yes. This is the same chart you received in April, sir.

MR. STONE: Okay.

MS. PETERS: With the addition of service population. And that's all I have on this one, ma'am.

VADM(R) TRACEY: So the Army makes up
36 percent of the active duty population and 43, almost 44 percent of --

MS. PETERS: Yes, ma'am.

VADM(R) TRACEY: -- cases that you looked at. So I think that's a column that's missing here is, you know, what share of the population does the service comprise. Is the share of the cases consistent with their proportion or are they overrepresented in the cases?

MS. PETERS: Yes, ma'am. I do have that information. Would you like me to read it off? I can provide it.

VADM(R) TRACEY: I think that that just --

MS. PETERS: Okay. We have that, and we can add that to this information if you'd like it.

VADM(R) TRACEY: I think you just need another column on that.

MS. PETERS: Okay. But we undertook that without wanting to overwhelm with numbers.
So the next slide is -- Ms. Holtzman, you asked -- you said it would be nice when viewing the appellate information. This is the percentage of cases with a conviction reviewed and what happened, just to have a sense of the percentage rather than the raw numbers.

The far column has the percentage, and this could be reflected in the final report on appellate data. And so that's why I have just provided it to you, so you have it for your consideration. Other than that, these numbers have not changed since the April presentation.

And the last -- last bit of information is, Mr. Stone, you asked Dr. Galbreath from DoD SAPRO to provide trend data from his FY15 SAPRO report. So in your day of folder there are -- there is a stapled piece of paper with a bar graph on it, and at the top it says unrestricted reports of sexual assault. The staff has combed through all of the statistical data in the SAPRO report for that year, provided what would be relevant to the JPP's activities,
and included that for your reference.

HON. HOLTZMAN: I'm trying to understand. These are unrestricted reports, top page?

MS. PETERS: Yes, ma'am. These are not consecutive in the report. Again, we selected things throughout the whole report.

HON. HOLTZMAN: What's the significance of this report?

MS. PETERS: To have an understanding of on what types of information does DoD look backward several years and try to aggregate or -- not aggregate, try to -- to try to come up with a trend or show a trend line.

HON. HOLTZMAN: What does this mean, command action for alleged military offenders under DoD legal authority?

MS. PETERS: This is --

HON. HOLTZMAN: What does "command action" mean?

MS. PETERS: Disposition. Initial disposition, ma'am.
HON. HOLTZMAN: Does that mean --

MS. PETERS: The court-martials and

action --

HON. HOLTZMAN: Oh, I see.

MR. STONE: Were you surprised by

Footnote 1 on the first page? I'm a little

surprised that there were so many reports that

had missing data on subject and victim type. It

seems like a lot of reports.

MS. PETERS: It does, sir, and I don't

have an explanation for that.

MR. STONE: Yeah. Okay.

HON. HOLTZMAN: What does it mean a

victim type or a subject type?

MS. PETERS: Whether the victim is a

service member and whether the subject is a

service member or a civilian.

MR. STONE: Then I'm a little confused

because I just look at the bar chart at the end

there. You have in green and in blue

"unidentified subject service member victim" as

15 percent. I guess I don't understand why it
saying -- but the number is 4,020, yet down below
it says the number is 4,584. Is there a reason
why the bar chart number and the footnote don't
match up when you have it there? Why is that not
in here, unidentified subject service member
victim? Oh, okay. It's only one. That's not
gathered. Okay. There's a "but." Okay. Got it
now. Thanks.

MS. PETERS: If you don't have any
further questions, we can move to the proposed
recommendations regarding data that the staff has
proposed for the JPP's consideration. There are
three of them, and they can be found at Tab 4 of
your read-ahead materials.

The proposed recommendations are in
Tab 4 at letter B, potential JPP recommendations.
They begin with the number 52, numbered to follow
consecutively what might currently be the -- what
would currently be the recommendations in the
victim's appellate rights report. If this one
came next, we would start with JPP recommendation
52, as things currently stand.
And the recommendation, the proposed one, is -- and I will read each of them in turn if -- Madam Chair, if you would like, I can read through each, and then discuss. The first is the JPP recommends --

HON. HOLTZMAN: Just the recommendation, not all of the bullet points.

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Please.

MS. PETERS: The JPP recommends that the Secretary of Defense and the military services use a standardized, document-based collection model for collecting and analyzing case adjudication data in order to implement Article 140a, Uniform Code of Military Justice, titled Military Justice Case Management, Data Collection, and Accessibility.

HON. HOLTZMAN: Are we ready to vote on this? Is there any objection to this recommendation?

It's adopted.

The second -- let's go to --
MS. PETERS: Proposed recommendation

53 is the new military justice data collection system developed pursuant to Article 140a, Uniform Code of Military Justice, should be the exclusive source of sexual assault case adjudication data for DoD's annual report to Congress on DoD's sexual assault prevention and response initiatives.

HON. HOLTZMAN: Can I ask a question? Why are we making this recommendation?

MS. PETERS: Ma'am, the members discussed briefly at the last meeting that there is an issue with the amount of useful information in DoD's data collection. The panel couldn't get -- because the panel couldn't get a clear picture on either courts-martial, administrative actions, or non-judicial punishment actions, and in light of the fact that there is a required military justice information-gathering in the works pursuant to statute, the panel may want to consider whether this new UCMJ article is a better answer to understanding sexual assault in
the military justice system.

HON. HOLTZMAN: Do we know something about this? I mean, do we have the background to make this recommendation? I mean, do we know what this system is, and have we looked at it? And why should it be the exclusive source?

MS. PETERS: What we know is that it has been enacted in the '17 NDAA and that it is basically in development for the next few years. The standards and criteria for what should be collected about military justice cases is going to be developed in the next two years, and this was getting at a recommendation for -- getting at what the services and DoD should be looking at. They should aim to answer important questions about sexual assault with this military justice data collection.

And, second, when the DoD responded to the JPP's request for information about the status of its own recommendations about developing a standardized database, they said, "Well, we are going to have to consider the
requirements of this new Article 140a if we are to implement the JPP recommendation," meaning their -- the DoD's response to JPP previous recommendations was "see Article 140a. We are going to proceed under those -- under that new requirement." And this recommendation gets at influencing how they do that.

HON. HOLTZMAN: I don't know. I mean, I am just confused because it just says -- if you tell me it's under development, how can it be the exclusive source of sexual assault adjudication data for the DoD annual report?

MS. PETERS: The intent of the proposal is to say that one of their aims, because there are so many contours that have yet to take shape, one of their aims should be to answer Congress' questions about sexual assault cases when they build the criteria for this --

HON. HOLTZMAN: So why don't we just say that?

MS. PETERS: -- collection?

HON. HOLTZMAN: So why don't we just
say that?

MS. PETERS: We can absolutely say that, ma'am.

HON. HOLTZMAN: Instead of this because this doesn't say that, what you're saying. What you're saying --

MR. STONE: Didn't we sort of say that in the one before? I thought the one before sort of said that, that we used a standardized document-based model?

HON. HOLTZMAN: Yeah. But that -- the one before just says we should use the standardized model. What she's saying here is what they want to do is the model should also, or should partly, or should in some way, respond to or have data that is going to be responsive to what Congress is interested in. Am I misstating you?

MS. PETERS: No, ma'am. The panel previously found that DoD's data collection and reporting on sexual assault was insufficient to answer its questions and the questions it found
important.

HON. HOLTZMAN: Right.

MS. PETERS: Therefore, the proposal is maybe the DoD SAPRO policy office should not be the primary source of military justice data on sexual assault cases.

It happens to be that now -- now the services and DoD have to come up with a military justice reporting system, and the proposal is that that supplant, this -- the DoD SAPRO statistics that they produce about courts-martial and NJP and administrative actions, because it hasn't been useful to the panel, and it --

HON. HOLTZMAN: Well, how do we know the new one is going to be any -- useful?

VADM(R) TRACEY: So what if we modified the recommendation to say, "New military justice data collection system developed pursuant to Article 140a should be designed so as to become or to be able to serve as the exclusive source of sexual assault case adjudication data," yada, yada.
HON. HOLTZMAN: I like that.

MS. PETERS: Okay.

HON. HOLTZMAN: And what about "to be developed" or "under development" or "required to be developed," so that we understand that it's not in existence at the moment?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Something like that.

MS. PETERS: Okay.

HON. HOLTZMAN: As amended, are we in favor of this?

MS. PETERS: Yes.

HON. HOLTZMAN: Any opposition? Okay.

Great. Perfect. Great.

MS. PETERS: The proposed recommendation states, "The successor Federal Advisory Committee to the JPP, the Defense Advisory Committee on the investigation, prosecution, and defense of sexual assault in the armed forces, should continue to analyze adult victim sexual assault court-martial data on an annual basis as the JPP has done, and should also
examine the following patterns that the JPP discovered in its analysis of fiscal year 2015 court-martial data: a) cases involving military victims tend to have less punitive outcomes than cases involving civilian victims; b) the conviction and acquittal rates for sexual assault offenses vary significantly among the services; and c) if a service member is charged with a sexual assault offense, the probability that an accused would be convicted of a sexual assault offense is low."

HON. HOLTZMAN: Can we just rephrase this? The probability that he or she, not that an accused -- I mean, we're talking about if a service member is charged with a sexual assault offense.

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Maybe that service member or the probability that that service member will be convicted of a sexual assault offense is low.

MS. PETERS: Okay.
HON. HOLTZMAN: Or something like that, but we should use the same terminology for the service member.

Any objection to this recommendation?

MR. TAYLOR: Well, I would just like to at least propose the -- what I think is a friendly amendment, and that would be something along the lines of "should consider continuing to analyze" and "should consider examining," because I really -- I'm really uncomfortable saying they should do it.

They may come up with a better, more efficient way of doing this, so I think if we just say "should consider continuing," I think that would --

HON. HOLTZMAN: Excellent, in my opinion. As amended, or any other objections to this?

MR. STONE: Well, I'm also uncomfortable about our role telling the next advisory committee that the different -- has a different statutory authorization what to do and
trying to decide if "should consider" makes me --

it definitely makes me more comfortable. I just
don't know if it makes me comfortable enough.

MR. TAYLOR: Well, I guess my theory,

Mr. Stone, is they can consider it. If they
decide not to do it, they don't do it. If they
think of another different way, or if they want
to look at a different set of factors, I mean,
these are clearly some that we have looked at and
have been open to us.

MS. FRIED: I would also add that the
recommendations of the JPP are not binding on the
DAC-IPAD until the Secretary of Defense acts on
those recommendations.

MR. TAYLOR: Good point.

VADM(R) TRACEY: So is our
recommendation actually to the Defense Advisory
Committee or is it that the Secretary charge the
DAC-IPAD?

MS. FRIED: Either way works, ma'am.

HON. HOLTZMAN: This way would be
adequate.
MS. FRIED: This would be fine, because the Secretary of Defense will look at the recommendations and take whatever actions might be --

HON. HOLTZMAN: Oh. So, in other words, that responds -- does that really respond to your concern, Mr. Stone?

MR. STONE: That this is advice.

HON. HOLTZMAN: To the -- basically, the Secretary of Defense can junk it or can forward it to the DAC.

MS. FRIED: Leave the directors as part of the DAC-IPAD charter to do this, if he wanted to adopt the recommendations.

HON. HOLTZMAN: Right. And, actually, all you have to do is tell him to consider it, too.

MR. STONE: I guess --

HON. HOLTZMAN: Not to adopt it.

MR. STONE: I guess after the word "should" I might add a phrase that says, "If the Secretary of Defense agrees, continue -- consider
continuing to analyze" blah, blah, blah. I feel a little better making it clear that we don't think that we're overriding that somehow.

I don't want to look like we're, you know, taking the Secretary's authority either for granted or that we're somehow stepping on their toes. So I guess I would like to -- I wouldn't mind surfacing that, and then I'd be fine.

HON. HOLTZMAN: Well, my concern as to what Maria said -- I mean, Ms. Fried said, that that didn't really matter. So, you know, I don't think we need this section, do you?

MS. FRIED: You can say, "The Secretary of Defense should consider having the Federal Advisory -- the successor Federal Advisory Committee continue analyzing." That's a suggestion. But either way --

HON. HOLTZMAN: Okay. I'm fine with that.

MR. STONE: "Secretary of Defense should consider having the" blah, blah, blah --

HON. HOLTZMAN: right.
MR. STONE: -- "continue advising."

That's a little better, yeah.

HON. HOLTZMAN: Okay. "Continue analyzing." Right. And then they can figure out how they want to -- and he can tell them how he wants to do it.

Okay. So are we in favor of this as amended?

MR. STONE: Yes.

VADM(R) TRACEY: Yes.

HON. HOLTZMAN: Do we have the language down, somebody?

MR. STONE: Right.

HON. HOLTZMAN: Okay. Great. So we're finished?

CAPT. TIDESWELL: Yes, ma'am.

HON. HOLTZMAN: Wonderful. Thank you so much. Oh, I'm sorry. Go ahead.

VADM(R) TRACEY: Just what becomes of the report at Tab 3?

MS. PETERS: The staff will undertake selecting the statistics that you all have found
important and discussed by putting them into a
graphic in the final report and just explaining
what those results are, similar to last year,
this is what we are reporting, with limited --
without an explanation for why necessarily.

But we can take the same statistics as
last year, add the new information that we were
able to obtain this year.

VADM(R) TRACEY: My concern is, there
is probably an audience that needs that in its
very precise formulation, but it doesn't
communicate to the typical user at all. Your
very elegant, you know, conviction rate is
roughly equal for a -- when you take out the
cases that the military judge is just reviewing a
plea.

I think that the average non-DoD
person won't understand the places where the
outcome wasn't possible. So there are certain
kinds of sentences that can't be awarded at given
levels of trial. There are certain things that
can't be done to officers at NJP. And if you're
not "in the know," that all is missed in this formulation of data. And so it ends up that the data is skewed because you couldn't have that outcome.

So I'm concerned that the report, as it stands, is not useful to anybody who is not a statistician. Maybe that doesn't matter, but it struck me as being -- and I am a statistician, and it struck me as being nearly incomprehensible.

MS. PETERS: We can provide some explanation around each -- each table for what is and what is not included in the numbers, or we just have to be more selective and kind of pick the higher level numbers that require less --

VADM(R) TRACEY: But the report is public information, right?

MS. PETERS: Yes, ma'am. And it could be an appendix to the report, as it was last year. Dr. Spohn's report you have at Tab 3 could form an appendix, and we would select what is -- what could be explained to the layperson in the
body of the report.

VADM(R) TRACEY: That's probably good.

I guess one of my concerns is that Dr. Spohn didn't acknowledge some things that are just the facts of can't do that in the military.

MS. PETERS: Right.

VADM(R) TRACEY: And so it --

MS. PETERS: Right. An officer has to go to a general court-martial. That's why they all went there.

VADM(R) TRACEY: And lead to an uninformed use of the data if we don't do something to correct that.

MS. PETERS: Can staff take -- make an attempt to identify those issues and explain them in the draft report to your satisfaction, ma'am?

VADM(R) TRACEY: Yes. I think so.

MS. PETERS: Okay.

HON. HOLTZMAN: And if you have some areas that you have identified as problematic, we need to let them know. Or we're going to have another chance to review this report. I mean,
you'll send us a final draft.

    MS. PETERS: Yes, ma'am.

    HON. HOLTZMAN: Okay. So does that satisfy everybody? So that's --

    MR. STONE: The only question I have is I see it says Appendix B down here on the trend data, so this will be attached to that report, too? It's not in there, but it -- I think the trend data is interesting.

    MS. PETERS: We can certainly add that at -- add reference to that information somewhere you feel is useful.

    MR. STONE: I mean, we collected it; let's preserve it.

    MS. PETERS: The item that you're referring to is DoD SAPRO's data that DoD SAPRO calculated separate, which is separate from the JPP data project.

    MR. STONE: Well, you can put it --

    MS. PETERS: If you find it informative, sir --

    MR. STONE: Yeah. And you can put a
little intro on it that says that. That's for
sure. That's why I just -- I mean, it says
Appendix B on the bottom of it. So that's -- I
just wanted to be sure that it doesn't get lost.

MS. PETERS: Okay. And that reference
is to Appendix B of DoD-SAPRO's FY15 report. It
wasn't meant to reflect where it might fall in a
JPP product.

HON. HOLTZMAN: Are there any further
questions? Okay. Thank you very much, Ms.
Peters. Appreciate your help.

Can we take a really short break, or
should we go on to the next item?

MR. STONE: Do you want a short break?

HON. HOLTZMAN: We're good? So let's
proceed.

Okay. So our next panel deliberation
is on military sexual assault investigations
report.

CAPT. TIDESWELL: Yes. Ms. Peters is
going to walk you through that also.

HON. HOLTZMAN: Oh, okay. Great.
Thank you.

MS. PETERS: Members of the panel, to begin this session, I'd like to summarize for you what the panel has reviewed and done in regards to the subject of sexual assault investigations in the military regarding the report from the subcommittee, and then JPP's own product.

And then since the staff has previously provided a proposed executive summary and list of JPP recommendations, we can go through the panel members' feedback to the staff with regard to that staff product and highlight the comments and the edits that each panel has made.

But I thought because this report originally came to you from the subcommittee at the February JPP meeting, it might be useful to have the background of how we got to where we are today.

HON. HOLTZMAN: Very briefly. What tab are we on?

MS. PETERS: We're on -- the draft
report is at Tab 9. So the JPP --

HON. HOLTZMAN: Oh, I see. Okay.

MS. PETERS: -- product is at Tab 9, and the subcommittee's product is at Tab 10 right behind it.

MR. STONE: I don't have a Tab 10.

MS. PETERS: I can give you a hard copy of -- if you don't, it's because there is a blue bound copy of the --

MR. STONE: Ah. Okay.

MS. PETERS: -- subcommittee's investigations report that should be up in front of you.

MR. STONE: Right. Okay.

MS. PETERS: And as background, you received a presentation from the subcommittee on its report on sexual assault investigations in the military on February 24th. The JPP members questioned the subcommittee members about their findings and recommendations.

Then the JPP moved to deliberations on the subcommittee's report, and the JPP members
voted to adopt the subcommittee report on investigations, along with its recommendations. The JPP members wanted to add an introductory statement to their executive summary, noting how some of these subcommittee and now JPP reports address similar issues along the lines of the adequacy of investigative resources for one stakeholder or another. Since then, the staff drafted proposed findings and recommendations, which we have already referred to as Tab 9 of your read-ahead materials. The draft language was based on your deliberation session on February 24th, and it also reflects the fact that since the subcommittee issued a report to you there was a DoD policy that took effect on March 22nd of this year which essentially allows -- which touches on the essence of the subcommittee's first recommendation about military -- or MCIOs getting assistance from other agencies in the investigation of sexual assault.
So that DoD policy was incorporated into the first JPP recommendation listed in the investigations report.

Since we sent you the draft executive summary and recommendations, the staff received comments and edits from several of the members. The staff has made those changes, and in your Tab 9 you will see that those changes are highlighted in track changes, and there is a comment with a label next to it, so you know who -- that your changes were made and, where there was room, an explanation for the change.

In addition, the staff received additional explanation for the changes proposed by Mr. Stone to the executive summary and the JPP recommendations. The explanation that Mr. Stone provided for his edits is included at Tab 11 of your read-ahead materials. So we included that in the exact form that we received it in your read-ahead materials.

So today's deliberation session can focus on the language of the JPP recommendations
and the draft executive summary, with the understanding that the subcommittee's report would form the body of the JPP's report on investigations.

HON. HOLTZMAN: Okay. Can I just clarify in my own head where we stand here? Sorry to do this to everybody, but we have a document at page -- at Tab 9 that has got seven pages. They include -- that's the draft report that the staff provided to get -- for JPP report, together with comments made by various panel members.

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: And that's what our objective is today is to review these edits and decide on the basis of accept, reject, and accept the edits, or whatever, or dispose of the edits and then decide whether or not to accept the report. Is that correct? Is that what --

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: -- we're supposed to do? Okay. So if it's okay with everybody,
should we just go through the edits one by one, or is there a quicker way to do it? I don't know. Anyone have a suggestion?

MR. STONE: Well, I have a preliminary question that I didn't understand then, and I guess I still am not clear on, and that is there is no JPP report attached to this.

Our staff -- I thought after we discussed this there would be a JPP report, but it was clarified to me before this meeting that there is no JPP report, there is only a subcommittee report, and that we are sending forth a subcommittee report which was based on data, which was not gathered publicly in open session basically, as our report. And I am uncomfortable doing that because I understood that what we did was to hold public hearings so people could make comment on stuff and that we would have that as a basis for public reports.

So I'm confused about how we can adopt something that was devised in a non-public way.

MS. FRIED: So, Mr. Stone, the
subcommittee has conducted preparatory work
sessions where they went on fact-finding missions
at these sites to bring this information back to
the panel. The panel can, as I said in my
opening remarks, accept, reject, or adopt
anything the subcommittee does.

If you feel the subcommittee report is
comprehensive enough to answer your questions and
support the recommendations, then you are free to
adopt that, and the panel member -- the panel can
do that as a whole, a majority, or however. But
the report -- and we have done these with other
advisory committees -- can be -- the subcommittee
report, if you accept it as your own,
incorporated and adopted as the JPP's work
product.

HON. HOLTZMAN: And so just to make
sure I understand something -- Mr. Stone has an
important question -- what we could do here -- we
have various options. What you're saying is we
have a -- what I understand, the staff has -- we
have a subcommittee report that has been
presented to us.

The staff has proposed that we -- if we're going to send out the subcommittee report, that we adopt an executive summary with proposed amendments. We could do the following, as I get -- these are the options. Number 1, we could reject the idea of sending out the subcommittee report. Two, we could accept the -- decide that we do want to send out the subcommittee report, and we could append to it this executive summary.

MS. FRIED: I would say, if you're going to adopt the subcommittee report, you call it the JPP report.

HON. HOLTZMAN: Okay. All right.

MS. FRIED: And that was the purpose of the executive summary.

HON. HOLTZMAN: So I'm just trying to clarify.

MS. FRIED: Right.

HON. HOLTZMAN: I'm not --

MS. FRIED: No, I appreciate that, ma'am. Yeah. No, I think --
HON. HOLTZMAN: No. Thanks for clarifying that. Okay. So we could -- one option, then, just to make sure I understand the options, one option is to adopt the subcommittee report and issue it as the JPP report.

MS. FRIED: Correct.

HON. HOLTZMAN: And we can do that regardless of how the factual information was --

MS. FRIED: Correct.

HON. HOLTZMAN: -- obtained by the subcommittee. That's not the legal or any kind of impediment to our doing that. The second is we could reject doing that. We could decide, no, we don't like the subcommittee report for whatever reasons, and we're not going to issue it as a JPP report.

If we decide we want to issue it as a JPP report, then we could decide whether we want to include this executive summary and decide on each of the edits. Is that basically -- so the first order -- I'm sorry.

MS. FRIED: And there's one more
option.

HON. HOLTZMAN: Okay.

MS. FRIED: You can pick and choose what you want from the subcommittee report and make it your own separate JPP report as well.

HON. HOLTZMAN: All right. So I guess the first thing we should do is, based on what -- on this interchange, the first thing we should do because -- it's irrelevant to deal with the executive summary if we're not going to send out this report, if we're not going to adopt this report.

So I think the first question that we should deal with is, to what extent are we going to accept the subcommittee report as a JPP report? Okay. I think that's --

MR. STONE: First question?

HON. HOLTZMAN: Have I fairly stated it?

MR. STONE: Yeah.

HON. HOLTZMAN: Okay. So I guess --

VADM(R) TRACEY: And that's at Tab 10,
right?

HON. HOLTZMAN: That's at Tab 10. I don't know whether it's better to say adopt the subcommittee report as a whole or do we -- do we want first amendments to the subcommittee report? I don't know. Does somebody have a suggestion on that?

CAPT. TIDESWELL: I mean, just to go back, during the April 7th meeting, you all went through the recommendations of the subcommittee. You voted by a vote of five to zero to adopt all of the recommendations. And so the executive summary was the staff's way of sort of encapsulating and putting that down into writing for you.

HON. HOLTZMAN: Okay. So have we already voted to adopt this report as the JPP?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: So why is that an issue before us now?

MR. STONE: The reason it's an issue is because I thought we were adopting the fact
that this is what they sent to us. I did not
understand what was just clarified for us, that
that means -- whether that means we pick and
choose what we want or that that automatically
becomes a JPP report. That to me are two
entirely different things. I fully agree that a
subcommittee can send us what they want to send
us, which is what I thought I was voting on.

   But to the extent that I may have
misunderstood and thinking that that
automatically means we are adopting everything in
that report, and you'll know particularly from my
comments that I don't agree with recommendation --
-- proposed recommendation 46, or the sections of
the -- that subcommittee report that relate to
that, that I hereby withdraw any vote in favor of
the whole report that I might previously have
done.

   And I would expect an opportunity to
figure out which portions of the report, as a
JPP, I would be willing to sign onto, keeping in
mind that an awful lot of that report says
several people have told us, many have told us, some have told us, without eliciting a specific number and a service -- which is why I asked the question earlier, without saying two-thirds of the defense counsel we spoke to said this, or one-third of the prosecutors said that, without giving us numbers, which is why I was hoping we might get a tabular version of the questions we asked to have answered.

And maybe after I got that, if it's planned to be forthcoming, I wouldn't have as much trouble with comments as a JPP, because then I could say something, even though frankly it appears to be, to me, what in law we would call hearsay. Somebody else reports what somebody else said, and in this case it's worse because we don't even know who said it to them, except we heard today it was a snapshot from mostly lower level officers and no victims.

So it puts me in a funny position. No, as a whole, I can't endorse that today. If I saw what was behind it, our questionnaire and a
tabulation, I think there's probably parts of it
I wouldn't have any trouble with.

HON. HOLTZMAN: Mr. Stone, I think in
fairness to you -- this is my proposal -- is that
we already had a vote on this. But in fairness
to you, since it wasn't clear, I think you should
be entitled to -- we don't have to have a vote
now, that you can look through this report and
amend your vote to -- to reflect which, if any,
of these portions of this report you are willing
to accept. I don't want to --

MR. STONE: As a JPP report.

HON. HOLTZMAN: As a JPP report. I
don't think you should be bound to a vote that
you didn't -- wasn't clear. Okay.

All right. So that seems to me to be
step number 1. So JPP has already voted to
accept this report.

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Okay. Mr. Stone is
going to have the opportunity to reconsider his
vote in light of the new clarification. Anybody
else wants to reconsider his or her vote in light of that clarification is also welcome to do that, and then we can -- but not hearing from anybody else, I guess we just have Mr. Stone's, and Barbara is stuck.

But then you can, by the next meeting or whenever is appropriate, indicate which, if any, portions of this report you agree to accept, and that your vote -- so you can amend your vote and what -- the significance of your vote.

MR. STONE: Right. Because now it appears --

HON. HOLTZMAN: Clarify what your vote --

MR. STONE: -- and it clarifies that we would be accepting it as a JPP report.

HON. HOLTZMAN: Right.

MR. STONE: Not as a subcommittee report.

HON. HOLTZMAN: Right. So that -- I want to give you that opportunity to clarify your vote.
MR. STONE: Will I get that tabular whatever it is, either yes or no, between now and then, so I have it to look at? Because that will help me figure out what I have here.

CAPT. TIDESWELL: We'll have it for you next week.

MR. STONE: Oh, great. Fine.

HON. HOLTZMAN: So then you can make your vote.

MR. STONE: That will help.

HON. HOLTZMAN: -- you know, a judgment about how you want to --

MR. STONE: Right.

HON. HOLTZMAN: -- how you want to proceed, unless somebody has got some better option. I'm always open to that, just going
through the various edits and saying yes or no.

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Any other approach to
this? Okay. So let's go.

MS. PETERS: The first edit in the
executive summary is on Tab 9. It's labeled page
2 because page 1 is the title. It's the second
paragraph. Ms. Holtzman, you suggested adding
"actually," so that it says "how policies have
actually affected the military justice system."

The second edit in the --

MR. STONE: Before you leave that one,
please, I don't think the word can be --
"actually" can be put in there. I'd rather have
the word "anecdotally" put in there because we
know this was a sample snapshot. So it's how
they have anecdotally affected the military
justice system. We have to be up front about
that.

HON. HOLTZMAN: Well, they -- well,
first of all, I was about to say I withdraw the
comment. But not to obviate your concern, I want
to make sure that it is reflected in here, and I think we have said it, that this is not intended to be anything other than a reflection of what we -- of the site visits that we did, and not purporting to be a survey of every single person in the military who is involved in the military justice system. I mean --

MR. TAYLOR: How about something like "appears to have affected"? Would that be something that is --

MR. STONE: Well, no, because even this -- this was not even a random sample, definitely not an exhaustive sample. I didn't say that. We didn't go after everybody. But it's not even a random sample. It's of people on bases who are available to us on bases that were available to -- to entertain the subcommittee. So it's even more limited than that.

MS. FALK: Can I make a suggestion? How "in their view" this happened?

MR. STONE: I'm sorry. Could you come up? I can't hear you.
MS. FALK: That in their view this happened.

HON. HOLTZMAN: So somebody could have -- right. So we target the individuals that we spoke with, how in their view it has affected the military. Fine. That seems to me to get at your point, Mr. Stone.

MR. STONE: That's better.

HON. HOLTZMAN: Okay.

MS. PETERS: The next edit is at the bottom of the paragraph, and the sentence as edited would read, "That report," referencing the subcommittee's report, "included here as Appendix A, contains much of the substance on which the JPP drew in the following recommendations." I think "much of" is the language that --

MR. STONE: Well, do we need to change that whole sentence now that we find out we're adopting it? It sounds like -- I'm getting a nod of the head over there. Do you want to -- we have to change that whole sentence.

HON. HOLTZMAN: Yes. So we just say
that report -- we don't have to say "included" here. That report is issued as a JPP report. That report is adopted by the JPP and issued as its -- as its report.

MR. TAYLOR: But the reason that I thought "much of" added something was because it also consisted of testimony that we've heard that I think tends to support --

HON. HOLTZMAN: Right.

MR. TAYLOR: -- the observations.

HON. HOLTZMAN: Right. I agree with that. So I think we have three of us in favor of "much of."

MS. PETERS: Okay.

HON. HOLTZMAN: Meghan, are you keeping track?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Okay.

MS. PETERS: So "much of" --

HON. HOLTZMAN: And one opposed. I take it you're still opposed?

MR. STONE: No. I don't mind having
"much of." I mean, that's -- that's fine. I mean, to the extent we're doing -- again, recognizing that I haven't voted to adopt the introduction --

HON. HOLTZMAN: Okay. So my --

MR. STONE: -- I agree with you that we want to make it as close as we can to what we agree on.

HON. HOLTZMAN: Okay. So "much of" is in. Then the next -- go to the next one, Ms. Peters.

MS. PETERS: Moving to the next paragraph, the first sentence reads, "In its report, the subcommittee identified a number of problems in military sexual assault investigations that it discovered during its site visits."

I think the crux of this edit, Ms. Holtzman, you suggested is to say that problems were identified with regards to investigations in the course of these site visits. And I think the word "problems" was not highlighted. Before it
said that the site -- that the subcommittee discussed information gathered.

HON. HOLTZMAN: Right. So I'm okay with changing the word "problems." You could have "issues" or "concerns." I just want it to identify that we weren't just describing, you know, some kind of nice beach vacations.

MS. PETERS: Yes, ma'am.

MR. STONE: Well, I think either of those other words are better, "concerns."

HON. HOLTZMAN: Fine. I like "issues" better than that.

MR. STONE: You like "issues"?

HON. HOLTZMAN: Yeah.

MR. STONE: I'm okay with "issues."

HON. HOLTZMAN: All right.

MS. PETERS: "Issues" instead of "problems"?

HON. HOLTZMAN: Yeah.

MR. STONE: So it says "issues."

HON. HOLTZMAN: Right.

MS. PETERS: The next sentence --
HON. HOLTZMAN: I want to withdraw the word "tremendous."

MS. PETERS: Okay.

HON. HOLTZMAN: I don't think that's a good idea.

MS. PETERS: Yes, ma'am. That was the next edit, that added "tremendous," we'll take that out.

The next edit is in the -- I'm sorry, it's actually a comment on the next paragraph. The next -- and this paragraph gets at having two JPP reports address, generally speaking, the issue of investigations, meaning whether you're talking about defense investigators or military criminal investigation organizations.

Ms. Holtzman, your comment was essentially, should this sentence be moved to a footnote? Is it appropriate -- or is it appropriate for the body of the ex summ here? Would it be better placed in a footnote rather than sort of up front in the executive summary?

HON. HOLTZMAN: Not a big deal. I
agree to footnote.

MR. STONE: Yeah. I agree with it being a footnote.

MS. PETERS: Okay. Moving to the next paragraph, the first edit would change the JPP -- reference to the JPP making five recommendations. It would convert it to four recommendations if -- if I believe it's recommendation 46 is not adopted by the panel, and it just notes that there is -- there will be, I assume, a discussion there.

The other --

HON. HOLTZMAN: But that's a little bit moot, Ms. Peters, because we have already voted on the five recommendations. So we can go past that. I'm just trying to abbreviate things. This is --

MS. PETERS: Okay. So the next sentence just rewords I think a similar concept to address the DoD -- there was a new DoD policy that came about after the subcommittee report was issued, and that DoD policy is incorporated -- is
factored into the JPP's recommendations, meaning it's a positive development that the JPP approves of.

MR. STONE: Well, you skipped word problems that arose two other places. Are we going to put "issues" in there?

HON. HOLTZMAN: Yeah, sure.

MR. STONE: It's still at the top.

MS. PETERS: Oh, at the top line of that paragraph?

MR. STONE: And then the beginning of the next sentence.

HON. HOLTZMAN: So the one after that, right?

MR. STONE: Yeah.

HON. HOLTZMAN: And it's one of these --

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: -- right here?

MS. PETERS: We'll make that edit. So that sentence -- if you'd like me to read back the first two sentences?
HON. HOLTZMAN: No.

MS. PETERS: Okay.

HON. HOLTZMAN: We edit; you follow it.

MS. PETERS: Well, we're good then.

That is the first three sentences. The last sentence has an edit to say, "The JPP approves of DoD's implementation of that DoD policy."

VADM(R) TRACEY: May I recommend "we concur with" or "we support"?

HON. HOLTZMAN: Where are you?

VADM(R) TRACEY: "The JPP approves of DoD's implementation."

MR. TAYLOR: Yes. I agree with that. It should be "concurs with."

VADM(R) TRACEY: Right.

MS. PETERS: "Concurs with"?

The next edit says that -- I guess finishes the sentence with additional language or rewords what the purpose of following up on that DoD policy is, to see if it is working and put the burden on investigative resources. I'm not
sure if anyone has any issues with that language.

HON. HOLTZMAN: You could just say see if it -- instead of "improving the burden," maybe "reducing the burden"?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Maybe you don't "working," to see if it is reducing the burden on investigative resources. All right. Maybe "burden" isn't even the right word. I mean, you know, I was --

MR. STONE: Working to --

HON. HOLTZMAN: Or you can just say see if it is improving investigative resources. Maybe that would be another way of dealing with it. I think there are a lot of ways to skin that cat.

MS. PETERS: So maybe something more like improving the language is then more positive than just seeing how much burden remains I guess.

HON. HOLTZMAN: Okay.

VADM(R) TRACEY: So it's now "if it is reducing the burden," is that --
MR. STONE: No. I think it's "if it
is improving investigative resources."

HON. HOLTZMAN: Yeah. Or --

MS. PETERS: In sexual assault cases.

HON. HOLTZMAN: Yeah. Or to see if it
is improving the MCIO's ability to focus on the
most serious sexual assault cases.

VADM(R) TRACEY: Back to the original,
yeah.

HON. HOLTZMAN: Go back to the
original, "improving the MCIO's ability focus on
the most serious" --

MS. PETERS: Yes, ma'am.

MR. STONE: That's better.

HON. HOLTZMAN: All right.

MR. STONE: That's good.

MS. PETERS: The last edit to the
executive summary is from Mr. Stone, and it
reflects changes he has suggested to the wording
of recommendations. So the old language
referenced "barriers from initial victim
interviews," and the suggested change would say
"any unwarranted restriction on prompt initial victim interviews."

And, likewise, the original language -- reflecting the current language of the draft JPP recommendations is I think barriers to thorough questioning, so it's barriers to initial victim interviews and identify and remove barriers to thorough questioning of sex assault victims. New language would change "barriers" to any -- "removing any unwarranted restrictions."

In addition, this last sentence omits reference to proposed recommendation 46 as drafted.

HON. HOLTZMAN: Let's take them one at a time, Ms. Peters. Which is the first one we want to deal with?

MS. PETERS: The fact that --

HON. HOLTZMAN: The unwarranted restrictions point?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Anybody have a problem with that?
VADM(R) TRACEY: No.

HON. HOLTZMAN: I don't. Mr. Taylor?

MR. TAYLOR: No, that's fine.

HON. HOLTZMAN: Okay. So that's okay.

Then what is the second one?

MS. PETERS: The second is the barriers regards thorough questioning of sex assault victims, and so that's changed to unwarranted restrictions. That's the second --

HON. HOLTZMAN: We just approved that.

MS. PETERS: In both instances?

HON. HOLTZMAN: Oh, we have it twice?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Oh, okay. Sure. Does anybody have a problem with making the change twice?

VADM(R) TRACEY: No.

MR. TAYLOR: No.

MS. PETERS: Then the last change is that the sentence, as drafted, would remove reference to recommendation 46, which regards MCIO access to tangible evidence in the
possession of sexual assault victims.

HON. HOLTZMAN: What language are we focused on?

MS. PETERS: In the lined through portion, basically we were summarizing each of the five recommendations in the --

HON. HOLTZMAN: Oh, I see. So that -- so the word from -- starting from "barriers" all the way to the end?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: All the way to "forensic laboratories."

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Okay. So --

MS. PETERS: We're rewriting that with this edit.

HON. HOLTZMAN: Okay. So, in other words, if we leave -- if we oppose this edit, those one, two, three, four, five -- five-and-a-half lines, or five lines, we would be dealing with the recommendation 46, which Mr. Stone opposed at that time.
MS. PETERS: Mm-hmm.

HON. HOLTZMAN: Okay. So I think since we voted on that, we need to have it in there.

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: I mean, we voted to approve it.

MR. STONE: And I'll just note my opposition for the record.

MS. PETERS: The question --

HON. HOLTZMAN: You may change -- you know, I don't know what your view is going to be, Mr. Stone, if --

MR. STONE: Well, I wrote a long comment, which everybody has, at Tab 11, and it's the second page. It says, "Delete entirely draft recommendation 46." And that comment is really not based on facts; it's based on the law, the Constitution, Article 6b, the Fourth Amendment, and so it's really not likely to change when I see the number. So that's why I'm --

HON. HOLTZMAN: Oh, okay. Fine.
MR. STONE: -- standing on that.

HON. HOLTZMAN: But we have adopted that already, so --

MS. FRIED: We can -- and you could note his -- his writing separately or dissent in the executive summary, and then reference --

MR. STONE: Right.

HON. HOLTZMAN: Absolutely. But that should stay in because everybody else has approved the recommendation.

Okay. Now we're up to page 5?

MS. PETERS: Yes, ma'am. And I think the question from the staff on these changes is by changing the language barriers in this last sentence to "unwarranted restrictions," you wanted to keep that twice in the last sentence. That is reflective of language in the recommendations, meaning the corresponding recommendation says "barriers to prompt victim interviews" not "unwarranted restrictions."

Should we change the language of the recommendation based on what you have just
discussed?

MR. STONE: Yeah. You can see that in recommendation 45. That's where it's quite clear, on page 5.

HON. HOLTZMAN: My view is that the language of this should reflect the language of the recommendation.

MR. TAYLOR: I agree with that.

MS. PETERS: Make them consistent?

HON. HOLTZMAN: Yeah.

MS. PETERS: So that means the staff will change the word "barriers" in recommendation 45 to "any unwarranted restrictions on thorough questioning" and --

VADM(R) TRACEY: The other way around, right?

HON. HOLTZMAN: Well, Mr. Stone had proposed "unwarranted restrictions," which originally I thought was okay. But now the staff says that that language is not consonant with the --

VADM(R) TRACEY: That's what I'm
saying is you want to change back to "barriers."

HON. HOLTZMAN: Correct.

VADM(R) TRACEY: In the executive summary.

HON. HOLTZMAN: Correct.

MS. PETERS: Okay.

VADM(R) TRACEY: Going to make the executive summary match the --

MS. PETERS: Okay. Understood.

HON. HOLTZMAN: Okay. All in favor?

MR. STONE: Opposed.

HON. HOLTZMAN: Okay. The record should note that Mr. Stone opposes that.

Okay. Recommendation -- we're up to page 5 now, right?

MS. PETERS: Page 4 is recommendation 43. That's the first recommendation, ma'am.

VADM(R) TRACEY: There are no changes on that, right?

HON. HOLTZMAN: There are no changes on that.

MS. PETERS: Right. There is no
changes on that, and I guess so we are on -- we are on 5, and recommendation 44 presents an item from Mr. Taylor adding "or other law enforcement agencies."

MR. TAYLOR: No. That was just intended to be a friendly amendment to reflect the change in circumstance.

HON. HOLTZMAN: No objection. Any objection?

VADM(R) TRACEY: No.

MS. PETERS: Sir, for your consideration, the staff reviewed -- in the DoD policy on MCIO interviews, it says, "The MCIO must do the first interview." It says nothing about whether law enforcement or MCIO's have to do the subsequent interviews of the victim. But recommendation 44 regards specifically the initial victim interview, and so I just wanted to make sure that was clear in your suggested edit.

MR. STONE: Maybe it doesn't belong there because the MCIO still has to do the initial?
MS. PETERS: That's one implication, potentially, for your consideration.

HON. HOLTZMAN: Do you want to add the word "initial" after the word "prompt" in that, so it would make it very clear what we're talking about?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Does that solve your problem, Mr. Taylor?

MR. TAYLOR: Yes. Thank you.

MS. PETERS: And so that's -- we'll take out "other law enforcement" --

HON. HOLTZMAN: Okay.

MS. PETERS: The next edit regards the findings below recommendation 44, changing "critical" to "it's helpful for law enforcement to have" or "helpful to law enforcement to have the initial interview with the victim be conducted promptly -- be conducted promptly."

VADM(R) TRACEY: You have an extra "that" in that sentence, right? So you're going to take that out.
MS. PETERS: Yes, ma'am. I see that.

I took that out.

HON. HOLTZMAN: Any objection to the change? I'm going to object because I think it's more than just helpful. I think it's important. I'm not going to say it's critical. I think -- I think your point is well taken, Mr. Stone. That language may be excessive, but --

MR. STONE: Well, do you want to suggest another word?

HON. HOLTZMAN: Well, how is "important"?

MR. STONE: I think "helpful" says what it is, it helps them, but we have lots of cases that take -- don't even get reported for two years. So that's why I know it can't be critical.

HON. HOLTZMAN: Yeah. But it's after the -- that's fine. I'm not disagreeing with you. I think that's a very -- I think it's appropriate what you've suggested. I just think -- I don't want to get into a fight over it
because we don't have that much time, but I would just suggest "important." If you think "helpful" is sufficient, I'm guided by Mr. Taylor, Admiral, who are both wordsmiths here, you can --

VADM(R) TRACEY: I'm good with "helpful."

MR. TAYLOR: So am I.

HON. HOLTZMAN: Okay. So we have "helpful."

MS. PETERS: The second bullet, the next edit takes the second line, regarding delays in that initial interview, changes -- the original framework was that they are "often" because special victims' counsel are unavailable to "sometimes" because counsel are unavailable to attend the interview.

HON. HOLTZMAN: My objection here is that I think there is a factual point. Maybe "often" is not 100 percent correct in terms of the site visit reports, but it's more than "sometimes." So I think either you ought to say "a number of times" or "many times," but
"sometimes" makes it sound too -- reduces the -- it really doesn't accurately reflect what we heard. So I would suggest -- I mean, I don't mind changing "often" to something that is "a number of times" or "many times" or -- but "sometimes" I object to. I object to that.

MR. STONE: My comment was put in because we had no data. We have zero data that was accumulated by -- by service and by number of interviews, so we cannot say "often." And I don't even think we can say "many times," and I was just looking for different verbiage that made it clear that that was anecdotally what they got back.

HON. HOLTZMAN: I think that that responds to that. I think that is central to the report. I'm not saying that this reflects everything. I don't think it matters what service it comes from, but I -- but based on what we heard, I think this is not an accurate reflection, sometimes. That's all I'm saying.

MR. STONE: Another option is to say,
in that second line, "Victim interviews may be substantially delayed because" and skip -- take out the word "often" and "sometimes," but point out that it's maybe substantially delayed.

I think that the SVCs and VLCs from the prior testimony we heard on other days are making incredible efforts to get out there and attend interviews.

HON. HOLTZMAN: No one said that they're not. No one --

MR. STONE: So I don't think that there's -- there's any data in front of us to tell us that the MCIO's interviews are being delayed.

HON. HOLTZMAN: Well, there's a difference between making an effort and actually being there. No one impugned any efforts that anyone is making here. No one said a word in the subcommittee to that effect, which is that SVCs are now -- are incredibly overburdened, and so there's an issue about that. No one is blaming anybody here. We're just saying this is a
problem.

So we're kicking it upstairs to resolve the problem, but we're just noting the impact of that problem. We need more SVCs, and we need something else.

VADM(R) TRACEY: So what about "The MCIO's initial victim interviews may be substantially delayed when a special victims' counsel or victims' legal counsel are unavailable to attend the interview."

MR. STONE: That's fine with me.

HON. HOLTZMAN: I don't think that that still captures it. I think what we're saying is that -- well --

VADM(R) TRACEY: You're saying it's happening a lot.

HON. HOLTZMAN: I'm just saying --

MR. STONE: Mr. Stone is saying we don't have the data to say that it's happening a lot.

HON. HOLTZMAN: Right.

VADM(R) TRACEY: However often it's
happening, it's a problem when it happens.

    MS. FRIED: Or we could say, "The
    MCIOs interviewed indicated that initial victim
    interviews are being substantially delayed."

    That's fine. Then I'd leave out the "may." I
    like what -- how you resolved it, Ms. Fried.
    Well, somebody --

    MS. FRIED: How about "MCIOs who were
    interviewed indicated."

    HON. HOLTZMAN: Right. "That victim
    interviews are being substantially delayed
    because" -- right.

    MS. FRIED: I think it was, "The MCIOs
    -- the MCIOs interviewed indicated that initial
    victim interviews are being" -- the rest of it
    stays the same, yeah.

    HON. HOLTZMAN: Right.

    MS. PETERS: And that language would
    replace the "according to site visit feedback"?

    HON. HOLTZMAN: Right. Or you could
    leave that in, too.
MR. STONE: Now you can leave out "often" and "sometimes."

MR. TAYLOR: I got the impression from the MCIO's testimony that they thought it was often.

HON. HOLTZMAN: Right. It was a problem. So I think -- I think the word ought to be in there.

MR. TAYLOR: I do, too.

HON. HOLTZMAN: As long as we ascribe it to the interviews, and we know that the interviews are not of every MCIO, I think that's sufficient.

Okay. So what would it read now? How would it read?

MS. PETERS: It would read, "According to site visit feedback, the MCIO" --

HON. HOLTZMAN: Provided to the JPP subcommittee.

MS. PETERS: From there, ma'am?

HON. HOLTZMAN: Well, we'd have the whole -- the whole first clause here.
MS. PETERS: Okay. "According to the site visit feedback provided to the JPP subcommittee, the MCIOs interviewed indicated the MCIO's initial victim interviews are being substantially delayed, often because special victims' counsel or victims' legal counsel are unavailable to attend the interview."

HON. HOLTZMAN: No. I think the "often" is in the wrong place there.

MS. PETERS: Okay.

HON. HOLTZMAN: If you leave the whole sentence the way it was originally, except you add in the "MCIOs interviewed," isn't that really --

VADM(R) TRACEY: That is how it was.

HON. HOLTZMAN: Not the victim interviews, but the MCIOs interviewed.

VADM(R) TRACEY: "The MCIOs interviewed indicate that the MCIO initial victim interviews are being substantially delayed, often because special victim's counsel" --

HON. HOLTZMAN: Right.
VADM(R) TRACEY: That's how it was originally.

HON. HOLTZMAN: Right. Right.

MS. PETERS: Is that what the members are agreeing on then, ma'am?

HON. HOLTZMAN: Mr. Taylor?

MR. TAYLOR: Yes.

HON. HOLTZMAN: Admiral?

VADM(R) TRACEY: Yes.

HON. HOLTZMAN: Mr. Stone?

MR. STONE: There's no data to back that up, and we don't know how many MCIOs were interviewed, so I can't adopt that as a JPP comment. I can understand that it's a subcommittee comment, but I can't adopt it as my own based on non-public testimony of people who didn't -- I don't even know how many who weren't randomly selected and aren't identified. So, no, I can't go for that.

HON. HOLTZMAN: Okay. Are we up to recommendation 45 now?

MR. STONE: There's a comment on the
third bullet, the next bullet.

HON. HOLTZMAN: Oh, okay.

MS. PETERS: Yes, ma'am. It deletes "as well as impair a victim's ability to clearly remember important details," meaning the consequences of a delay in the initial victim interview would omit that clause.

MR. STONE: And since no victims were interviewed, I don't know how they can possibly say that.

HON. HOLTZMAN: No, of course not. It's only based on logic and human experience. The longer you delay, the worse the memory is. That's all.

MR. STONE: We heard just the opposite. We heard testimony before us that the trauma was such that it is often the case that victims remember more a month or two later or three months later than they do in the week following the traumatic event when they are blocking out everything. They can't even tell you where they were.
HON. HOLTZMAN: Okay. That's --

MR. STONE: So that's why there's no

data for that.

MS. FRIED: Was that a perception of
the MCIOs that's being captured in this bullet as
relating to the subcommittee?

MS. PETERS: This particular bullet
comes from a summary of the site visit feedback.
A majority of the agents expressed concern this
passage of time could cause them to lose valuable
physical or digital evidence, as well as impair a
victim's ability to clearly remember details.

MS. FRIED: The investigators who were
interviewed indicated that to the site -- to the
subcommittee members who went on the site visits.

HON. HOLTZMAN: You know, I personally
think that it's a real waste of time and printing
resources, not to mention paper, to repeat that
at every circumstance. I think that that should
be made -- that point needs to be made very clear
at the outset, that this report is based only on
these interviews. It's not purporting to be a
comprehensive report of the -- of that, and
sometimes that should be very clear. I mean,
that concern of Mr. Stone's I think is perfectly
legitimate.

MS. FRIED: So do you want language
that is not generalizable to the entire DoD
population at all its military installations?

HON. HOLTZMAN: Yeah. Some language
to that effect, and so it's clear and that it
applies to -- and that this report is based on
these interviews as well as some additional
research that was made. But that point -- if
it's not clear, it needs to be made clear, and
it's applicable to all of the -- all of the
statements that are made here I think. I don't
know. I don't know why we need to repeat it
every --

MR. TAYLOR: Well, I mean, that is
certainly the way that I interpreted even
bullet 2. I mean, and to that extent, I didn't
think the addition -- I was not opposed to the
addition, but I didn't think it was necessary
because --

HON. HOLTZMAN: Right. But I don't know why we need to state it. I mean, you know, that's my only point is we've got -- we can put it in every single time, but it's just unnecessary it seems to me, if we make it clear in a disclaimer at the beginning or somewhere.

MS. FRIED: I'm sorry. I wouldn't suggest that we change that bullet. I was just trying to make clear to the panel members where that information was coming from. It wasn't from the victims because it wasn't that they didn't interview the victims, so the sections from the MCIOs.

HON. HOLTZMAN: Oh. I'm sorry. I thought you --

MS. FRIED: No, that's okay.

HON. HOLTZMAN: -- asked you about Okay.

All right. So in favor of Mr. Stone's edit, say aye.

MR. STONE: Aye.
HON. HOLTZMAN: Opposed?

VADM(R) TRACEY: No.

MR. TAYLOR: No.


Are we up to 45?

MS. PETERS: Yes, ma'am. The only edits for recommendation 45 changes "barriers" to "any unwarranted restrictions," but I think we discussed that --

HON. HOLTZMAN: It has been adopted already.

MS. PETERS: It has been adopted with "barriers remaining." So there is nothing else on that recommendation.

The next edit is the second bullet below that, and it says -- in the second line of the second bullet regarding MCIOs relating to supervisor approval that is required for doing a subsequent victim interview.

HON. HOLTZMAN: Where are you?

MS. PETERS: In the second bullet below recommendation 45. This regards the
thorough questioning of sex assault victims and
the issues the subcommittee found. The second
bullet --

HON. HOLTZMAN: Isn't it just a word?

MS. PETERS: Yeah. It's just adding
"some."

HON. HOLTZMAN: The word "some" is
being proposed by Mr. Stone, right?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Okay. I think it's --
any -- should we just vote? Any discussion on
that? Do we have anything in our notes that
indicates whether this is most of the
investigators or some of the investigators or --

MS. PETERS: Well --

HON. HOLTZMAN: -- or what is it? Oh,
I think actually the report would indicate that
it's -- that these barriers affect all of the --
I mean, we basically had a consensus from
investigators. It wasn't some. "Some" actually
incorrectly states the results of the interviews.

MS. PETERS: The text of the report
says, "Many agents explained that they're required to obtain a supervisor approval, which was viewed by them as a deterrent." That's what the subcommittee report says.

HON. HOLTZMAN: All right. So I think that, you know, this just varies what the subcommittee found. I'm not in favor of it, but obviously why don't we just vote. Any other comment?

MR. STONE: No. My only comment is there is no data.

HON. HOLTZMAN: Okay. Those in favor of Mr. Stone's edit, say aye. Mr. Stone, you're not voting for your edit?

MR. STONE: I'm in favor of it, yes.

HON. HOLTZMAN: Okay. Those opposed?

VADM(R) TRACEY: No.

MR. TAYLOR: No.

HON. HOLTZMAN: Okay. The no's have it. All right. Then we are up to bullet 3.
MS. PETERS:  Yes, ma'am. Mr. Stone recommended deleting entirely bullets 3 and 4 below recommendation 45.

VADM(R) TRACEY:  I didn't understand why you wanted to delete them.

MR. STONE:  Well, victims have and special victims' counsel have an absolute legal right to be interviewed or not be interviewed, and this implies that they have no right to decline a follow-up interview in bullet 3, and in bullet 4 that -- that rapport-building opportunities of MCIOs with victims is important enough to warrant more questioning by MCIOs.

I don't think it's -- that we have at any point ever said that the rapport between the neutral investigator and the victim is something that any system is obligated to protect. In fact, if there was rapport, probably the investigator should be disqualifying himself. He is supposed to do a neutral investigation.

And in terms of whether or not SVCs can limit the scope of questions or object to
requests for follow-up interviews, that's their job. And it seems to me putting that in here chills them from making objections when they think questions might be going towards maybe collateral misconduct they don't think is relevant or other issues that they don't think the victim should answer.

That is their job, and putting that in these bullets not only impedes them on a recommendation of them doing their job but suggests they are not doing their job properly. And I don't think that's the case. That's why they have counsel.

VADM(R) TRACEY: So do you dispute the reasonableness of the last bullet?

MR. STONE: The last bullet?

VADM(R) TRACEY: Mm-hmm. Isn't it correct that if there is a barrier to thorough questioning by MCIOs, then they do lose these things whether rapport-building is important or not?

MR. STONE: Since I don't think
rapport has anything to do with it, I have to dispute that bullet because --

VADM(R) TRACEY: It says rapport-building, but how about the important details about the reported offenses since the details didn't play out over time? Do you disagree with that?

MR. STONE: Come again? I have no -- well, coming together over time, which is the exact opposite by the way of what we just put in about -- in bullet 3 in the recommendation before, that they should have the right to quickly -- they are going to lose their -- their memory, the ability to clearly remember, they're going to lose it as time goes on. This says there is going to be more coming together I think after a traumatic event. That's the information I was relying on in the other bullet.

MR. TAYLOR: So when I read these two bullets, I just saw them as a statement of fact, basically, as a statement of what their -- what their conversations indicated were facts that
support the general recommendation. And I
certainly didn't take it as an indictment or
criticism of the roles that they were playing.

VADM(R) TRACEY: Same here.

HON. HOLTZMAN: I think that that's
true because I think that one of the
recommendations was that training -- some of the
objections, for example, to turning over the
phone may come from a lack of understanding that
there are ways of just -- I don't know what the
technique is, but videoing the relative --
relevant portions of the phone without -- there
are new technologies to do that without giving up
the whole phone.

And so if you could train the SVCs or
VLCs on that kind of technology, assuming that it
exists, which we were told at the subcommittee
meeting that they do, that that is -- that's a
way of alleviating the problem. It's a way of
resolving the concerns of the SVC and the victim,
as well as resolving the concerns of the
prosecutor or the trial counsel and the MCIOs.
So it's not necessarily that we are even talking about a conflict here. We're talking about a way of resolving conflict.

So I don't think that it's fair to assume that this is telling SVCs not to do their job. They obviously have that job. It's saying that there are -- these create problems and are there solutions to them? And in some cases there may be technological solutions that would be useful.

MR. STONE: Well, okay. You've moved to the substance of the next recommendation, so I'll respond to that in -- by saying that I think that to the extent that the subcommittee made these two bullet recommendations, and the next one, they are way off base.

It makes absolutely no difference whether or not there are now electronic ways to image only part of a cell phone, because if that information gets used a trial, a defense counsel, on the grounds of completeness, is going to have a right to the whole cell phone.
I can't imagine a judge not giving that to them, and certainly not previewing everything on the cell phone. Therefore, it's very much like a Fifth Amendment privilege. You cannot start to answer a question and then say, "Oh, I claim my Fifth." You waived your Fifth Amendment privilege on the stand if you begin to answer a question. You have to completely refuse, or on the grounds of completeness you're out of luck. It's waived.

And the same thing is true about the privacy rights in the cell phones, and so those other new programs that let you protect the privacy of somebody looking at them don't really apply in an adversarial trial setting as here, in my view.

And so I think that one has to look at the legal consequences of these bullets, as well as what the MCIOs who typically are not lawyers would love to have. I mean, I'm sure they would love to have a completely candid statement from every defendant about everything that happened,
but many times they are not going to get it. The defendant is going to claim the Fifth or say, "I really don't want to talk to you."

Yes, the MCIOs would be in a better position to make a recommendation, and, yes, maybe the system would have fairer results. But the defendants aren't going to waive their privilege, victims have rights with special legal counsel, special victims' counsel, and they're in the same position because we've heard many times at the beginning about issues of collateral misconduct, which make them either want to withdraw from the case all together or not, and that goes also to this business about what amounts to their diaries. That's what today's cell phone are -- people's diaries.

So, yes, I think that those two bullets are misleading. I don't think they reflect an understanding of the legal merits of what's going on and what the military services have done by giving people their own counsel to decide.
I'm really not interested in rapport on behalf of the MCIOs. That's not what they're supposed to be doing, developing rapport. They are supposed to be gathering the facts. And if an attorney for any witness, not just a victim, says to their client, "I don't think it serves your interest to answer this question," that's why they have an attorney.

You know, if the MCIO doesn't like it, he can write in his report "I tried to -- I asked this question, and counsel advised the witness not to answer. It causes me to draw the following conclusion." And they have every right to write that, but that's the way the legal system works.

So I -- for that reason, I have objections to those two bullets, and that's basically my concerns on Fourth Amendment ground, constitutional grounds, Article 6b grounds that say victims now have a right to be treated with respect, and their privacy has to be protected, and the additional statutes that give them
counsel, all of those are demeaned by these comments that suggest MCIOs can invade those rights.

HON. HOLTZMAN: I think with all due respect, Mr. Stone, you're misunderstanding the thrust of these bullets. First of all, you know, it's many years since I've been a prosecutor or a DA in Brooklyn, but I recall in the good old days -- and I think it's still true -- that you have specially trained -- and it's also true for MCIOs. People are specially trained to handle people who -- victims who have been through a terrible ordeal.

So maybe rapport-building isn't exactly the right word, but you want to be in a situation where you have sensitive handling of these cases. So I don't think there is anything objectionable to that. I think it's really actually an advance in how we handle the cases involving sexual assault. People are specially trained.

Secondly, no one is saying to
undermine any of the amendments of the Constitution because, first of all, even if we wanted to we couldn't, and some of us wouldn't want to do that. But what we are saying here is sometimes you may have an SVC who is not fully trained.

We're talking about some cases people who are brand new to the position, and so they may think they are defending the interests of the victim, which they have every right to do and which we want them to do, but on the other hand they may be harming the victim because if the prosecutor or the investigator can't get the critical evidence, the case may not go forward. So that's a consequence.

And so all we're saying here is really to see if there are ways of reconciling these two very valid concerns. Sometimes these are irreconcilable; I understand that. And no one is saying that the victims' privacy rights or Fourth Amendment rights should be abandoned.

All we're saying is if there are ways
to reconcile two very laudable objectives, we ought to try to do that in light of the concerns that were raised. That's all that is being said here, Mr. Stone, and I think you're envisioning dragons that just don't exist, that were not intended to exist. So I object to your --

MR. STONE: That's okay. We can disagree. I take your comment as suggesting that the investigators and maybe, from some of these other comments, that the defense counsel know better than, as you put it, the brand-new SVCs, and, therefore, they should intrude into that relationship. Absolutely not. And I would object to that, and any suggestion of that.

If you don't like what a counsel is doing, like an SVC, there are -- there is a chain of command in the military, and the MCIO can certainly go over his head to the supervisor of that SVC, whether they're on base or they're at some other location and say, "I think the SVC here is not giving sufficient or correct advice to his client. Do you want to please counsel
That's as far as it goes. They don't get to -- they don't know more than the SVC does in their relationship with their victim. They keep out of that relationship. That's not their business. Their business is to gather facts, and the SVC's business is to advise their client.

HON. HOLTZMAN: Okay. You're misconstruing. I don't know whether it's deliberately or not. I'm assuming it's not. What I've said, I haven't said anything like that. I'm not trying to interfere with anybody's job.

We're just talking about education and, sure, education could change how people view things, but that's one of the reasons that we have it, so that people understand what their options are more fully than they would otherwise. I don't understand why you would object to that. That seems to me to be totally incomprehensible, but I think it's time to vote on this.

So we have two bullets. We'll take
them in order. The page -- the bottom of page 5, to eliminate bullet -- the last bullet on page 5, Mr. Stone's recommendation, Mr. Stone -- all in favor of deleting bullet -- the last bullet on page 5, say aye.

MR. STONE: Aye.

HON. HOLTZMAN: Opposed?

VADM(R) TRACEY: No.

MR. TAYLOR: No.

HON. HOLTZMAN: The no's have it.

Page 6, the top, all in favor of Mr. Stone's recommendation to remove the top bullet, say aye.

MR. STONE: Aye.

HON. HOLTZMAN: Opposed?

VADM(R) TRACEY: No.

MR. TAYLOR: No.

HON. HOLTZMAN: The no's have it.

I guess recommendation 46 is to take everything out; is that correct?

MS. PETERS: Yes, ma'am. That's the only --
HON. HOLTZMAN: Okay. So let's vote on that. Those in favor -- I think we've had a discussion of that. I mean, I'm sorry, anybody want to say anything else about that? Okay. Those in favor, say -- of Mr. Stone's recommendation to delete recommendation --

MR. STONE: I would, before you say that, just point out, as was pointed out by Mr. Taylor at our earlier meeting, there is a perfectly satisfactory military process that goes to a neutral decision-maker to try and get something like a phone from a victim.

And there was no testimony that that was a process which in any number of cases, large or small, has defeated the ability to get those phones. It's a process similar to getting a warrant, and before you get somebody's diary you would do it anywhere.

So if there was no process, military process, that would be one thing, but there is a military process, and this recommendation recommends getting rid of the current military
sanctioned process which is sanctioned in the
military rules of evidence, UCMJ, and no longer
using military search authorization based upon
probable cause. That's completely missing from
here.

HON. HOLTZMAN: Okay. Any further
comment? Those in favor of Mr. Stone's
recommendation to delete recommendation 46, the
proposal to delete recommendation 46, say aye.

MR. STONE: Aye.

HON. HOLTZMAN: Those opposed?

VADM(R) TRACEY: No.

MR. TAYLOR: No.

HON. HOLTZMAN: The no's have it.

Recommendation 47.

MS. PETERS: The first edit, Mr. Stone
would delete "more" before "expeditious."

HON. HOLTZMAN: Mr. Stone, do you want
to explain that?

MR. STONE: Yeah. We don't have
expeditious testing now, so the word -- having a
modifier in there doesn't make any sense. We
want to ensure expeditious testing. I don't know how you can ensure more expeditious when we don't have a schedule. Again, we don't have data to know how long it is taking, so we just want to recommend that it's expeditious.

VADM(R) TRACEY: I have no objection to the change.

MR. TAYLOR: I have no objection.

HON. HOLTZMAN: Me either. Okay. So the change is adopted, bullet 1.

MR. TAYLOR: You know, I would just explain that bullet 1 modified simply to add the other law enforcement agencies, the MCIOs, and just recommending that we reorder them in a way that I thought made more chronological sense.

HON. HOLTZMAN: Any objection?

VADM(R) TRACEY: No.

HON. HOLTZMAN: Without objection, that is accepted.

And what do we have, on page 7?

MS. PETERS: Yes, ma'am. That's where the bullet originally was, so that deletion is
already consistent with moving it to the first bullet --

HON. HOLTZMAN: Okay.

MS. PETERS: -- on 45.

HON. HOLTZMAN: Are we finished?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Great. So let's take a 10-minute break now, and then we're up to victims' appellate rights, right?

MS. PETERS: Yes, ma'am.

HON. HOLTZMAN: Wow, moving right along. Okay. Thank you. We're going to take a 10-minute break now.

(Whereupon, the above-entitled matter went off the record at 2:38 p.m., and resumed at 2:48 p.m.)

HON. HOLTZMAN: Since the staff is trying to throw me out of here early, and they put me on an earlier flight, I think we'll try to speed through this even more quickly than we were thinking about before. I think we're up to -- what are we up to?
MR. STONE: Tab 12.

HON. HOLTZMAN: Tab 12, right, victims' appellate rights. Let me just say, I think it's really important to address Mr. Stone's concern about leaving any misimpression that this report purports to be a comprehensive survey of the problem.

So I'm thinking of -- maybe we can circulate some language, if we can't agree on it today, to the effect that this report does not purport to be a universal comprehensive analysis of the problems or concerns identified. On the other hand, it does not reflect the concerns of a single individual or single service, that these were concerns broadly brought to our attention across all site visits that were made, something to that effect.

MR. STONE: Okay. Send them to me and I'll be happy to look at it and consider it with whatever data I'm getting and what the revised report looks like, in order to decide what comments, if any, I will put into writing before
the next meeting and get back to the --

HON. HOLTZMAN: Right. And if you

have any comments on that disclaimer --

MR. STONE: Right.

HON. HOLTZMAN: -- for the members of

the panel, but I think it would be, given the

concerns that were raised, I don't think that we

should in any way be misleading about this report

to anybody.

MR. STONE: Okay. And I have -- I may

have no comments when I see it all, so --

HON. HOLTZMAN: Right.

MR. STONE: -- I'll wait to see it.

HON. HOLTZMAN: Okay. So, Captain?

CAPT. TIDESWELL: Yes, ma'am. We're

at Tab 12. This is the deliberations portion

of --

HON. HOLTZMAN: Before you start, can

I just say thank you for having -- for you -- for

the work that you and the staff, under your

direction, has done for us.

CAPT. TIDESWELL: Thank you, ma'am.
Appreciate that.

HON. HOLTZMAN: Really, we know that you are working under tight restrictions and we really appreciate what you've been doing for us, so thank you.

CAPT. TIDESWELL: Thank you. Thank you so much.

Yes, ma'am. So we're at Tab 12. It's the Victims' Appellate Rights Report, and it was previously sent to all the members for potential changes or edits.

Mr. Taylor was kind enough to provide us with several copy edits, but if you don't mind, Chair Holtzman, I thought I would focus the panel on what I would consider more of the substantive changes.

HON. HOLTZMAN: Yes, ma'am.

CAPT. TIDESWELL: And those start on page 10, and the first change is a recommendation by Mr. Stone. And on page 10, it's paragraph 3, and it's the last sentence of that paragraph.

Mr. Stone is recommending an edit that reads,
"Neither of these cases discuss the rights of the holders of privileged records as those rights now appear in MRE 511a or MRE 1101c, formerly subsection b."

HON. HOLTZMAN: Captain, do you want to give an analysis, or, Mr. Stone, do you want to first speak to it?

CAPT. TIDESWELL: I'm just going to defer to you.

MR. STONE: I'll just explain that the cases that were -- were cited and referred back to deal with confidential or sealed materials, not privileged materials. That's all.

And I make that same comment in a couple of places, just so it's clear to the reader that the reason we're making some of the recommendations we are is because we are trying to distinguish now carefully between when prior context -- the prior context only dealt with sealed materials and when it dealt with privileged materials, which do sometimes overlap. So that's why that sentence is in there and
actually why the sentence that's on the next page, on page 11, is in there, too. That's just for clarification purposes.

HON. HOLTZMAN: Any objection?
VADM(R) TRACEY: No objection.
MR. TAYLOR: No objection.
HON. HOLTZMAN: Okay. It's adopted.
CAPT. TIDESWELL: And then, as Mr. Stone pointed out, there is a similar recommendation that is contained on page 11, paragraph 3. And I believe it's --
VADM(R) TRACEY: No objection.
HON. HOLTZMAN: Let me just ask a question. Would these -- would these materials be privileged under MRE 511 or 1101?
MS. GALLAGHER: 511 is a rule of admissibility for privileged material that has been disclosed already. So I'm not really certain where it's --
HON. HOLTZMAN: Whether it's relevant?
MS. GALLAGHER: -- helping a proposition.
MR. STONE: 511a, right, is whether they have previously been litigated.

MS. GALLAGHER: Right. Admissibility of already disclosed material versus the material we're addressing here, which we're saying shouldn't be disclosed without --

MR. STONE: Well, do you have any problem with the comment?

MS. GALLAGHER: I guess I'm just confused as to why 511 is relevant.

MR. STONE: Well, because 511 is in there because 511 is the one that says, "Unless you allow holders of privileged material to contest that material, it's not admissible at trial." It covers all the privileges. And absent a prior opportunity to contest it, none of it is admissible.

HON. HOLTZMAN: What does that have to do with appellate rights?

MR. STONE: Well, that's what I'm saying, that it didn't consider that. It's not considering whether --
HON. HOLTZMAN: Well, why would we consider something --

MR. STONE: -- they were also privileged.

HON. HOLTZMAN: Well, wait a minute. I'm just trying to understand this. I'm not trying to be argumentative. But is this relevant, 511a, to the appellate rights that we are discussing? Because if it's not, why are we considering this here at this time?

MS. GALLAGHER: It's a proposal Mr. Stone made for your consideration.

HON. HOLTZMAN: I understand, but I'm raising you the question --

CAPT. TIDESWELL: We do not believe that it's relevant, but we defer to Mr. Stone. It's his recommendation.

HON. HOLTZMAN: And why do you believe it's not relevant? Would you explain that to me, please?

MS. CARSON: We haven't received any testimony or discussed this issue.
CAPT. TIDESWELL: That's one part of it.

MS. GALLAGHER: 511 -- the material we're talking about, they have already invoked the privilege. The privilege occurred at the trial level, and it has been invoked already. And 511 is a rule of admissibility of already disclosed evidence.

HON. HOLTZMAN: At a trial. The 511 has nothing to do with --

CAPT. TIDESWELL: At a trial.

HON. HOLTZMAN: -- this appellate issue?

CAPT. TIDESWELL: I do not believe --

HON. HOLTZMAN: Is that the issue that we discussed where the -- the military came back and said that they had some issues with the issue that was raised?

MS. GALLAGHER: Right. I believe they addressed --

CAPT. TIDESWELL: 1101.

MS. GALLAGHER: -- MRE 1101c. I don't
recall 511 coming up before Mr. Stone's proposed
addition.

HON. HOLTZMAN: Here, in this
document.

MS. GALLAGHER: Yes.

CAPT. TIDESWELL: Yes.

HON. HOLTZMAN: Okay. So we haven't
considered 511a?

MS. GALLAGHER: Not to my knowledge,
ma'am.

MR. STONE: 511a simply is the
mechanism by which you determine that something
is privileged at the trial level, and all I'm
saying is you can -- we can drop the reference to
MRE 511a. That just clarifies whether they were
also privileged. That's how they were
privileged, because they were found privileged
under MRE 511a.

So if you want to drop under MRE 511a,
it isn't going to make any substantive
difference. Basically, the point is, they follow
its plain language as to sealed documents without
considering whether the documents were also
privileged.

HON. HOLTZMAN: I'm still not
following it. So let's just take -- so you say
we can drop 511a. What's the point of 1101c?
Did we have -- do we have the same issue with
regards to, did we discuss that with this
committee how --

CAPT. TIDESWELL: Yes, ma'am. You
received a letter, a comment from Colonel Jeffrey
Palomino and Mr. Brian Mizer. They're at the Air
Force appellate defense shop, and they've opined
that they do not believe that 1101 -- that even
applies at the appellate level, and that was
something that was put before the panel.

MR. STONE: And that was in response
to my comments that the plain language of 1101c
says that at all stages of the proceeding the
privilege rights of the holder have to be
honored. And all this is saying is that the CCAs
did not consider that, and that's correct. The
CCAs didn't consider 1101c. There is no
discussion of it in any of the opinions that are
being quoted as cited.

HON. HOLTZMAN: But doesn't this
language say that there is the holder of a
privilege -- doesn't this imply that there is a
privilege under MRE 1101c here? I mean, if --
I'm sorry that I didn't catch this earlier. I
guess it's just late in the day, and we've been
considering a lot of different things.

But I guess what I'm hearing is that,
number 1, we did not substantively consider the
1101 -- I mean, you're dropping the MRE 511a, but
the 1101 issue, we didn't substantively consider
it, and we've had an objection to this point from
the Air Force.

MR. STONE: I brought it up several
times.

HON. HOLTZMAN: Right. And you
brought it up. We haven't -- aside from you, we
haven't heard from any other experts on this.

MR. STONE: Yeah, we did. Because I
asked some of the experts who were in front of
us. I asked them each whether or not they thought 1101c would affect the outcome, and they basically said they hadn't really thought about it.

HON. HOLTZMAN: Well, I understand that, and that's -- I mean, that's not to say that you haven't thought of an issue that they -- I mean, that you've thought of an issue that they haven't. But, still, I think before the panel can take a position on something, we need to have -- even if they haven't thought about it, we need to ask their opinion of the subject before we make a decision or a ruling on it, particularly given that the Air Force counsel took a contrary position to you.

So I just don't know whether this is a --

MR. STONE: I have no problem lining out the latter half of the phrase "under 511a or MRE 1101c, formerly b." You can take all of that out, and then it should be less controversial. And all it does is restate what is correct.
HON. HOLTZMAN: Well, then, what do we need it for?

MR. STONE: What? Those two -- those two references or --

HON. HOLTZMAN: Why do we need the -- why do we need -- neither of these cases discuss the rights of the holder of privileged records.

MR. STONE: I'm talking about the next comment. You're back on 10. I thought you were on 11. You went back to 10. I thought you were already passed --

HON. HOLTZMAN: Aren't they the same? Okay. Sorry. Well, okay, I'm on 10 -- I'm on 10 and 11, because I think the same issue applies to both of them, that we have not heard from -- I mean, that we haven't heard from -- aside from your comments on this, and the fact -- well, we heard about this issue from our expert panelists as, one, they haven't thought about it; or, two, they were opposed to it.

And I don't -- I mean, just as a matter of prudence, I think we ought to have more
of a basis for us as a panel to make a decision
on these -- on matters than just that.

MR. STONE: I am perfectly willing to
strike the phrase "as those rights now appear in
MRE 551a or MRE 1101c, formerly subsection B" on
page 10, and "under MRE 551a or MRE 1101c,
formerly B" on page 11, if you find those
confusing.

I actually think they are helpful to
people, but if you think those are confusing,
that's fine. None of the cases before then or
the courts discussed specifically the rights of
holders of privileged records. They only talked
about sealed records. That's why the comments
are in there.

I believe it's a matter of urgency,
since this is the fourth meeting that we've had
trying to get this report out, and that if we
don't get it out soon it may be too late. And,
therefore, I believe I'm willing to strike those
phrases as long as we clarify what the CCA's and
the CAAF's prior decisions discussed, which was
sealed documents, not privileged documents. You won't find the word "privileged" in any of their decisions.

HON. HOLTZMAN: Well, I'm not sure I understand what your position is now. Are you willing to withdraw your comments to both 10 and 11?

MR. STONE: No. The second half of the comments.

HON. HOLTZMAN: So you --

MR. STONE: The substantive comment, neither of these cases discussed the rights of the holders of privileged documents, and the first one is accurate and it can stop there, and the second one can say, "As to sealed documents, without considering whether those documents were also privileged" on page 11. Those are purely descriptive comments.

MR. TAYLOR: Well, I guess the question I have, Mr. Stone, is are you implicitly saying that they should have considered those?

And if I understood the chair's questions, is
that an area that we have spent enough time on
that we want to comment on? Is that what we're
implicitly saying?

It may be. I'm sure it is because you
were very careful in -- a very careful lawyer,
but it is a factually accurate statement that
they did not discuss it. But if by saying it we
are implying that they should have, then isn't
that a slightly different statement?

MR. STONE: I was just trying to
describe historically what happened. I think
that we look more complete by describing what
historic -- actually, in some ways, it says they
are not to be blamed, because they didn't discuss
it.

HON. HOLTZMAN: Well, are they to be
blamed because they didn't discuss it?

MS. GALLAGHER: It shouldn't --

MR. STONE: No. It wasn't in front of
them.

MS. GALLAGHER: -- an issue before the
court.
HON. HOLTZMAN: Right. So I don't understand why we need to raise it at this point, since we ourselves can't take a position, in my opinion, because we have not personally gotten expert testimony aside from your view on this subject. So I'm concerned about raising this issue at all. That's my concern.

And I think there's -- you know, I think Mr. Taylor raises also an issue that I would have, too. That's why I don't know why we need to raise it. I mean, there's nothing inaccurate about what the staff has put together in terms of this report, is there, without this comment in it?

MR. STONE: I think it makes it more intelligible. If people don't want it, I'll be guided by the majority vote.

HON. HOLTZMAN: Well, just in light of the fact that the substance of it is something that we really haven't considered in the normal way that we consider things with the expert testimony, we have -- aside from the views of the
very distinguished members of this panel, I would
-- my own view is that we should just not accept
these two suggestions on page 10 and 11.

MR. STONE: I would point out that I
absolutely recall asking retired Judge Orr
whether or not those cases involve privilege
material, among other experts who testified, and
he said, no, they didn't. So I think we did
discuss it. I think we did get testimony. I
asked that of other individuals when there were
-- I don't think they're crucial sentences. I
think we should vote on them. If the majority
don't think they clarify what's going on, then
you won't adopt one. Shall I call for a vote on
10 and 11?

HON. HOLTZMAN: Okay. So in favor of
Mr. Stone's suggestions on page -- well, I guess
let's do -- page 10, I think we already voted,
but since I want to change my position on it, on
10, those in favor of Mr. Stone's suggested
amendment, say aye.

MR. STONE: Aye.
HON. HOLTZMAN: Those opposed.

VADM(R) TRACEY: No.

MR. TAYLOR: No.

HON. HOLTZMAN: I think the no's have it. On page 11, those in favor of Mr. Stone's amendment, please say aye.

MR. STONE: Aye.

HON. HOLTZMAN: Those opposed?

VADM(R) TRACEY: No.

MR. TAYLOR: No.

HON. HOLTZMAN: The no's have it.

Okay.

CAPT. TIDESWELL: Yes, ma'am. The next issue is on page 13, subparagraph C, proposals and considerations. In the first paragraph, Mr. Stone is recommending in two places the insertion of the word "privileged."

MR. STONE: Again, all of my comments on page 13 are meant for clarification. And if panel members think that they don't provide clarification, or are confusing, then feel free to vote against them. I believe it clarifies
what we're trying to say, but if you don't, that's fine. It's whether you think it clarifies. I do.

HON. HOLTZMAN: Well, can I have some view of the staff about any issues with regard to this language?

MS. GALLAGHER: I don't have any --
CAPT. TIDESWELL: I have no objection to that language.

HON. HOLTZMAN: Mr. Taylor?

MR. TAYLOR: No objection.

HON. HOLTZMAN: Do we know -- I would have a question, which is how do we know that these records are in fact privileged?

MR. STONE: We know that because all mental health records in the military are privileged.

HON. HOLTZMAN: Well, suppose they have already been released in some form.

VADM(R) TRACEY: Well, the sentence deals with only those that were reviewed in camera but were not released to counsel at trial.
That's the whole point of these changes is to separate out the things that were already released from those that were not.

HON. HOLTZMAN: Right. I'm not talking about released to counsel. I'm talking about released in some other format or some other forum or something like that.

MS. GALLAGHER: Right. But if they have been released in some other format, the privilege has been waived.

HON. HOLTZMAN: Fine. So that's not all right. So I have no objection either. So I don't think anybody has an objection to the words "privileged." And what about "of all kinds," is there any issue with regard to that one?

VADM(R) TRACEY: No issue.

HON. HOLTZMAN: Any objection, panel members, to that one? So those are adopted.

MR. STONE: My next comment is on page 19.

CAPT. TIDESWELL: Yes, ma'am. The
next comment is in the second paragraph. Mr. Stone would like to add the words or a sentence that states, when referring to the Pacer system, "Registered litigants are separately notified via electronic filing and titled with each new document by email."

HON. HOLTZMAN: Is there any issue with regard to that language? Any objection to that language?

VADM(R) TRACEY: No.

HON. HOLTZMAN: I have no objection. It is adopted.

CAPT. TIDESWELL: Yes, ma'am. I believe the last issue is on page 28.

HON. HOLTZMAN: Wow.

VADM(R) TRACEY: I have a question on page 21.

HON. HOLTZMAN: Sure.

VADM(R) TRACEY: Under the JPP findings and recommendations, the last sentence on page 21, "JPP believes that development of these procedures should be left to the Services,
each of its because positions," and so forth. I thought that the language under our support for the Pacer equivalent system was -- suggested that we favored a unitary system.

So do we mean that the JPP believes that the development of these interim procedures?

CAPT. TIDESWELL: No. I think we -- I think you've hit an excellent point, and perhaps we should consider changing the language, because I would think you would want a common system throughout. But I think it's also the -- I'm sorry, ma'am.

VADM(R) TRACEY: I think in this section what we're talking about is the fact that that process is going to take until 2020 or thereabouts. And in the interim, there should be such a process, and I thought what we were saying is that the Services should be free to develop a process in the interim that works for them.

CAPT. TIDESWELL: Yes, ma'am.

VADM(R) TRACEY: And then they need to align to the defense --
CAPT. TIDESWELL: The overall -- yes, ma'am.

VADM(R) TRACEY: So I think the JPP believes that the development of these interim procedures should be left to the Services.

MR. STONE: That's fine with me.

HON. HOLTZMAN: And do you want to add "and that the final system should be a uniform" --

VADM(R) TRACEY: Should have its own legal organization structure until the Pacer-equivalent system is implemented, and that's not the right way to describe that, but I'm told that --

CAPT. TIDESWELL: We've got it. Yes, ma'am.

HON. HOLTZMAN: A uniform system is -- similar to the Pacer system is adopted for the entire military.

VADM(R) TRACEY: Yes.

HON. HOLTZMAN: Something like that.

Okay.
MR. STONE: Okay. Good.

HON. HOLTZMAN: All right. So page 28

is our next --

CAPT. TIDESWELL: We're in paragraph D, JPP findings and recommendations, first paragraph. Mr. Taylor had made a suggestion that perhaps we should provide more information, basically the rationale behind the recommendation. The staff has, in fact, drafted that language per Mr. Taylor's request. In doing so, we really relied strongly on Mr. Stone's dissent.

MR. TAYLOR: I would just add that leading up to that, the arguments pretty much laid out pro and con, and then we just come up with the recommendation. And I just thought that it would be more logical to at least rely upon Mr. Stone's analysis of it, which I found persuasive, to put together some words that would explain why those of us who voted for this recommendation did.

VADM(R) TRACEY: I thought so.
MR. STONE: Are you fine, Mr. Taylor, with those words? Because it was your choice to add it in.

MR. TAYLOR: Well, I thought the words pretty well captured the discussions that we had, so I was fine with it. But since you were the author of most of it --

MR. TAYLOR: I'm willing to --

MR. STONE: -- I'll defer to you.

HON. HOLTZMAN: Okay. Okay.

CAPT. TIDESWELL: That's it. Yes, ma'am. So staff will make the changes and send it back out to the Panel for review.

MR. STONE: Do we vote on this report now?

HON. HOLTZMAN: We can, yes. All in favor of adopting the report, as amended?

MR. STONE: Aye.

VADM(R) TRACEY: Aye.

MR. TAYLOR: Aye.

CAPT. TIDESWELL: Yes, ma'am. That's all we have for this meeting.

HON. HOLTZMAN: Subject, of course, to the --

CAPT. TIDESWELL: To the changes.

HON. HOLTZMAN: -- to the changes, which you'll send out promptly, and we'll get them approved promptly, and then --

CAPT. TIDESWELL: Yes, ma'am.

MR. STONE: And I guess a signature letter, too, that --

CAPT. TIDESWELL: The transmittal letter, yes, sir.

HON. HOLTZMAN: Okay. Great.

MS. FRIED: If that's all, ma'am.

HON. HOLTZMAN: I think so.

MS. FRIED: Okay. Thank you. The record is closed.

HON. HOLTZMAN: Thank you very much.

Thanks, panel members.

(Whereupon, the above-entitled matter went off the record at 3:12 p.m.)
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In the matter of: Judicial Proceedings Panel Public Meeting

Before: United States Department of Defense

Date: 05-19-17

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