

## 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

C-O-N-T-E-N-T-S

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

2 9:06 a.m.

3 CHAIR HOLTZMAN: Good morning,  
4 everyone.

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

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

21 The following distinguished  
22 individuals have been appointed to the Panel: the

1 Honorable Elizabeth Holtzman, who serves as the  
2 Chair to the JPP; the Honorable Barbara S. Jones;  
3 Vice Admiral (Retired) Patricia Tracey; Professor  
4 Tom Taylor; and Mr. Victor Stone. The Members'  
5 biographies are available at the JPP website at  
6 <http://jpp.whs.mil/>.

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

15 As you will hear from Madam Chair, the  
16 first presentation is from the JPP Subcommittee.  
17 The Subcommittee reports to the parent Panel, the  
18 JPP. Additionally, the findings and  
19 recommendations of the Subcommittee are based on  
20 the Subcommittee's site visits to 25  
21 installations and testimony received by the JPP  
22 during public meetings. More information on the

1 methodology used by the Subcommittee is further  
2 described in the report. The recommendations of  
3 the Subcommittee are directed to the JPP, and the  
4 JPP is free to adopt, modify, or reject the  
5 recommendations and findings of the -- of the  
6 Subcommittee.

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

14 CHAIR HOLTZMAN: Thank you very much,  
15 Ms. Fried, and good morning everyone, again. I  
16 would like to welcome the participants and  
17 everyone in attendance today to the 30th meeting  
18 of the Judicial Proceedings Panel. Only four of  
19 the five Members are present today.  
20 Unfortunately -- excuse me -- Judge Jones  
21 couldn't be present, although she planned to do  
22 so.

1           Today's meeting is being transcribed,  
2           and the full written transcript will be posted on  
3           the JPP website. The Judicial Proceedings Panel  
4           was created by the National Defense Authorization  
5           Act for Fiscal Year 2013, as amended by the  
6           National Defense Authorization Act for Fiscal  
7           Years 2014 and 2015. Our mandate is to conduct  
8           an independent review and assessment of judicial  
9           proceedings conducted under the Uniform Code of  
10          Military Justice involving adult sexual assault  
11          and related offenses since the most recent  
12          amendment to Article 120 of the UCMJ in 2012.

13           Today's meeting will begin with a  
14          presentation from Members of the JPP Subcommittee  
15          on their report on barriers to the fair  
16          administration of military justice in sexual  
17          abuse -- sexual assault cases. Following  
18          deliberations on the Subcommittee report, the  
19          Panel will deliberate on the -- excuse me -- JPP  
20          sexual assault adjudication data for Fiscal Year  
21          2015. Next, the Panel will deliberate on two JPP  
22          reports that report on military sexual assault

1 investigations and the Victims' Appellate Rights  
2 Report.

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

20 I just want to say that I personally  
21 feel very fortunate, and I think the other Panel  
22 Members do too, that you have been so willing,

1 each of you Members of the Subcommittee have been  
2 willing to put in so much time and effort, not  
3 just to making the site visits, but to preparing  
4 these reports and sharing those reports with us,  
5 so on that note, I would like to ask you to  
6 begin, and again, thank you very much for the  
7 efforts you have made. And I don't know who is  
8 going to -- who is -- oh, Dean Schenck, okay.

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

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



1 to the Defense Task Force on Sexual Assault in  
2 the Military Services.

3 After my appointment as the Associate  
4 Dean for Academic Affairs at GW Law School in  
5 2009, I have continued to participate in the DoD  
6 and congressional efforts studying sexual assault  
7 in the Military Services, serving as a  
8 Subcommittee Member for the Response Systems  
9 Panel; as a consultant for the Secretary of the  
10 Air Force Scientific Advisory Board in its study  
11 on the combating of sexual assault; and serving  
12 as one of two civilian members on the Uniform  
13 Code of Military Justice, DoD's Code Committee,  
14 since January 2014.

15 Additionally, I try to stay on top of  
16 the changes in the military justice system, as I  
17 have co-authored a cases and materials book on  
18 military justice, which is currently in its  
19 second edition, and due to the changes that are  
20 forthcoming, soon to be the third edition to that  
21 textbook. I also have published a number of  
22 articles on -- pertaining to sexual assault in

1 the Military Services, as well as provided some  
2 op eds on the issue.

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

18 And I am also joined by Ms. Jill Wine-  
19 Banks. Among her many accomplishments, she  
20 served as a Department of Justice prosecutor  
21 prosecuting organized crime and labor  
22 racketeering cases, and then as an assistant

1 special prosecutor, she played a crucial role in  
2 investigating and trying the Watergate  
3 obstruction of justice case. Ms. Wine-Banks is  
4 very familiar with the military justice process.  
5 She also served as the General Counsel of the  
6 United States Army and was also a litigation  
7 partner at Jenner & Block and the Solicitor  
8 General and Deputy Attorney General of Illinois.

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

18 As you know, from July-September 2016,  
19 at your request, our Subcommittee conducted site  
20 visits to gather information, and during those  
21 site visits, we spoke to more than 280  
22 individuals involved in the military justice

1 process, from all the Services, from 25  
2 installations in the United States and Asia. Our  
3 discussions with prosecutors, defense counsel,  
4 Special Victims' Counsel, Victims' Legal Counsel,  
5 paralegals, investigators, commanders, sexual  
6 assault response coordinators, victim advocates,  
7 and victim witness liaisons from all the Services  
8 were held without attribution. Those discussions  
9 focused on the investigation, prosecution, and  
10 defense of sexual assault -- assault offenses.

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

20 In December 2016, we reported on  
21 military defense counsel resources and experience  
22 in sexual assault cases. Our February 2017

1 report focused on sexual assault investigations  
2 in the military, and in March, we issued three  
3 short reports on DoD's initial disposition  
4 withholding policy, Military Rules of Evidence  
5 412 and 513, and the training and experience of  
6 trial counsel and Special Victims' Counsel and  
7 Victims' Legal Counsel.

8 Today's report builds on the -- on the  
9 observations and conclusions provided in those  
10 previous reports. The report we present you with  
11 today describes some of the changes made to the  
12 military justice process in recent years, as well  
13 as the perceived pressure on convening  
14 authorities and judge advocates to refer sexual  
15 assault cases to trial, regardless of the  
16 likelihood of conviction. Further, drawing from  
17 our discussions with counsel from every Service  
18 and information gathered, this report highlights  
19 how the implementation of recent reforms has in  
20 essence created barriers to the fair  
21 administration of military justice in sexual  
22 assault cases.

1 I will address the changes to the  
2 Article 32 hearing, and I will be followed by Ms.  
3 Laurie Kepros, who will discuss issues involving  
4 referral decisions and prosecutorial discretion.  
5 Ms. Jill Wine-Banks will then discuss additional  
6 issues as well as present our conclusions and  
7 recommendations. Because each part of the report  
8 and corresponding presentations are intertwined,  
9 we respectfully would ask you to please hold your  
10 questions until we have completed our  
11 presentations.

12 So with that, I will provide you with  
13 some background. Just to set the stage and  
14 provide a brief background, as you know, in the  
15 past, high-profile sexual assault cases have led  
16 to public criticism regarding prosecution and  
17 punishment for sexual assault in the Military  
18 Services. The public has demanded accountability  
19 and justice, and several DoD and congressionally  
20 appointed panels reviewed the military's sexual  
21 assault prevention -- prevention, victim care,  
22 investigation, and prosecution in the military,

1 and those panels issued reports and  
2 recommendations on those topics.

3 Congress, the President, and DoD have  
4 implemented procedural changes and modified how  
5 sexual assault cases are processed. More than  
6 100 statutory reforms and numerous policy changes  
7 have been instituted in just the past five years.  
8 Two major changes included the implementation of  
9 the Special Victims' Counsel/Victims' Legal  
10 Counsel SVC/VLC program, providing attorneys to  
11 sexual assault victims at all pre-trial and trial  
12 stages of the case processing. Another major  
13 change involved the Article 32 pre-trial hearing,  
14 allowing victims to decline to testify and  
15 changing the hearing from a pre-trial  
16 investigation to a probable cause hearing.

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

22 So first, the referral process: once

1 a sexual assault is reported, if it is an  
2 unrestricted report, the military criminal  
3 investigative organizations, the MCIOs, will  
4 investigate. Prosecutors will then discuss the  
5 case with the appropriate commander, who  
6 determines whether to prefer charges or take  
7 other disciplinary actions against the alleged  
8 perpetrator.

9 Rule for Courts-Martial 306(b)

10 provides that allegations should be disposed of  
11 in a timely manner at the lowest appropriate  
12 level. The non-binding discussion to that rule  
13 provides several factors to consider when making  
14 the disposition decision, and those are reflected  
15 in our report, I believe on page 8. These  
16 factors include but are not limited to the nature  
17 of the offenses, subordinate commander  
18 recommendations, and the victim's views as to  
19 disposition.

20 Rule 306 also requires the convening  
21 authority to consider a sexual assault victim's  
22 views as to whether the case should be processed



1 by the military or it should be processed by a  
2 civilian court with jurisdiction over the  
3 offense. If charges are preferred and the  
4 special court-martial convening authority decides  
5 that trial by general court-martial is  
6 appropriate, he or she must direct the case to a  
7 preliminary Article 32 hearing.

8 The NDAA Fiscal Year '14 included  
9 extensive changes to the Uniform Code of Military  
10 Justice Article 32. These changes revised the  
11 Article 32 hearing from a pre-trial investigation  
12 and mechanism for pre-trial discovery to a  
13 preliminary hearing to determine whether probable  
14 cause exists to believe an offense was committed  
15 and to believe the accused committed the offense.  
16 Under the new format, the preliminary hearing  
17 officer still provides a pro forma verification  
18 of court-martial jurisdiction and considers the  
19 form of the charges, and the hearing officer  
20 still makes a non-binding recommendation to the  
21 convening authority regarding charging and  
22 disposition.

1           The Article 32 officer -- hearing  
2 officer, however, can no longer compel a military  
3 victim to testify, and a victim now may decide  
4 not to testify at the Article 32 hearing.

5 Furthermore, the corresponding new Rule for  
6 Courts-Martial 405 from NDAA Fiscal Year '14  
7 specifically states that the Article 32 hearing  
8 "is not intended as a means of discovery," and  
9 although it is too early to tell the impact, the  
10 NDAA Fiscal Year '17 has modified an accused's  
11 ability to present evidence, defense and  
12 mitigation evidence. An accused will be limited  
13 to presenting evidence relevant to the issues of  
14 probable cause and the hearing officer's  
15 recommendation as to disposition. We don't know  
16 what the impact of that is going to be.

17           Site visit information and testimony  
18 at the JPP public meeting in January confirmed  
19 that due to these changes, the new Article 32  
20 hearing is no longer a meaningful process to  
21 evaluate the strength of the case. Unless  
22 information is now being provided to the

1 convening authorities prior to making the  
2 referral decisions, sexual assault victims do not  
3 have to testify, and we heard from the -- from  
4 the site visits that frequently, the victims  
5 decide not to testify. Oftentimes, these victims  
6 are testifying and are cross-examined for the  
7 first time at trial. Some SVCs and VLCs are  
8 limiting trial counsel's access to the victims,  
9 and these factors and others may be causing  
10 victims to be unprepared for trial and testifying  
11 -- and -- and result in testifying poorly.

12 Counsel informed us that probable  
13 cause can be easily established now at the  
14 Article 32 hearing, so in many cases, the Article  
15 32 hearing has become a paper drill or rubber  
16 stamp based on documentary information and  
17 completed without any witness testimony, and many  
18 noted that they waived the hearing. This means  
19 they merely provide the victim's statement and  
20 minor documentary evidence to go forward to the  
21 convening authority -- for the convening  
22 authority to determine whether or not to refer

1 the case to trial.

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

17 In fact, case information provided  
18 from the Services indicated that in Fiscal Year  
19 2015, of the 416 sexual assault cases that were  
20 tried at general court-martial involved 32 -- 54  
21 of those cases, the 32 hearing officer  
22 recommended against referring one or more sexual

1 offense charge, and the convening authority  
2 referred those charges nevertheless in 54 of  
3 those cases. The staff judge advocate in those  
4 cases also recommended referring those charges  
5 despite the Article 32 hearing officer's  
6 recommendation not to go forward with the sexual  
7 assault offense. Of those 54 cases, 46, the  
8 accused in 46 of those cases was ultimately  
9 acquitted of those charges.

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

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

17 After the Article 32 preliminary  
18 hearing, the report of the preliminary hearing  
19 officer, the case file, the disposition  
20 recommendation all go to the general court-  
21 martial convening authority for disposition. At  
22 that time, the staff judge advocate provides

1 written pre-trial advice to the convening  
2 authority, and that has to include advice on  
3 whether each specification states an offense  
4 under the UCMJ, whether the allegations are  
5 warranted by the evidence that's in the  
6 preliminary hearing report, whether the court-  
7 martial would have jurisdiction over the accused  
8 and the crime, as well as a recommendation about  
9 what action should be taken by the convening  
10 authority.

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

20 In Fiscal Year '17 NDAA, there was a  
21 new Article 33 created, and that directs the  
22 Secretary of Defense to issue non-binding

1 guidance to be considered by convening  
2 authorities and judge advocates in exercising  
3 their duties concerning the disposition of these  
4 charges. In that guidance, the statute provides  
5 that they should take into account "principles  
6 contained in official guidance of the Attorney  
7 General to attorneys for the government with  
8 respect to disposition of federal criminal  
9 cases."

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

20 Among the information in that earlier  
21 guidance in the report for the preliminary  
22 hearing officer, there can be consideration of

1 hearsay and other evidence that might not be  
2 admissible at trial, so this is kind of a  
3 different threshold in terms of the nature of the  
4 evidence that would be recommended for  
5 consideration.

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

17           The American Bar Association has also  
18 issued criminal justice standards for the  
19 prosecution function that speaks to what the  
20 standard should be for prosecution of a criminal  
21 charge, and in the ABA standards, the guidance is  
22 that beyond probable cause, the prosecutor should



1 consider "whether admissible evidence will be  
2 sufficient to support a conviction beyond a  
3 reasonable doubt as well as whether the decision  
4 to charge is in the interest of justice." The  
5 standard does note that a prosecutor may file  
6 charges even if juries may be generally -- have  
7 had a tendency to acquit people for those kinds  
8 of crimes, so that caveat is there.

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

21           In Fiscal Year '14 NDAA, there was a  
22 requirement that a convening authority's decision

1 not to refer certain sexual assault cases be  
2 reviewed either by a higher general court-martial  
3 convening authority or by the Service Secretary.  
4 There was a further amendment in the Fiscal Year  
5 '15 NDAA to require the convening authority's  
6 decision not to refer certain sexual assault  
7 cases be reviewed by the Service Secretary when  
8 the chief prosecutor of the Service requests such  
9 review, and just to be clear, it is the non-  
10 referral only that triggers those kinds of  
11 review.

12 We have done some additional  
13 investigation into that matter, surveyed the  
14 Services, and learned that since December 26th of  
15 2013, there have been zero instances in which a  
16 Service Secretary reviewed a convening  
17 authority's decision not to refer a qualifying  
18 sex-related crime to court-martial. Since the  
19 2014 change, there have been zero instances in  
20 which the chief prosecutor requested the Service  
21 Secretary review a convening authority's decision  
22 not to refer to court-martial.

1           In addition, since 2013, we gathered  
2           some information about how often the decision not  
3           to refer was forwarded for review to the next  
4           superior commander when the general court-martial  
5           convening authority decided not to refer the case  
6           to court-martial, and that was a total of 59  
7           cases across the Services. In 58 of the 59  
8           cases, the next superior commander agreed with  
9           the convening authority's non-referral decision,  
10          leaving only one case where there was a  
11          disagreement and the next superior commander  
12          elected to refer the charges.

13           Another issue that has come up in the  
14          site visits and in our investigation is the issue  
15          of pressure on convening authorities to refer  
16          sexual assault cases to court-martial. We spoke  
17          with many, many trial and defense counsel, and  
18          they overwhelmingly reported a perception that  
19          convening authorities feel pressure to refer  
20          sexual assault cases to courts-martial, due in  
21          large part to public and congressional pressure  
22          on the issue and the way that it is being

1 discussed within the Services.

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

21           In our site visits, there was a  
22 consensus among the numerous people we spoke to

1 that the probable cause standard alone is too low  
2 and needs to be countenanced by other factors,  
3 such as the credibility of the victim, the  
4 likelihood of obtaining a conviction at trial.  
5 There are codes of ethics required of these  
6 lawyers within the JAG Corps because they are  
7 members of state bars, and many of these ethical  
8 codes do include these kinds of higher standards  
9 for the prosecution of criminal cases.

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

21 The vast majority of the counsel that  
22 we spoke with shared an impression that the

1 pressure is causing convening authorities to  
2 favor referral rather than deal with potential  
3 adverse consequences from not referring a sexual  
4 assault case such as career setbacks, media  
5 scrutiny, the possibility of their non-referral  
6 decisions being subjected to an elevated review,  
7 or questions about why the case was not referred.  
8 The lawyers' suspicion was that commanders may  
9 feel that sending a case to trial is the safe  
10 move, that it is going to trigger less scrutiny  
11 of their decision.

12 We did in our site visits also have  
13 the opportunity to speak with some commanders.  
14 One commander told the Subcommittee he forwards  
15 every sex assault case to the next general  
16 officer in the chain of command, "because I would  
17 not want to get it wrong and have someone get  
18 away, so I send it forward to let the system sort  
19 it out." One commander reported that he felt the  
20 need to do something immediately or face harm in  
21 his career. One commander felt that there was  
22 pressure to be transparent, although he

1 highlighted that transparency as the thing that  
2 was being expected as opposed to a pressure to  
3 send every case to court-martial.

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

21 One commander noted there is pressure  
22 to go to trial if the victim wants to go to

1 trial, regardless of the merits of the case.  
2 Additionally, counsel noted that guilty plea  
3 agreements in their experience will not be  
4 approved by commanders if the victim does not  
5 support the disposition. There is a common  
6 perception that the victim has veto power over  
7 whether the commander will dispose of a case  
8 through a court-martial or through an alternate  
9 disposition.

10 The JPP has heard testimony obviously  
11 from some of the same kinds of stakeholders that  
12 we spoke to without attribution in the site  
13 visits, and that testimony I think largely  
14 corroborates the reports that we heard: for  
15 example, testimony about cases being referred  
16 when there was no chance for conviction, an  
17 outcome that was identified as causing both the  
18 accused and victim to suffer needlessly. The JPP  
19 heard testimony that no convening authority wants  
20 to fail to refer a sexual assault case to court  
21 only to have it determined later that there was  
22 additional evidence and that the case should have



1       been tried by court-martial.

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

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

1 to trial.

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

10 Additionally, Article 34 of the UCMJ  
11 states that the convening authority cannot refer  
12 a charge to a general court-martial if advised in  
13 writing by the staff judge advocate that the  
14 specification is not warranted by the evidence.  
15 There was testimony to the Subcommittee from a  
16 Navy representative that prosecutors in the Navy,  
17 because they are using that other standard, look  
18 at not only probable cause, but also whether  
19 there is a reasonable probability of success at  
20 trial. However, in the same meeting, we heard  
21 from a Marine Corps lawyer that, once probable  
22 cause is established, counsel are compelled to go

1 forward even if they do not believe there is a  
2 reasonable likelihood of success at trial, and  
3 several counsel spoke about their sense that  
4 sometimes going forward was just the right thing  
5 to do, even when the likelihood of conviction was  
6 low.

7 The perception that cases are being  
8 referred despite a low probability of conviction  
9 is buttressed by additional data that is already  
10 being considered by the JPP, has been analyzed by  
11 Dr. Cassia Spohn. And just to pull out some of,  
12 I think the more significant findings, in the  
13 data for Fiscal Year 2015, Dr. Spohn calculated  
14 for penetrative offenses that proceeded to court-  
15 martial -- and in the military, this is both  
16 cases that went to a trial and also involved a  
17 guilty plea -- that of those cases, 40 percent  
18 resulted in a conviction of any type of sexual  
19 offense, so the vast majority either was not even  
20 a sex offense conviction, and in 30 percent of  
21 the cases, the accused was acquitted of all  
22 charges. And of those cases where the sexual

1 crime alleged was a contact offense, only 25  
2 percent of those cases resulted in any kind of  
3 sexual offense conviction.

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

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

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

18 I will be addressing some of the  
19 additional issues that didn't quite fit into  
20 those two categories. The first one, you have  
21 already heard about the reforms that created the  
22 Special Victims' Counsel/Victims' Legal Counsel,

1 which greatly benefitted victims, and it has been  
2 a good thing, but it has had some unintended  
3 consequences that were brought to our attention  
4 in our site visits.

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

18 So in addition, we heard reports that  
19 the interviews that do happen are limited in  
20 scope because of advice from counsel, and so the  
21 prosecution ends up with less information for  
22 prosecuting the case. One specific piece of

1 evidence that was brought to our attention that  
2 is not being given anymore or is limited now  
3 because of this are the personal cell phones of  
4 the victim, and while we recognize all the rights  
5 of the victim not to provide it, we also  
6 recognize the rights of justice if a case is  
7 going to be pursued on behalf of the victim that  
8 the prosecution have a full story. And the  
9 prosecutors felt that they were not always able  
10 to prepare the victim to combat what the defense  
11 might have from the cell phone of the victim  
12 because they didn't have it. And they -- they  
13 felt in general that their rapport with the  
14 victim had been hurt by this, although they  
15 appreciated having the advice being given to  
16 victims.

17           The second additional issue has to do  
18 with the SAPRO training, and that is that there  
19 is a serious and pervasive problem about the  
20 consumption of alcohol and a misunderstanding  
21 about what that means in terms of consent. And  
22 it is attributed to this training, although

1 everybody we spoke to who is involved in the  
2 training said we do not say that one beer means  
3 you cannot consent. Nonetheless, I don't think  
4 we heard from any single member of the military  
5 in any level in any capacity that did not say  
6 that that is what they believed, and as a result  
7 of that belief, as this total misperception, it  
8 was sometimes hard to even pick a panel because  
9 panel members would say that is what they  
10 believed, and they could not set that aside. And  
11 that is because in part the training has led them  
12 to that and because the training is so pervasive  
13 and so often that they just can't set it aside.

14 So the staff judge advocates we have  
15 heard are starting to review the training  
16 materials and to try to ensure that the  
17 information communicated about consent and  
18 alcohol are more accurate. The Subcommittee  
19 views that as a very positive step and encourages  
20 its widespread adoption as a way of dealing with  
21 this, but we heard so many reports where the  
22 misperception just couldn't be overcome and

1 jurors -- panel members could not be selected  
2 that we think that that needs to be addressed.

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

10 Finally, the third additional issue  
11 was the expedited transfer rule, which I am sure  
12 you all are aware, it's a policy that allows  
13 sexual assault victims who file an unrestricted  
14 report to be transferred almost immediately at  
15 their own request. Usually, the request is  
16 submitted by their -- their victims' counsel, and  
17 they can be transferred to any installation, and  
18 they can even specify the installation. The  
19 purpose of course is to put the victim out of the  
20 reach of the perpetrator, to put the victim where  
21 no one knows about the assault and the victim  
22 does not have to deal with their -- their



1 colleagues knowing about it, and also to put them  
2 in places where there is good counseling, family,  
3 and other support, friends, family.

4 The problem that has arisen is that  
5 some commanders and even victims' counsel and  
6 defense counsel are believing that this policy is  
7 being abused and that some are reporting sexual  
8 assaults to get transferred from unfavorable  
9 locations to a more favorable location.

10 Frequently, they request Hawaii or San Diego.

11 And as a consequence of this transfer, there are  
12 several consequences. The victim is not  
13 available to the prosecution for -- and  
14 investigators for the kind of interviews that are  
15 necessary, and the victim often will say, well, I  
16 am not there, I don't have to deal with this, and  
17 they don't want to pursue the trial anymore.

18 And so that has presented a problem,  
19 and the defense counsel have used this transfer  
20 to challenge the credibility of victims who do  
21 pursue the case, arguing that they have filed  
22 false allegations just to get a transfer. And

1 that has been an issue in several trials.

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

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

22 So for example, the Article 32 changes

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

20 Another conclusion we drew is that  
21 often, Article 32 officers, PHOs, as they are now  
22 called, recommend against referral of charges,

1 but that recommendation is not followed. It is  
2 not a binding recommendation, and it is often  
3 ignored. 54 cases were referred by a convening  
4 authority in 2015 where the PHO had recommended  
5 that there was no probable cause or advised for  
6 some other reason against pursuing the case. Of  
7 those 54 cases, 45, or 80 percent, were acquitted  
8 at trial. So there may be some reason to think  
9 that we should have some rule that gives the PHOs  
10 a more robust voice in this process.

11 We need a way to get the convening  
12 authority to understand all the strengths and  
13 weaknesses of a case before he or she decides on  
14 referral. We need the guidelines which have been  
15 addressed, and we need the evidence that used to  
16 come from an Article 32. We note that good order  
17 and discipline and a belief that the assault  
18 occurred may justify referral even when  
19 conviction on admissible evidence may not be  
20 likely, but I want to go to page 29, where we  
21 talk about the need for guidance, and there --  
22 despite these good reasons, a convening authority

1 should not be forced to make the critical  
2 decision which has life-changing impact on the  
3 victim and the defendant without clear guidelines  
4 and a better sense of the evidence strength.  
5 Convening authorities must be corrected if they  
6 erroneously believe that a decision to refer a  
7 case will have few consequences because the  
8 consequences are great and severe.

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

18           Several prosecutors discussed their  
19 practice in sexual assault cases of the  
20 prosecution merits memo laying out the evidence  
21 in the case, both good and bad, and the  
22 likelihood of conviction, to aid the decision,

1 but while this seems like a useful tool to fill  
2 the void that used to exist in the Article 32, it  
3 is worth noting that under Article 34, the SJA  
4 pre-trial advice is something that the defense  
5 automatically gets, and therefore, the advice may  
6 be parsed in ways that don't give the convening  
7 authority as much information as they should.

8 And you will hear our recommendation on that.

9 There is no parallel in civilian jurisdiction  
10 where information provided by a prosecutor to his  
11 or her superiors would have to be provided, other  
12 than of course exculpatory evidence, which of  
13 course must be provided.

14 On site visits, counsel also discussed  
15 their perception that there is a severe pressure  
16 on convening authorities to refer cases, and that  
17 has been addressed here, so I am not going to go  
18 too much into that. And the perception of a high  
19 acquittal rate is one that seems to be borne out  
20 by the data, as Laurie has set forth. And  
21 although our Subcommittee did not have time to  
22 continue investigating the potential causes of

1 the high acquittal rate, we felt that it needs  
2 further exploration. We note that the  
3 authorizing legislation for our successor panel,  
4 the DAC-IPAD, may be able to conduct an ongoing  
5 review of cases to determine whether this is a  
6 serious problem.

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

20 The public may view the high acquittal  
21 rate as a result of a more aggressive approach to  
22 sexual prosecution, which in the sense that we

1 are bringing cases, then that would be a good  
2 thing, but it also could be viewed as the  
3 military's indifference to sexual assault that  
4 we're not convicting people, and public loss of  
5 confidence would be a terrible thing and has the  
6 potential to harm the military enlistment and  
7 officer accession rates as well as retention  
8 rates. So we think there has to be a balance, a  
9 system that treats sexual assault victims fairly  
10 and compassionately and that also provides  
11 defendants with due process.

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



1 serves a useful purpose.

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

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

22           **Recommendation 2: the JPP Subcommittee**

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

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

20           Recommendation 3: the JPP Subcommittee  
21 recommends that after case disposition guidance  
22 under Article 33 UCMJ is promulgated, the DAC-

1 IPAD conduct both military installation site  
2 visits and further research to determine whether  
3 convening authorities and staff judge advocates  
4 are making effective use of this guidance in  
5 deciding case dispositions. They should also  
6 determine what effect, if any, this guidance has  
7 had on the number of sexual assault cases being  
8 referred to courts-martial and on the acquittal  
9 rate, and the reason we mention the site visits  
10 is that we found that the off-the-record  
11 discussions on how the rules that we heard about  
12 in Washington are being perceived and used in the  
13 field was very helpful.

14 Recommendation 4: the JPP Subcommittee  
15 recommends that the DAC-IPAD review whether  
16 Article 34 of the UCMJ and Rules for Court-  
17 Martial 406 should be amended to remove the  
18 requirement that the staff judge advocate's pre-  
19 trial advice to the convening authority, except  
20 for exculpatory information contained in that  
21 advice, be released to the defense upon referral  
22 of charges to court-martial. The DAC-IPAD should

1 determine whether any memo from trial counsel  
2 that is appended should also be shielded from  
3 disclosure to the defense. This review should  
4 consider whether such a change would allow the  
5 staff judge advocate to provide more fully  
6 developed, candid written advice to the convening  
7 authority regarding the strengths and weaknesses  
8 of the charges so that the convening authority  
9 can make a better-informed disposition decision.

10 Recommendation 5: the JPP Subcommittee  
11 recommends that Congress repeal provisions from  
12 the National Defense Authorization Act for 2014  
13 and 2015, Sections 1744 and 541, respectively,  
14 that require non-referral decisions in certain  
15 sexual assault cases to be forwarded to a higher  
16 general court-martial convening authority or to  
17 the Service Secretary. The perception of  
18 pressure on convening authorities to refer sexual  
19 assault cases to court-martial created by these  
20 provisions and the consequent negative effect on  
21 the military justice system are more harmful than  
22 the problems that such provisions were originally

1 intended to address. It is one way of dealing  
2 with some of the perceived pressures on convening  
3 authorities.

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

13 Recommendation 7: the JPP Subcommittee  
14 recommends that the Secretary of Defense ensure  
15 that SVCs/VLCs receive the necessary training on  
16 the importance of allowing full access by  
17 prosecutors to sexual assault victims prior to  
18 courts-martial. Such training will ensure that  
19 SVCs/VLCs are considering the value of a  
20 meaningful victim/prosecutor relationship in the  
21 advice they provide their victim clients and  
22 assist prosecutors in sufficiently developing the

1 rapport with the victim needed to fully prepare  
2 for trial.

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

18 I am sorry. That was not our final  
19 Recommendation. Our final Recommendation, number  
20 9, the JPP Subcommittee recommends that the  
21 Secretary of Defense review the policy on  
22 expedited transfer of sexual assault victims and

1 consider whether it should change -- it should be  
2 changed to state that, when possible, sexual  
3 assault victims should be transferred to another  
4 unit on the same installation or to a nearby  
5 installation. This change will help ensure that  
6 prosecutors have access to victims in preparing  
7 for courts-martial, will satisfy the need to  
8 separate the victim from the accused, and will  
9 maintain the victim's access to support systems  
10 while combating the perception that the ability  
11 to ask for these transfers has encouraged  
12 fraudulent claims of sexual assault.

13 Commanders and SVC/VLCs should also  
14 receive training on how relocating victims from  
15 less desirable to more desirable locations can  
16 foster the perception among military members that  
17 the expedited transfer system is being abused and  
18 on how such transfers can be used by defense  
19 counsel to cast doubt on the victim's  
20 credibility, possibly leading to more acquittals  
21 at courts-martial. The JPP further recommends  
22 that the DAC-IPAD review data on expedited

1 transfers to determine the locations from which  
2 and to which victims are requesting expedited  
3 transfers and to review their stated reasons.

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

9 CHAIR HOLTZMAN: Thank you very much.  
10 Before we -- I ask my Panel Members to commence  
11 the questioning, just because not everybody is a  
12 lawyer on this Panel, and also because some of us  
13 may not have vast experience with criminal law,  
14 would you just somebody here take a stab at  
15 defining probable cause for us?

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

18 (Laughter.)

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

21 MS. WINE-BANKS: Yes.

22 DEAN SCHENCK: I like to say it's a



1 reasonable belief that the crime was committed  
2 and this guy likely did it. That is the layman's  
3 perception. When you're looking for probable  
4 cause for evidence, it is the same: probable  
5 cause, belief that the evidence is in this  
6 location. But the Uniform Code -- the Manual for  
7 Courts-Martial I believe has a different  
8 definitions. They will use probable cause in  
9 some places, so I can't confirm that that is the  
10 solid response under the Manual.

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

21 Do you have an obligation -- I of  
22 course operated under the federal rules, and that

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

12 MS. KEPROS: Actually, I would like to  
13 just provide an example of how I think this might  
14 play out. I think you can meet a probable cause  
15 standard if an accuser says this person did this  
16 thing to me, and it constitutes a crime. The  
17 distinction becomes what if there is more to the  
18 situation beyond what is provided in that  
19 probable cause analysis? So the person made this  
20 report, but there are text messages that show  
21 that claim is questionable. There are bizarre  
22 motives or biases that are not made clear in that

1 initial report. The report may not paint the  
2 full picture of the situation or what is  
3 ultimately going to be considered credible to a  
4 fact-finder at trial.

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

11 CHAIR HOLTZMAN: Okay. Admiral?

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

22 DEAN SCHENCK: I can answer that since

1 I lived through the old process. The convening  
2 authority would -- the government would provide a  
3 list of witnesses to the hearing officer, and  
4 witnesses were called, including victims. The  
5 hearing officer could also call witnesses to make  
6 a determination. The accused was also given a  
7 right to make a statement, written or through  
8 counsel or sworn. There were a lot of  
9 opportunities for the defense to provide  
10 mitigation and defense information and evidence  
11 at those hearings.

12 The convening authority would receive  
13 the recommendations as to disposition and a  
14 summary of the transcript at that hearing, and  
15 the evidence, and that would go to the convening  
16 authority. So in past Article 32 hearings, all  
17 the -- all the witnesses testified, so you knew  
18 who saw what and who did what to whom. And I  
19 think I have said in the past, many of these  
20 sexual assault offenses occur when there is  
21 alcohol involved and other unit members, so the  
22 32 involved everybody from the unit testifying,

1 so you knew everybody who was there, everything  
2 that happened.

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

14 And when we say convening authority,  
15 we mean the special court-martial convening  
16 authority. The special court-martial convening  
17 authority would appoint the 32. The 32 would do  
18 this rigorous investigative hearing, very very  
19 time-consuming in many of these cases, with lots  
20 of evidence, and then the transcript was  
21 provided. When the victim testified, they  
22 sometimes in many cases did verbatim transcripts

1 so you could get exactly what was said. Then  
2 that, with the recommendations as to disposition,  
3 would go to the special court-martial convening  
4 authority -- that is the O-6 -- to take a look at  
5 it, and in many of those cases, the O-6 would say  
6 I think this is a BCD special, I don't think it's  
7 a general court-martial, or I think we need to  
8 dismiss this charge or that charge.

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

17 MS. WINE-BANKS: I think one of the  
18 things that you got in the Article 32 was an  
19 ability to evaluate credibility because you had  
20 actual witnesses, as opposed to an investigator  
21 saying through hearsay this is what I heard, this  
22 is what I was told. And you also did have the

1 opportunity for the defense to counter, which is  
2 something of course that doesn't happen in the  
3 grand jury federal process, where it is one-  
4 sided. The prosecution witnesses, including a  
5 victim, you would never not have the victim  
6 testify at the grand jury -- or, I shouldn't say  
7 never, but you would likely have the victim  
8 testify.

9 VADM(R) TRACEY: Do changes to Article  
10 32 apply to more than Article 120 cases?

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

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

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

20 MS. KEPROS: Although Admiral, I will  
21 tell you it was reported to us, and it seems to  
22 be borne out by some of the statistics, that the

1 vast majority of cases that are actually going to  
2 trial are sexual assault cases.

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

6 MS. KEPROS: Yes.

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

14 MS. WINE-BANKS: Well, from my  
15 perspective, I think trained lawyers, trained  
16 prosecutors, trained judges, part of what we get  
17 in our experience is an ability to predict is  
18 this a good case or a bad case? It is something  
19 that is -- not just as a prosecutor, but as a  
20 defense lawyer, I would tell my client maybe this  
21 isn't worth your money to bring this case because  
22 here is why, legal issues or factual issues.



1           And if you have any experience at all,  
2           to some extent, you can predict. You can always  
3           be wrong. I mean, many cases are convicted where  
4           you go whoa, how did that happen? But it is --  
5           it is a -- it's a professional skill. So I think  
6           there is some ability to predict. I don't think  
7           that is changed by the Article 132 in particular  
8           because the question applies no matter what: how  
9           do you ever predict?

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

18           MS. WINE-BANKS: If we don't change  
19           the standard in some way, maybe not, but it is a  
20           more experienced person who has a better ability,  
21           but the issue about the Article 32 and the lack  
22           of -- the PHO can't judge credibility. The PHO

1 is -- we did hear consistently, it's a paper,  
2 rubber-stamp exercise that many defense counsel  
3 are waiving now, but some say they still do it  
4 just because. I don't think -- did either of you  
5 hear on any of our site visits anybody say I  
6 still do it because I gain X? I didn't --

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

9 MS. WINE-BANKS: With a specific gain?

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

19 And I keep referring to text messages  
20 because it seemed to come up in pretty much every  
21 case, and I can tell you, in civilian practice,  
22 it seems to these days, too. But I think

1       although I definitely have the concern that was  
2       shared with us that the less robust 32 that we  
3       now have probably isn't going to allow decisions  
4       to be as of -- as informed or as of the same  
5       level of quality as maybe they have been if there  
6       had been a, you know, thorough vetting of all of  
7       the evidence, I do agree with what Ms. Wine-Banks  
8       is saying that experienced trial lawyers who have  
9       run into comparable evidence start to get a sense  
10      for where are there going to be problems with the  
11      jury? Where are there going to be problems with  
12      the fact-finder?

13                   What kind of -- you know, they may get  
14      the packet, and they say, well, here are 15  
15      unanswered questions in this interview. Any good  
16      defense attorney is going to be able to do  
17      something with that. And maybe they can answer  
18      those questions through interviews with the  
19      victim off the record or not. You know, that is  
20      obviously an open question. But I do think when  
21      it comes to probability, nobody has a crystal  
22      ball.

1           It was very impactful to me, that  
2           statistic that both of my colleagues referenced  
3           that there were 54 no probable cause findings by  
4           PHOs. Well, they were right 80 percent of the  
5           time, so obviously, they had a pretty good --  
6           they were a pretty good predictor in their role  
7           of where was there going to be an acquittal of  
8           these charges, even with the narrower scope of  
9           the hearing.

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

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

21           One is this -- defense investigators,  
22           you know? So if we had defense investigators,

1 defense investigator information would be  
2 provided to the 32 officer, right? And if you  
3 had a military judge, the military judge could  
4 sort it out, or senior military justice experts,  
5 judge advocates, not environmental law judge  
6 advocates that may be sitting as the 32 officer.  
7 So that -- that is one distinction.

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

18           But, you know, when you think about  
19 it, there's three parties involved. So if the 32  
20 officer is just looking at probable cause and the  
21 defense doesn't have an investigator and there is  
22 another lawyer representing the victims' counsel,

1 that 32 officer is just going to say, okay,  
2 probable cause, I think it is -- I think it is  
3 met, you know? I've got a statement, it's  
4 reasonable belief a crime was committed. Is this  
5 a crime? The cops say this is a crime. The  
6 investigators have investigated it. They say  
7 that this possibly is a crime. Okay. Now I am  
8 just going to go forward.

9 So in the civilian sector, I don't  
10 know how it works, but I think those are the two  
11 things in the military that we -- this process  
12 has -- has caused a change in the impacts of the  
13 32 hearing.

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

16 MS. SAUNDERS: July of 2013.

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

21 MS. KEPROS: Yes. I think that would  
22 be a great thing to do.

1                   VADM(R) TRACEY: Yes. And I have one  
2 last question. I don't know that you had the  
3 opportunity to do this in any of the many  
4 incarnations that you had for this Panel: do we  
5 know what, if anything, has changed in the  
6 convening authority's preparation for their  
7 responsibilities since all of these changes were  
8 made to the UCMJ?

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

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

22                   DEAN SCHENCK: No. I believe they

1 have required training. Also, they go to -- the  
2 JAG school conducts the pre-command training  
3 course that provides them with training before  
4 they even become convening authorities.

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

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

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

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

21 VADM(R) TRACEY: I have to tell you  
22 guys, as a line officer, it would be hard not to



1 believe that you were being guided to refer  
2 charges, that it was the policy intention that  
3 you would refer rather than not refer charges.

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

13 MS. WINE-BANKS: Admiral, I think you  
14 have really hit on one of the key consistent  
15 pervasive findings that we had, which was we have  
16 really only addressed this one part of the  
17 pressure, which is the referral, which is a  
18 policy that clearly puts some pressure on. But  
19 there was an absolute -- everybody felt, at every  
20 level, from the commander convening authorities  
21 down to the lowest-level person we spoke to, that  
22 there was political pressure and public pressure

1 to proceed, and that careers would be negatively  
2 affected and that there would be -- commanders  
3 would say, well, if I refer it, it's not going to  
4 hurt my promotion chances, and the system will  
5 sort it out. If they are innocent, they will be  
6 acquitted.

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

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

20 MS. WINE-BANKS: No, no --

21 CHAIR HOLTZMAN: Okay. I just wanted  
22 to clarify that for the record.

1 MS. WINE-BANKS: No, no, no. It was  
2 a feeling that Congress in general supports a  
3 stronger stance on prosecuting rape allegations,  
4 sexual assault allegations, within the military.

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

8 MS. WINE-BANKS: Yes.

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

15 A tactical question, if I may? And  
16 this is my last question. You may not have had  
17 an opportunity, but I think that you said there  
18 were 59 cases that were reviewed at the next  
19 higher level as to whether -- do you know whether  
20 they were exceptional in terms of how weak the  
21 cases were, or were they consistent with -- did  
22 we see an example of people who did have the --

1 the strength of character to exercise the  
2 leader's responsibilities, or are these just  
3 really weak cases that stood out as --

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

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

18 MS. KEPROS: Absolutely --

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

21 MS. KEPROS: What made the difference?

22 VADM(R) TRACEY: Yes.

1 MS. KEPROS: Right.

2 CHAIR HOLTZMAN: Thank you. Mr.  
3 Taylor?

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

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

9 (Whereupon, the above-entitled matter  
10 went off the record at 10:29 a.m. and resumed at  
11 10:40 a.m.)

12 MR. TAYLOR: Yes, I'd like to start by  
13 adding my thanks to that of the Chair, to this  
14 subcommittee, and specifically to you three who  
15 have been stalwart and persistent and patient.  
16 Not only in seeking good solutions to hard  
17 challenges, but also to your unfailingly good  
18 sense of humor as you have tolerated our  
19 questions. So you really have my gratitude as  
20 does of course Judge Jones for chairing the  
21 effort over the last nearly three years.

22 I'd like to follow up with some point

1 of information to the question that Admiral  
2 Tracey asked. It's been my pleasure for the last  
3 seven years almost to be the capstone lecturer  
4 for the Senior Officer Legal Orientation course  
5 at the Army's Legal Center and School. And that  
6 course is attended by colonels and lieutenant  
7 colonels going into command. Some have already  
8 started command. But I have monitored the  
9 progress of that course over the years.

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

21 One of the things that General Odierno  
22 pointed out in hearings regarding the future of

1 command relationships and whether commanders  
2 should still be in the driver's seat on this  
3 issue, is that the Army is so serious about it  
4 that it's making every effort to be sure that  
5 when commanders assume these responsibilities,  
6 they understand what's at stake. And they  
7 understand what the issues are. And I have  
8 monitored the program of instruction as I go down  
9 on a nearly monthly basis for the last seven  
10 years, at least for seven to eight months of the  
11 year, to see exactly what they're teaching. And  
12 the content of that course that's devoted to the  
13 kinds of issues that we have been discussing.

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

18 (Laughter.)

19 MR. TAYLOR: But I would commend to  
20 them that they take a look at what the Army's  
21 legal corps is doing in this regard, because I  
22 think it will be helpful. I don't know what the

1 other Services are doing. But the percentage of  
2 the instruction, the required instruction, that  
3 is devoted to these topics is significant. Now  
4 there are other optional topics that they can  
5 take as well. But everyone must learn all these  
6 basics. So I just mention that, Admiral, in  
7 response to your question.

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

16           In other words - let me, while you're  
17 thinking about that let me ask the question in  
18 another way. If you have a defense counsel, as  
19 Ms. Kepros pointed out, who wanted to get  
20 information before the PHO, thinking it might  
21 make a difference in what kind of recommendation  
22 the PHO would make to the convening authority.



1 Can that occur? Is it just a question of whether  
2 or not - it wouldn't be ruled inadmissible as  
3 irrelevant because the rules of evidence don't  
4 apply.

5 MS. KEPROS: Could I address that?

6 MR. TAYLOR: Sure.

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

18 MR. TAYLOR: I see.

19 DEAN SCHENCK: Right. And as I  
20 understand it, well at least the Army had a DA  
21 PAM which provided a script to the Article 32  
22 Hearing Officers. And it would provide the

1 script, you have the right to make a statement.  
2 You have a right to call witnesses. Those rights  
3 in that script. And when I questioned the folks  
4 in the field since there was no guidance to the  
5 field, I was wondering whether they were still  
6 following the script.

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

18 And since the convening authority  
19 cannot consider the quality of Service, a  
20 characterization of Service, there's no reason to  
21 call anybody from a defense counsel perspective.  
22 Because I would show you my cards, right? And so

1 I found it troubling because the accused is  
2 sitting there, being told he has all these - he  
3 or she has all these rights. And then nobody is  
4 called, and everybody walks out of the room. I  
5 found that to be troubling. So I think Laurie is  
6 right.

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

16 MR. TAYLOR: Well, I appreciate that.  
17 In my younger years, I actually was a defense  
18 counsel for the Army JAG Corps. I always viewed  
19 the Article 32 as an opportunity to find out all  
20 I could. And at the same time, to start in bits  
21 and pieces if strategically and tactically it  
22 made sense. Sort of laying the foundation for

1 what I hoped would be a better outcome for my  
2 client.

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

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

1 definitely not going to start calling witnesses.

2  
3 MS. WINE-BANKS: We were concerned  
4 enough - I mean, we did mention at the bottom of  
5 page ten, top of page eleven, this change to the  
6 rule. And saying, because it hasn't been  
7 implemented, we're not sure whether a PHO will  
8 allow any defense information in. So that's  
9 something that needs to be monitored going  
10 forward. DAC-IPAD should definitely see how does  
11 this play out.

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

22 You know, in my system in Colorado,

1 credibility is not relevant at the probable cause  
2 hearing. So I just save it for trial. And I'm  
3 sure the prosecutors really wish I didn't.  
4 Because it can be very damaging.

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

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

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

22 MR. TAYLOR: And that would go to the

1 Staff Judge Advocate? And then that's where it  
2 would stop?

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

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

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

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

22 MS. KEPROS: Exactly.

1 MR. TAYLOR: But they did not think  
2 the case was strong.

3 MS. KEPROS: Exactly.

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

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

12 MR. TAYLOR: Right. So then once it  
13 gets to the Staff Judge Advocate, did you get a  
14 sense that the Staff Judge Advocates feel as if  
15 they are having to pull their punches on these in  
16 order to satisfy the convening authority's  
17 desires to prosecute more of these cases? Or do  
18 you think that in the conversations they have  
19 with them that are not in the review itself, that  
20 they are pretty candid about saying, you know,  
21 boss? I don't know whether this will fly or not  
22 but maybe we should try it.



1 MS. WINE-BANKS: I certainly heard  
2 from Staff Judge Advocates who said that they  
3 were honest. They weren't frequently listened  
4 to. But that they were, and I think I heard that  
5 more often than that - although it wasn't unheard  
6 of - that a Staff Judge Advocate said, I know  
7 what the outcome wanted was. And I geared my  
8 remarks to that. But I think more commonly it  
9 was that they were honest.

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

21 MR. TAYLOR: So then when you get to  
22 the next step, and that's the actual decision

1 process. You mentioned that there was at least  
2 someone who anecdotally provided evidence that  
3 maybe a victim deserves his or her day in court.  
4 Do you think that was a major factor in many  
5 cases? Let the victim's case be heard? Or do  
6 you think people were willing to take a more  
7 reasoned view of that and say, there's no way  
8 anyone will really believe this?

9 DEAN SCHENCK: I think it was - they  
10 have a paper case. They have a statement. The  
11 SJAs aren't speaking to the victims. They have  
12 the Victims' Legal Counsel and the Army working  
13 for them. Right? So they've got a paper case.  
14 I've got a statement. It could be credible. I  
15 haven't met with the victim. I don't know. So  
16 we don't have the 32 to vet that case. So we're  
17 going to take it to trial. You know? And the  
18 junior counsel that think they're going to lose?  
19 Well, that's what you do. You take the case to  
20 trial. Because I am not going to recommend that  
21 we not refer this case because I've got probable  
22 cause and no one has testified.

1 MS. KEPROS: And I don't think we can  
2 quantify that. Because we did just sort of do  
3 these snapshot visits to try to see if there was  
4 consensus around certain issues. But at the same  
5 time, I also have to wonder. Because we did hear  
6 mostly from trial counsel this value of the  
7 victim getting their day in court. Did that  
8 drive the decision to prosecute? Or is that a  
9 way to spare your morale after you are losing  
10 trial after trial after trial? And say, this  
11 must be for something because I'm losing all my  
12 cases and I'm working really hard.

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

21 MR. TAYLOR: So I'd be interested in  
22 knowing each of your views on this question.

1 What do you think the right answer to that  
2 question is in terms of how much weight should be  
3 given to the day in court argument when you have  
4 a case that's otherwise pretty weak? So drawing  
5 back from where we are on the ground to the  
6 thirty thousand like a Google map, what do you  
7 think the better answer, the best practice, is to  
8 how much weight that reserves?

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

21 And so, there's got to be - to me,  
22 there should be a more hands on approach prior to

1        preferral. Boom. This occurred last night.  
2        Last night? Special Victims' Counsel, meet with  
3        the victim right now. Let's figure out where  
4        we're going with this. Because I - back in the  
5        old days, we didn't have Special Victims'  
6        Counsel. We had victim witness liaisons. I was  
7        the prosecutor, Chief of Justice, Special  
8        Assistant U.S. Attorney, and the victim witness  
9        liaison. I had to deal with the victim. I had  
10       to talk to the victim about whether or not we  
11       should go to trial.

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

22                    And work it at that level, because

1 those victims - they want - not necessarily -  
2 they may not want to go to trial. They just want  
3 - if the accused did something to them, maybe  
4 they just want him to go away fast. And if you  
5 vet that before preferral, or even right after  
6 preferral - the problem with after preferral is  
7 then you get the review process. And that seems  
8 to me the difference between what used to happen  
9 and what happens now.

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

19 On a neutral - you know, not being on  
20 the defense side or the prosecution side. I  
21 would say it's not fair to any of the parties,  
22 including the military Service, but both the

1 victim and the defendant, to automatically weight  
2 the scales for one side or the other. I think  
3 victims are frequently hurt when they go to  
4 trial, they testify, and then they're not  
5 believed. And there's an acquittal. That has to  
6 take a toll on them. And they've publicly had to  
7 talk about a horrible experience. So I think  
8 there's a lot of factors that have to go into it.  
9 And I don't think I could say yes or no. I would  
10 have to say, like Lisa, that it depends on the  
11 totality of factors.

12 MS. KEPROS: Professor Taylor, I think  
13 your question is systemic sort of on the largest  
14 possible scale. Because it's really asking the  
15 question of should we have a disciplinary system  
16 in the military that is like the criminal justice  
17 system in the U.S.? Or should we have more of a  
18 civil model legal system? As a defense attorney,  
19 I have had the opportunity to represent clients  
20 who come from other countries where their  
21 criminal law system looks more like a civil  
22 system. And cases are prosecuted, literally,

1 based on the wishes of the victim or not.

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

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

22 I think it's important to remember



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

5 (Laughter.)

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

15 On the other hand, I don't think it's  
16 reasonable to expect prosecutors to have a  
17 crystal ball, and to only bring cases that they  
18 are certain they are going to win. Because we  
19 all know unexpected things happen. Who's going  
20 to be on the jury? It's a pretty important  
21 factor. You can't know until you get there. But  
22 there are certainly reasonable ways to make some

1 educated guesses about what a likely disposition  
2 is going to be.

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

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

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

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

21 MS. WINE-BANKS: Yes, they were the  
22 basis of our site visits.

1 MR. STONE: Okay. What I thought I  
2 was going to see, because I thought you were  
3 collecting data for us, was a tabulation without  
4 names on it of the various Servicemembers that  
5 you interviewed. How many from each Service, and  
6 whether they were prosecuted as defense counsel,  
7 SVC, SJAs, commanding officers, and some kind of  
8 tabulation of their answers to their views. But  
9 I didn't see a tabulation. Is there a chart like  
10 that somewhere that we get?

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

15 MR. STONE: Right.

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

20 CAPT. TIDSWELL: Mr. Stone, sir?  
21 There were site visit reports that were signed  
22 off by the subcommittee members and weren't

1 finalized, in a sense. At the direction of Chair  
2 Holtzman, the Staff was asked to sort of sanitize  
3 those so you couldn't draw a line back to who may  
4 have made a comment by name. So we do have a set  
5 of sanitized site visit reports that Ms. Holtzman  
6 and I are looking at. So it will say something  
7 like, a trial counsel. It would not say  
8 lieutenant so and so. So we tried to make them  
9 as anonymous as possible. Because that's what we  
10 promised the participants.

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

20 But I still want to know were they -  
21 the second question was, and I don't know if  
22 that's in there that relates to that, did they

1 have six months on the job or have they been a  
2 trial counsel for two years? Or three years?  
3 Because we ask every person up here so that we  
4 can judge their input how much of the system they  
5 have seen. And so that's why I was asking you  
6 if we're going to get a tabulation that supports  
7 -

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

21 MR. STONE: Right.

22 DEAN SCHENCK: We did annotate on the

1 forms that we took with us, the number of people,  
2 whether they were defense counsel, their ranks,  
3 that kind of stuff.

4 MR. STONE: Okay, good.

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

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

12 MR. STONE: I guess the reason I'm  
13 asking is because throughout the draft report  
14 that you got and we're discussing, sometimes it  
15 says some counsel, sometimes it says some defense  
16 counsel, sometimes it says it says an  
17 overwhelming majority of all counsel. Again, we  
18 heard this as a snapshot and I agree. But I  
19 don't feel comfortable making recommendations on  
20 anecdotal evidence that may be an outlier. And  
21 it sounds like, to the extent this is a snapshot,  
22 that's what we're getting.

1           The reason I say that is let's go to  
2           the numbers that every member here on the Panel  
3           has heard you give us several times. About  
4           fifty-four cases where the PHO recommended  
5           against going forward and you said in forty-six  
6           of the cases, it was an acquittal.

7           DEAN SCHENCK: For that charge.

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

11          DEAN SCHENCK: No, sir. We do not.

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

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

19          MR. STONE: Okay.

20          DEAN SCHENCK: In other words, we are  
21          not drawing final conclusions, final  
22          recommendations for action to be taken. We are

1 recommending to the follow-on investigative Panel  
2 to look at those issues. Because we did draw on  
3 perceptions that we got from non-attribution  
4 discussions in the field.

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

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

17 MR. STONE: Is that right?

18 CHAIR HOLTZMAN: Yes.

19 MR. STONE: So then they might have  
20 decided to plead guilty to a straight assault  
21 charge rather than a sexual assault charge in the  
22 disposition. But I gather you didn't collect



1 those fifty-four cases and afterwards interview  
2 prosecutors and defense counsel. So we know  
3 whether that was a result of plea bargaining or a  
4 decision by counsel to offer to plead their guy  
5 guilty to something less in a difficult case.  
6 Right?

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

9 (Simultaneous speaking.)

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

18 MS. SAUNDERS: Mr. Stone, I have some  
19 clarity on that. I did gather the data for that  
20 and I can provide you more specific information  
21 after the meeting if you want. But in all of  
22 those fifty-four cases, they went to court on one

1 or more sexual assault charges. There may have  
2 been other charges with those charges, and they  
3 may have been convicted on some of those other  
4 charges. But on those where we talk about the  
5 acquittals, they were acquitted of the sexual  
6 offenses.

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

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

12 MR. STONE: Now, the other thing I  
13 don't understand and maybe you'll clarify for me  
14 about those fifty-four cases is you keep saying  
15 that the PHO was proved correct. The PHO decided  
16 that he didn't think there was probable cause.  
17 The outcome of the trial was that there wasn't  
18 proof beyond a reasonable doubt, a much harder  
19 standard to prove. It seems to me it's entirely  
20 possible that the PHO was wrong in all fifty-four  
21 cases. And it's just that these were hard cases,  
22 which he recognized.

1                   There was probable cause to go to  
2 trial. But the trier of fact was not convinced  
3 beyond a reasonable doubt. That doesn't mean  
4 that the PHO was proved right. And it doesn't  
5 mean in those forty-five cases where there were  
6 acquittals that there's an eighty percent rate to  
7 show that the PHO was right in those eighty  
8 percent cases. So maybe you can explain to me  
9 how those different standards are proved from  
10 different outcomes, why you draw the conclusion  
11 that the PHO was always right.

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

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

16                   DEAN SCHENCK: Well, my comment to you  
17 is I don't believe we said the PHO was right. I  
18 believe we said that this needs to be looked at  
19 further. And if you look - I'll draw your  
20 attention to our recommendation specifically.  
21 And it specifically says that we recommend the  
22 DAC-IPAD to look at the data and determine how

1 often these recommendations are not followed and  
2 see if there should be some modification to the  
3 process.

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

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

20 MR. STONE: Well -

21 CHAIR HOLTZMAN: Excuse me, Ms. Kepros  
22 wanted to answer that question.

1 MR. STONE: Yes. Sure.

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

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

22 MR. STONE: But the PHO's job is not

1 to decide the likelihood of conviction. It's to  
2 decide probable cause, right?

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

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

10 MS. KEPROS: That appears to be the  
11 case.

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

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

19 DEAN SCHENCK: I also want to point  
20 out the likelihood of success factor we're  
21 talking about, that the hearing officer might use  
22 in making a recommendation. That is because the

1 hearing officer has to make a recommendation  
2 regarding disposition. So that recommendation -  
3 we don't know - again, we don't know what we  
4 don't know. But that hearing officer may have  
5 recommended that that case be disposed of at an  
6 Article 15. Or a lower court-martial's level  
7 rather than the general court-martial. So we  
8 can't really armchair quarterback when we're  
9 talking about that twenty percent or the other  
10 percent.

11 MR. STONE: Or the eighty percent. I  
12 agree. That's why I don't find those numbers,  
13 just as numbers, help me get to any kind of  
14 conclusion. Because we also don't know whether  
15 those numbers have changed over the past five or  
16 ten years, since we know just like - we heard  
17 that forty percent of the cases result - only  
18 forty percent result in any kind of conviction.  
19 I think that that's been a pretty consistent  
20 number over many years. So we don't know that  
21 any of these changes have changed any of the  
22 numbers except that the recent numbers are in

1 line with old numbers.

2 All right, let's go for a moment to  
3 your recommendations on Article 32 and your  
4 observation that it's no longer used or able to  
5 be used as a discovery mechanism, and your new  
6 recommendation about that. That's your  
7 recommendation number one. In your report on the  
8 defense services, which we approved, you  
9 mentioned Article 32 and exactly this same  
10 problem. And we, based on that, agreed to  
11 recommend, as did the Response Systems Panel  
12 before us, that defense counsel ought to get some  
13 independent investigators and experts and more  
14 resources.

15 So I guess what I'm asking is, you  
16 brought that to us. We accepted that the rules  
17 have changed, and it means defense counsel get  
18 less discovery because of the way Article 32  
19 proceedings have been changed. What exactly are  
20 you asking for us to do now when again, and we  
21 haven't really had that much time to see how it's  
22 developed. But they haven't even gotten more



1 resources yet, the defense counsel. So why  
2 should we monkey with this again now? I have the  
3 early reports and the pages marked, where you  
4 talk about Rule 32 being changed and that is the  
5 justification for investigators and resources.  
6 And we approved it.

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

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

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

20 And we are appreciative that you've  
21 adopted our recommendation to give the defense  
22 counsel resources for investigation. Because if

1 in fact no changes are made to the 32 process and  
2 it remains a probable cause hearing, I would be  
3 willing to bet that those defense investigators  
4 are going to provide valuable information to the  
5 probable cause assessment.

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

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

20 MR. STONE: Well, I mean I think that  
21 runs through quite a few of your recommendations.  
22 I wasn't - I didn't see in my commission when I

1 got appointed that I had a job to recommend what  
2 the next committee can do. I'm pretty sure they  
3 can handle that. And they have a scope that may  
4 or may not include reviewing Article 32s. I  
5 think they probably do. But I don't think that's  
6 what I expected when we sent you out on to take  
7 interviews that were not going to be either  
8 public or available to the public and not  
9 ascribable to individuals by name, that we were  
10 planning to talk about what's going to happen to  
11 the next Panel.

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

22 DEAN SCHENCK: Again. I believe under

1 recommendation three, we are recommending that  
2 the DAC - recommending to you that the DAC-IPAD  
3 conduct their own site visits and research to see  
4 if the convening authorities and the SJAs are  
5 making use of guidance. Modified guidance. We  
6 recommend that the guidance be modified, but we  
7 recommend that there's research regarding how  
8 that's working in the field by conducting site  
9 visits and further research.

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

1 working.

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

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

21           MR. STONE: Let me ask you a couple  
22 questions about the items you mentioned when you

1 were giving your first statement. You talked  
2 about, and the report talks about the importance  
3 of the prosecutors developing rapport with the  
4 victim needed to fully prepare for trial. It's  
5 in your recommendation number seven. Part of the  
6 reason we're here is because victims felt that  
7 the relationship with prosecutors did not serve  
8 them well because prosecutors - they are not the  
9 prosecutors' client. And the victims have on the  
10 line their emotional, social, and professional  
11 career. And that is not the primary goal of the  
12 prosecutor, which is why they moved to Victims'  
13 Legal counsel and Special Victims' Counsel, and  
14 special counselors.

15 So tell me why you think rapport with  
16 the prosecutor should play any role at all? I  
17 dismiss it totally. The prosecutor should be  
18 independent, look at his evidence, and see  
19 whether he's got it. And if the victim decides  
20 for her own reasons not to be forthcoming to the  
21 prosecutor because the victim, he or she, decides  
22 it's going to ruin their career. And they would

1 just as soon swallow the problem. I don't really  
2 think that's any of the prosecutor's concern.  
3 He's not getting cooperation and he says, I don't  
4 have a case to go from.

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

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

22 MS. WINE-BANKS: I think the role of

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

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

19 The Victims' Legal Counsel can deal  
20 with other issues. The Victims' Legal Counsel is  
21 not prosecuting the case, but the victim is  
22 choosing to continue the case and without having



1 the proper relationship and information to the  
2 prosecutor, it's likely to not turn out as well  
3 as the victim might want.

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

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

1 acquittal.

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

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

1 to the victim.

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

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

20 MS. WINE-BANKS: I don't want to  
21 debate over the word rapport. And if there's  
22 another word that would make you more

1 comfortable, I think you're quite right. That in  
2 some cases the victim may feel more comfortable  
3 talking to their own lawyer. And the question is  
4 whether that counsel will share that information  
5 or tell their client that sharing that  
6 information would help in the outcome of the  
7 case.

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

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

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

20 MR. STONE: Okay. The reason I ask  
21 that is because we did, as a Panel, hear victims.  
22 And I heard even more victims when this JPP sent

1 me to the training program in Charlottesville  
2 that the SVCs all undergo. And I heard repeated  
3 victims tell me that the most important change,  
4 and the most important thing in their life was  
5 the expedited transfer. And the reason was, as  
6 you said, we just heard from even the Panel.  
7 Sometimes what the victim wants is just to get  
8 away from this.

9 MS. WINE-BANKS: Right.

10 MR. STONE: And if they can get an  
11 expedited transfer their life can begin,  
12 hopefully, again. And they explained how the  
13 real problem with expedited transfers were that  
14 they didn't get to specify where they were going.  
15 And that they didn't even get to specify what  
16 occupational specialty they were going to be in,  
17 because it wasn't always easy to place them in  
18 the same job for which they had been trained  
19 somewhere else. And that also was complicated  
20 sometimes. Because if the new job had an  
21 arrangement or relationship with the old unit,  
22 then they didn't gain much out of the expedited

1 transfer and how difficult it was on their lives  
2 and on their spouses' lives. And if they had a  
3 family, spouse's job, kids in school.

4 But that was still the most important  
5 item. I think that a recommendation that  
6 expedited transfers should go to the same  
7 installation or nearby installation without  
8 talking to victims, based on a snapshot, seems to  
9 me a difficult one for me to place much store by.  
10 I know, and defense counsel have an absolute  
11 right to say to a victim on the stand, you've got  
12 an expedited transfer out of this didn't you?  
13 And if that impeaches their credibility, that's  
14 something that the prosecution - everybody that  
15 whoever puts the witness up there knows.

16 But that's also true if an expert  
17 witness gets on, and they say, please tell us how  
18 much you got paid for coming here today. That's  
19 always something that's put before a witness. We  
20 know that. But, you know. Knowing that a  
21 victim's emotional, professional, and social life  
22 is undergoing great trauma, I don't understand

1       why - and maybe you can tell me - what it is you  
2       think is being done wrong with expedited  
3       transfers?

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

13                   Then we felt that there was a reason  
14      to say, maybe they shouldn't go to Hawaii. They  
15      should go on the same base. And we took into  
16      account, yes you would have to have the same - an  
17      appropriate job in the new unit. You couldn't be  
18      asked to take a lower level job or a different  
19      MOS. That would all have to play into this.  
20      We're just saying, look at whether this is having  
21      a deleterious effect on the outcome because it's  
22      hurting credibility.

1           I personally, if I were cross  
2           examining a victim, wouldn't think that would  
3           hurt their credibility much. Yes, I wanted to  
4           get away from this horrible person who abused me.  
5           And I was able to do that. I didn't see,  
6           personally, that as such. But we heard that it  
7           affected the perception of credibility and was  
8           leading to acquittals. So if you want to have a  
9           good outcome - I mean, if the victim is going to  
10          go through the horrible process of having to  
11          testify to a terrible thing that happened, and  
12          having to delay their career in many ways because  
13          of the pendency of this, then you want to have a  
14          good outcome. And so if this hurts a good  
15          outcome, we think it's worth looking at to  
16          enhance the opportunity for a conviction on  
17          behalf of the victim.

18                 MR. STONE: I think that's a fairly  
19                 logical conclusion. But I can't imagine that an  
20                 SVC wouldn't run that by his victim before the  
21                 victim asks them to definitely ask for an  
22                 expedited transfer. So I find it sort of



1       confusing without speaking to victims that you'd  
2       want to make a recommendation about that. When  
3       we heard actual testimony from Servicemembers  
4       here as a Panel about how much difficulty they  
5       were having finding an appropriate job slot for  
6       expedited transfers. That normally when  
7       vacancies come up in the military, they come up  
8       on not an immediate schedule.

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

16               There was one other topic - give me a  
17       second. I'm not sure I can recall what it is  
18       right now. I think it had to do with another one  
19       of these recommendations. Do we have any  
20       comparison, even subjectively from subjective  
21       data, about the pressure that Servicemembers  
22       think the high ranking officials are under to

1 bring criminal prosecutions and sexual assault  
2 cases that date in the past and currently? Ten  
3 years ago and now? Five years ago and now?  
4 Because I think there's always been this  
5 perception that they were under pressure to go  
6 ahead and do these cases. Certainly since 2010.

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

16 MR. STONE: And I gather - also now,  
17 I remember the other topic I wanted to get to.  
18 You make some recommendations about making  
19 victims available to prosecutors quickly and  
20 investigators quickly. And to be sure that they  
21 are - and this has to do with the transfers, I  
22 guess - that they are available to be interviewed

1 more than once if need be. And the effect that  
2 that will have. That they should be reporting -  
3 you mentioned even here today - the night that it  
4 happens, shouldn't the next day they be  
5 recommending some kind of action be taken?

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

22 DEAN SCHENCK: We're not saying the

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

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

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

19 DEAN SCHENCK: I think convictions are  
20 very important to justify the military justice  
21 system and the perception of the civilian society  
22 about the military justice system. Because if we

1 have cases going to trial where the victims are  
2 testifying for the first time, and the accused is  
3 acquitted, the perception may well be that our  
4 system is rigged. That the Panel members don't  
5 believe there is any such thing as sexual assault  
6 in the military Services. I think it's a bad  
7 perception of the military justice system.

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

13 CHAIR HOLTZMAN: Doesn't that happen  
14 sometimes when the victim is not properly  
15 questioned? Responding to Mr. Stone's point.  
16 The first interview with the victim, the victim  
17 may be very emotional. They may not be able to  
18 get to the bottom of everything in that  
19 interview. They may have to do it a second time.  
20 If you come into trial unprepared, can't you lose  
21 that case? Whereas if you had a second  
22 interview, you might have been able to clarify

1 some of the holes and prepare for a response to  
2 that. Isn't that a desirable outcome or am I  
3 missing something here?

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

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

11 DEAN SCHENCK: Absolutely.

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

19 DEAN SCHENCK: Absolutely.

20 CHAIR HOLTZMAN: Okay. I just wanted  
21 to get that clear. Let me ask about the issue of  
22 pressure to bring cases. And I think we were

1 getting to the corrosive impact of that. I  
2 think it's - I mean, I think maybe somebody or  
3 maybe you would elaborate a little bit more about  
4 what impact that has on - because it was  
5 mentioned in the report - on recruitment, on  
6 other issues, on morale and other issues in the  
7 military. The sense that somehow these cases are  
8 unjustified, or the convictions may be  
9 unjustified when the process is unjustified or  
10 unfair. What is the consequence of the view that  
11 the military justice system is systematically  
12 unfair?

13 MS. WINE-BANKS: Well, we heard all of  
14 the things that you've mentioned. We heard that  
15 it was impacting the overall view of the military  
16 justice system, not just the prosecution of these  
17 sexual assault cases. We heard that people were  
18 not re-enlisting because they felt that the  
19 system wasn't fair. So we heard all of - and we  
20 list a number of negative consequences in the  
21 report where we've - and what we heard, a lot of  
22 the pressure was sort of unidentified amorphous

1 from society. And so we couldn't come up with a  
2 solution to say, let's remove the pressure by  
3 doing X because it was not specific enough.

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

14 MS. KEPROS: You're right. We did  
15 enumerate some other consequences in our report.  
16 There is a list on page twenty-seven of six  
17 specific issues that we've pulled out. But it  
18 isn't just the immediate participants in the case  
19 who are suffering the impact. We heard that  
20 there is skepticism sometimes among Panel members  
21 because they've heard a lot of cases that don't  
22 seem to have a lot of merit are going forward.



1 So then when they sit on a case, they are  
2 skeptical looking at that case.

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

15 If you're a victim in that context,  
16 why bother? Why bother? We already know from  
17 the general victimology literature that victims  
18 are reluctant to report in the most - you know -  
19 slam dunk of cases where there's physical  
20 evidence, they don't even report. So I just - I  
21 think you can't put too fine a point on how, if  
22 nobody trusts the system, it's a problem. And if

1 you are a person considering enlisting in the  
2 military and joining a place where you are  
3 literally putting your life on the line, are you  
4 going to want to do that if you also feel like  
5 you will be treated unfairly if somebody makes a  
6 false accusation against you? Who would put  
7 someone in that position?

8 DEAN SCHENCK: It's bad for recruiting  
9 both ways. I've had people approach me and ask  
10 me if I thought their daughters should go in the  
11 military because of the sexual assaults occurring  
12 there. I've also had mothers of sons - as  
13 myself, I have a son who's adopted. He's at the  
14 Naval Academy. A midshipman. And his whole  
15 life, he's seen me work on this sexual assault in  
16 the military Services issue. Going to press  
17 conferences and I was afraid for him to go into  
18 the military and perhaps be the victim of a false  
19 report. Or perhaps engage in frat-like conduct,  
20 with alcohol involved, and then be charged. And  
21 then have to register as a sex offender. I mean,  
22 it's just bad for recruiting all around.

1 MS. WINE-BANKS: But it's also bad on  
2 the victim's side. Because if you know that  
3 there's a hundred percent, an eighty percent,  
4 even a sixty percent chance that it's going to be  
5 an acquittal, and you know the process is going  
6 to be painful and will re-traumatize you, I think  
7 it may lead to a conclusion of I'm not reporting  
8 this. I'm going to suck it up and I'm just going  
9 to live with it. And that's an unfortunate,  
10 terrible consequence of a high acquittal rate.

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

19 But if we have a situation where we  
20 can't get convictions, and victims don't feel  
21 they have a solution in the justice system, what  
22 kind of consequence is that? So one has to be a

1 little bit more nuanced and sophisticated and  
2 capable of thinking more complexly about this  
3 situation to try to address it. And it seems to  
4 me that we have to have all the parts working  
5 properly.

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

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

15 Convictions after due process to both the  
16 defendant and the victim. And in that situation,  
17 you're going to have the best outcomes. And  
18 you're right, that in order to do that when  
19 evidence changes and the prosecutor learns a new  
20 fact, they need to be able to ask the victim  
21 about that changed evidence. Otherwise, there  
22 will be too many acquittals.

1 CHAIR HOLTZMAN: And also with regard  
2 to the rapport with the victim. We heard in our  
3 subcommittee - I mean, it's not reproduced here.  
4 And she's not here today, unfortunately. Lisa  
5 Friel. But Lisa, and I'm probably understating  
6 her credentials, wasn't she twenty-eight years -

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

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

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

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

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

22 CHAIR HOLTZMAN: And also it may be

1 that - well, we'll leave that for later. Can we  
2 go, for a minute, to the consequences to the  
3 defendant of this idea that all cases should be -  
4 that all cases should go to trial? What did we  
5 learn about that? I know, Ms. Kepros, you  
6 probably have a good handle on that as well as  
7 the other members of the Panel. But I'd like to  
8 hear that. Because we need to know all the  
9 consequences.

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

21 CHAIR HOLTZMAN: A hundred fifty out of  
22 how many?

1 MS. KEPROS: That was out of I think  
2 520 or so. I'm sorry, I've got that number here  
3 somewhere. It was roughly a quarter where there  
4 was nothing. And I've already spoken about the  
5 percentages where there was some sort of sexual  
6 conviction. And of course in the remainder there  
7 was non-sexual convictions. We've heard  
8 sometimes there is a conviction for adultery, for  
9 example. Or some other kind of misconduct that  
10 wouldn't, in the civilian sector, maybe even  
11 necessarily constitute a crime.

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

22 Losing track of their role - let's say

1 they're even ultimately acquitted. You know,  
2 they have lost years off their career. You don't  
3 get years back. You don't get your youth back.  
4 None of us get that. And that's just a loss  
5 they're not compensated for in any way when that  
6 acquittal comes down. So it's very life  
7 altering. Certainly, obviously, if someone is  
8 convicted of a sex crime, our broader society  
9 treats that very seriously.

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

19           MS. HOLTZMAN: I guess I have one  
20 final area that I'd like to kind of address.  
21 Although I don't know that we have an answer to  
22 it. And that's contained in this news report.



1 It was put into our materials just recently about  
2 an admiral who was retired. Who, according to  
3 the news reports - I have no idea whether it's  
4 actually accurate. But the admiral said that he  
5 - I guess that was at a point when the convening  
6 authority still had clemency powers, which they  
7 don't have today. That he  
8 wanted to grant clemency because he didn't think  
9 the case amounted to a sexual assault.

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

20 Aren't we putting commanders in really  
21 a totally untenable position? When they have to  
22 choose between - I mean, he said it wasn't his

1 career. Because he was retiring. But one can  
2 imagine, easily, that a career is going to be  
3 jeopardized by a decision that's made. And how  
4 do we put people in a position where that  
5 happens? I mean, one of the reasons we have life  
6 tenure for federal judges is that they don't have  
7 to choose between putting bread on the table  
8 tomorrow and whether they're going to convict  
9 somebody who's innocent.

10 And yet, we're setting up this system  
11 here where there appears to be, from what was  
12 heard in these site visits and this most recent  
13 article which I find very troubling. I mean, I  
14 hope it's wrong. But if it's right, we're  
15 putting people in untenable positions where they  
16 have to make such a choice. And we can't always  
17 rely on - one, it's wrong to put people in that  
18 position. And two, we can't always rely on their  
19 making a decision in favor of what's just for  
20 another person. I know it's not one hundred  
21 percent addressed in this report, but how do we  
22 handle this additional information about the

1 pressures on the commander? Does that reinforce  
2 the recommendations that the subcommittee has  
3 made?

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

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

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

1 where they feel they have to refer it.

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

13 I'm not even going to say false.  
14 They've heard about so many acquittals. It may  
15 have been true, it may not have been. Somehow  
16 the evidence failed. But if the legitimate case  
17 is then dismissed and there's an acquittal where  
18 there shouldn't have been because of the  
19 skepticism. That's a serious, serious outcome.  
20 So they need to be made aware that there is a  
21 consequence to their decision to proceed on weak  
22 evidence.

1           DEAN SCHENCK: Especially now that  
2 Article 60 has been modified. So there cannot be  
3 any relief clemency granted after trial in a  
4 majority of these sexual assault cases. So if  
5 the accused is convicted at trial, and the record  
6 of trial comes forward and there's an issue  
7 regarding admissibility of evidence, that you can  
8 tell the accused shouldn't have been convicted -  
9 you have no authority to grant clemency.

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

19           (Laughter.)

20           DEAN SCHENCK: Also, I want to point  
21 out the recommendation that we have that the DAC-  
22 IPAD review the Article 34 pre-trial advice and

1 RCM 406, it's our recommendation four. That  
2 would also help this pressure, I believe, to  
3 allow the convening authority to receive those  
4 prosecutorial merits memos. Because then they  
5 could make a better assessment. The 32 is not  
6 giving them any information. There is no  
7 transcript. There's nothing to be said that I  
8 can read, that I can look at. I can't look at  
9 the transcript of the victim's testimony. I  
10 can't do that. So - but if you had that  
11 prosecutorial memo, it would be a better - it  
12 would be a more educated decision-making process.

13 So that's yet another way to help.

14 CHAIR HOLTZMAN: That's a very good  
15 point. I just wanted to say before I conclude  
16 that I think the military undertook some really  
17 important measures to deal with the actuality or  
18 the perception that sexual assault was not  
19 treated seriously. And it's true that they  
20 weren't because it was true in the civilian  
21 world. Just - we're not taking these cases  
22 seriously. They didn't believe that it happened.

1 It's in my lifetime that a woman's word, or a  
2 rape victim's word, was not taken as true and  
3 needed to be corroborated. So we're not talking  
4 that many years ago.

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

15 Understood, addressed, and if possible, resolved.

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

18 CHAIR HOLTZMAN: Okay.

19 MR. STONE: Again, this comes out of  
20 the last comment that was made about relief at  
21 the front end. I understood that there were in  
22 the neighborhood of 4,000 unrestricted sexual

1 assault complaints in the last year of which, as  
2 we just heard, only about 500 wound up being  
3 referred for trial. So I guess my question is -  
4 there seems to me there's an awful lot of stuff  
5 being done at the front end. And there's an  
6 awful lot of vetting and weeding out going on.

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

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

20 CHAIR HOLTZMAN: Okay, thank you very  
21 much to the Panel again, for the work that you  
22 did and for your testimony here. We really



1 appreciate your having given us the benefit of  
2 your work. Thank you. We will stand in recess  
3 for forty-five minutes.

4 (Whereupon, the above entitled matter  
5 went off the record at 11:59 a.m. and resumed at  
6 12:50 p.m.)

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

11 So we will hear from Meghan Peters.  
12 Meghan, welcome again. Thank you for your work.

13 MS. PETERS: Good afternoon, members  
14 of the panel. On the agenda, this is your  
15 deliberations session on court-martial data.  
16 What I'd like to do is highlight the information,  
17 before you begin your deliberations, that Dr.  
18 Spohn and the staff have gathered for you  
19 supplemental to the information that you received  
20 on April 7th.

21 So the members had several questions  
22 in response to Dr. Spohn's data analysis, and she

1 has since supplemented the original report. And  
2 so if I could just briefly draw your attention to  
3 Tab 2 of the read-ahead materials.

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

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

18 So what you have in front of you in  
19 Tab 2 is a summary that says guilty pleas and  
20 contested trials. This is a summary of something  
21 that she has added to her report, and the report,  
22 for reference, has been supplemented, and it's in

1 your read-ahead materials in Tab 3.

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

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

20 So it is a heavy read, and it is a  
21 required slow read, I believe, but it provides  
22 that additional clarity. And we can go through

1 the highlighted statistics if you want, or I can  
2 just draw your attention to the other topics.

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

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

15 In the 262 trials in which the most  
16 serious charge was a penetrative offense, 35.9  
17 percent resulted in conviction for a penetrative  
18 offense, and an additional 1.9, or really 2  
19 percent, resulted in conviction for a contact  
20 offense, meaning the chances of a contested trial  
21 on a penetrative offense resulting in a  
22 conviction for any sex assault offense was 38

1 percent. Another --

2 HON. HOLTZMAN: I don't get that.

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

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

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

9 HON. HOLTZMAN: Page 5?

10 MS. PETERS: I apologize. And it's  
11 36.8 percent.

12 MR. STONE: 37.8.

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

19 Of the contested trials in which the  
20 most serious charge was a contact offense, 30.8  
21 percent resulted in conviction for a contact  
22 offense, 34.6 percent resulted in conviction of a

1 non-sex offense, and 34.6 resulted in an  
2 acquittal on all contested charges.

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

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

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

20 HON. HOLTZMAN: Oh, okay.

21 MS. PETERS: And it's another way of  
22 looking at -- really, it's another way of looking

1 at the same information that we just discussed,  
2 and it might be worth certainly the panel looking  
3 at but not discussing in depth because it is  
4 looking at the same issues.

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

7 MS. PETERS: We're still on Tab 2.  
8 We're in Tab 2 of the read-ahead materials, and  
9 it's the first page of text. I thought for  
10 simplicity's sake, to focus on the new material,  
11 we're at Tab 2 because she has highlighted the  
12 types of analysis that are new for the panel in  
13 bold.

14 VADM(R) TRACEY: But if I could just  
15 -- I just want to make sure I'm clear. So  
16 originally she reported 137 convictions of  
17 penetrative offenses out of those who were  
18 charged with penetrative offenses. And of those,  
19 94 went to trial. Is that how I should  
20 understand the data? I'm on page 5 of Tab 3.

21 MS. PETERS: So I read that to be that  
22 the highlighted portion at the bottom of page 5

1 has the outcomes for contested trials. Out of  
2 the 262 contested, 94 were convicted, and that  
3 amounts to 35.9 percent, which I believe is what  
4 she highlights is the chance of conviction on a  
5 penetrative offense in that narrative in Tab 2.  
6 I think those are the same figures.

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

12 MS. PETERS: Convicted.

13 VADM(R) TRACEY: Go with 137  
14 convicted.

15 MS. PETERS: Yes.

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

20 MS. PETERS: Just one moment.

21 HON. HOLTZMAN: Or could they have  
22 pleaded before being referred?



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

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

22 The additional information that she

1 provided also includes trial forum information,  
2 meaning how did outcomes result when the forum  
3 selection was either trial by military judge  
4 versus a panel of military members.

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

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

16 When you take out the guilty pleas,  
17 the results show that the type of trial forum did  
18 not affect case outcomes for either penetrative  
19 or contact cases. So the conviction rate at a  
20 contested trials is relatively stable between  
21 judge-alone or panel. The conviction and  
22 acquittal rates were relatively equal.

1           The multivariate analysis that she  
2           undertook in response to questions from the April  
3           7th meeting included additional analyses that  
4           compared each Service against one another,  
5           meaning in the April meeting she chose one  
6           service, the Marine Corps, as sort of a control  
7           group, a baseline, to say, how do the conviction  
8           and acquittal rates compare to that baseline, you  
9           know, in the other services? And there was this  
10          larger difference between the Army and the Marine  
11          Corps, and the panel members felt that it would  
12          be interesting to see how the rest of that  
13          information compares. She has --

14                 HON. HOLTZMAN: So what did it show?

15                 MS. PETERS: It showed that there is  
16          -- there are still only a few items -- there are  
17          only a few instances where the service of the  
18          accused had a consistent effect on the outcome of  
19          the case, and that was generally that conviction  
20          rates were still higher in the Army than the  
21          other services and that the Air Force had the  
22          lower -- I'm sorry, the Air Force had a higher

1 acquittal rate than the other services, no matter  
2 which control group it was.

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

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

11 MS. PETERS: Yes, ma'am.

12 HON. HOLTZMAN: All right.

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

21 HON. HOLTZMAN: You can go --

22 MS. PETERS: -- the service made a

1 difference.

2 HON. HOLTZMAN: You can move on.

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

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

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

18 So I think the information that she  
19 has added to the report is really a summary of  
20 the discussion that she had with you all in the  
21 question and answer session from April 7th, and  
22 that has been highlighted in her now final

1 report.

2 VADM(R) TRACEY: I think one  
3 observation that we asked about that I didn't see  
4 reflected here was whether Army's numbers are  
5 proportionate to how much larger they are than  
6 the other services or if they are somehow out of  
7 --

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

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

1 materials.

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

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

19           There were other anomalies that  
20 explained the delta between cases identified and  
21 cases that made it into the database. Aside from  
22 making sure documents were complete and whatnot,

1 you know, taking a closer look at things, the  
2 Navy gave us 15 cases that didn't involve a  
3 preferral. So there was -- if a case didn't  
4 involve preferral, we didn't analyze it, it  
5 didn't meet our criteria. It wouldn't be  
6 consistent.

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

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

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



1 in any instance.

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

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

14 I believe, Admiral Tracey, this was  
15 one of your questions. Where do the alternate  
16 dispositions coalesce in terms of ranks of the  
17 individuals involved? It looked like, I'm sorry,  
18 75 percent of the cases resolved by alternate  
19 disposition involved an accused in the grade of  
20 E3, E4, or E5. And only 2-1/2 percent of the  
21 alternate dispositions involved officers.

22 So there were really only a handful of

1 cases involving officers, and that is where I  
2 think the important distinctions were. There was  
3 an array of ranks in the remaining percentages,  
4 but that's I thought the higher points that would  
5 resolve your questions about alternate  
6 dispositions.

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

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

19 What we did primarily count was an  
20 alternate disposition that was a request for  
21 resignation or discharge in lieu of trial because  
22 that happens concurrent with the decision not to

1 go forward with the case. You have a document,  
2 you understand how they're separated, when  
3 they're separated, and what -- sometimes what  
4 they're separated for.

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

12 MR. TAYLOR: Thank you.

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

16 MS. PETERS: What we know is that if  
17 a case was -- if a case was resolved with a  
18 discharge or resignation in lieu of trial, which  
19 is a specific type of separation, that we had --  
20 we could obtain specific documents for, we  
21 counted all of those and we documented that and  
22 we kept the documents.

1           If a case was just dismissed, line  
2           through the charge sheet, and that's all we had,  
3           we did not pursue the jurisdiction and say, "Did  
4           you do anything else to this accused?" So I just  
5           hold out the possibility that person could have  
6           received a non-judicial punishment for something  
7           --

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

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

17          Lastly, if we can move on to the next  
18          slide. I shouldn't say lastly because I do have  
19          more information beyond this briefly. That the  
20          court-martial information, according to active  
21          duty population size, is reflected in Slide 2 of  
22          this presentation.

1           So this is according to the FY15  
2           population for each service. What I've done in  
3           the first column is include the active duty  
4           population size, and the second column reflects  
5           numbers that were in this chart originally.

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

9           MS. PETERS: Okay.

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

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

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

18          MR. STONE: Okay.

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

22          VADM(R) TRACEY: So the Army makes up

1 36 percent of the active duty population and 43,  
2 almost 44 percent of --

3 MS. PETERS: Yes, ma'am.

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

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

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

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

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

21 MS. PETERS: Okay. But we undertook  
22 that without wanting to overwhelm with numbers.

1           So the next slide is -- Ms. Holtzman,  
2           you asked -- you said it would be nice when  
3           viewing the appellate information. This is the  
4           percentage of cases with a conviction reviewed  
5           and what happened, just to have a sense of the  
6           percentage rather than the raw numbers.

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

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

1 and included that for your reference.

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

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

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

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

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

18 MS. PETERS: This is --

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

21 MS. PETERS: Disposition. Initial  
22 disposition, ma'am.



1 HON. HOLTZMAN: Does that mean --

2 MS. PETERS: The court-martials and  
3 action --

4 HON. HOLTZMAN: Oh, I see.

5 MR. STONE: Were you surprised by  
6 Footnote 1 on the first page? I'm a little  
7 surprised that there were so many reports that  
8 had missing data on subject and victim type. It  
9 seems like a lot of reports.

10 MS. PETERS: It does, sir, and I don't  
11 have an explanation for that.

12 MR. STONE: Yeah. Okay.

13 HON. HOLTZMAN: What does it mean a  
14 victim type or a subject type?

15 MS. PETERS: Whether the victim is a  
16 service member and whether the subject is a  
17 service member or a civilian.

18 MR. STONE: Then I'm a little confused  
19 because I just look at the bar chart at the end  
20 there. You have in green and in blue  
21 "unidentified subject service member victim" as  
22 15 percent. I guess I don't understand why it

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

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

15 The proposed recommendations are in  
16 Tab 4 at letter B, potential JPP recommendations.  
17 They begin with the number 52, numbered to follow  
18 consecutively what might currently be the -- what  
19 would currently be the recommendations in the  
20 victim's appellate rights report. If this one  
21 came next, we would start with JPP recommendation  
22 52, as things currently stand.

1           And the recommendation, the proposed  
2 one, is -- and I will read each of them in turn  
3 if -- Madam Chair, if you would like, I can read  
4 through each, and then discuss. The first is the  
5 JPP recommends --

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

8           MS. PETERS: Yes, ma'am.

9           HON. HOLTZMAN: Please.

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

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

21                   It's adopted.

22                   The second -- let's go to --

1 MS. PETERS: Proposed recommendation  
2 53 is the new military justice data collection  
3 system developed pursuant to Article 140a,  
4 Uniform Code of Military Justice, should be the  
5 exclusive source of sexual assault case  
6 adjudication data for DoD's annual report to  
7 Congress on DoD's sexual assault prevention and  
8 response initiatives.

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

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

1 the military justice system.

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

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

18 And, second, when the DoD responded to  
19 the JPP's request for information about the  
20 status of its own recommendations about  
21 developing a standardized database, they said,  
22 "Well, we are going to have to consider the

1 requirements of this new Article 140a if we are  
2 to implement the JPP recommendation," meaning  
3 their -- the DoD's response to JPP previous  
4 recommendations was "see Article 140a. We are  
5 going to proceed under those -- under that new  
6 requirement." And this recommendation gets at  
7 influencing how they do that.

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

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

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

21 MS. PETERS: -- collection?

22 HON. HOLTZMAN: So why don't we just

1 say that?

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

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

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

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

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

1 important.

2 HON. HOLTZMAN: Right.

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

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

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

16 VADM(R) TRACEY: So what if we  
17 modified the recommendation to say, "New military  
18 justice data collection system developed pursuant  
19 to Article 140a should be designed so as to  
20 become or to be able to serve as the exclusive  
21 source of sexual assault case adjudication data,"  
22 yada, yada.



1 HON. HOLTZMAN: I like that.

2 MS. PETERS: Okay.

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

7 MS. PETERS: Yes, ma'am.

8 HON. HOLTZMAN: Something like that.

9 MS. PETERS: Okay.

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

12 MS. PETERS: Yes.

13 HON. HOLTZMAN: Any opposition? Okay.  
14 Great. Perfect. Great.

15 MS. PETERS: The proposed  
16 recommendation states, "The successor Federal  
17 Advisory Committee to the JPP, the Defense  
18 Advisory Committee on the investigation,  
19 prosecution, and defense of sexual assault in the  
20 armed forces, should continue to analyze adult  
21 victim sexual assault court-martial data on an  
22 annual basis as the JPP has done, and should also

1 examine the following patterns that the JPP  
2 discovered in its analysis of fiscal year 2015  
3 court-martial data: a) cases involving military  
4 victims tend to have less punitive outcomes than  
5 cases involving civilian victims; b) the  
6 conviction and acquittal rates for sexual assault  
7 offenses vary significantly among the services;  
8 and c) if a service member is charged with a  
9 sexual assault offense, the probability that an  
10 accused would be convicted of a sexual assault  
11 offense is low."

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

17 MS. PETERS: Yes, ma'am.

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

22 MS. PETERS: Okay.

1           HON. HOLTZMAN: Or something like  
2 that, but we should use the same terminology for  
3 the service member.

4           Any objection to this recommendation?

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

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

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

19           MR. STONE: Well, I'm also  
20 uncomfortable about our role telling the next  
21 advisory committee that the different -- has a  
22 different statutory authorization what to do and

1 trying to decide if "should consider" makes me --  
2 it definitely makes me more comfortable. I just  
3 don't know if it makes me comfortable enough.

4 MR. TAYLOR: Well, I guess my theory,  
5 Mr. Stone, is they can consider it. If they  
6 decide not to do it, they don't do it. If they  
7 think of another different way, or if they want  
8 to look at a different set of factors, I mean,  
9 these are clearly some that we have looked at and  
10 have been open to us.

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

15 MR. TAYLOR: Good point.

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

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

21 HON. HOLTZMAN: This way would be  
22 adequate.

1 MS. FRIED: This would be fine,  
2 because the Secretary of Defense will look at the  
3 recommendations and take whatever actions might  
4 be --

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

8 MR. STONE: That this is advice.

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

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

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

18 MR. STONE: I guess --

19 HON. HOLTZMAN: Not to adopt it.

20 MR. STONE: I guess after the word  
21 "should" I might add a phrase that says, "If the  
22 Secretary of Defense agrees, continue -- consider

1 continuing to analyze" blah, blah, blah. I feel  
2 a little better making it clear that we don't  
3 think that we're overriding that somehow.

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

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

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

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

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

22 HON. HOLTZMAN: right.

1 MR. STONE: -- "continue advising."  
2 That's a little better, yeah.

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

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

9 MR. STONE: Yes.

10 VADM(R) TRACEY: Yes.

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

13 MR. STONE: Right.

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

16 CAPT. TIDSWELL: Yes, ma'am.

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

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

21 MS. PETERS: The staff will undertake  
22 selecting the statistics that you all have found

1 important and discussed by putting them into a  
2 graphic in the final report and just explaining  
3 what those results are, similar to last year,  
4 this is what we are reporting, with limited --  
5 without an explanation for why necessarily.

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

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

17 I think that the average non-DoD  
18 person won't understand the places where the  
19 outcome wasn't possible. So there are certain  
20 kinds of sentences that can't be awarded at given  
21 levels of trial. There are certain things that  
22 can't be done to officers at NJP. And if you're



1 not "in the know," that all is missed in this  
2 formulation of data. And so it ends up that the  
3 data is skewed because you couldn't have that  
4 outcome.

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

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

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

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

1 body of the report.

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

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

6 MS. PETERS: Right.

7 VADM(R) TRACEY: And so it --

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

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

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

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

18 MS. PETERS: Okay.

19 HON. HOLTZMAN: And if you have some  
20 areas that you have identified as problematic, we  
21 need to let them know. Or we're going to have  
22 another chance to review this report. I mean,

1 you'll send us a final draft.

2 MS. PETERS: Yes, ma'am.

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

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

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

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

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

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

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

22 MR. STONE: Yeah. And you can put a

1 little intro on it that says that. That's for  
2 sure. That's why I just -- I mean, it says  
3 Appendix B on the bottom of it. So that's -- I  
4 just wanted to be sure that it doesn't get lost.

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

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

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

14 MR. STONE: Do you want a short break?

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

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

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

22 HON. HOLTZMAN: Oh, okay. Great.

1 Thank you.

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

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

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

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

22 MS. PETERS: We're on -- the draft

1 report is at Tab 9. So the JPP --

2 HON. HOLTZMAN: Oh, I see. Okay.

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

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

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

10 MR. STONE: Ah. Okay.

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

14 MR. STONE: Right. Okay.

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

21 Then the JPP moved to deliberations on  
22 the subcommittee's report, and the JPP members

1 voted to adopt the subcommittee report on  
2 investigations, along with its recommendations.  
3 The JPP members wanted to add an introductory  
4 statement to their executive summary, noting how  
5 some of these subcommittee and now JPP reports  
6 address similar issues along the lines of the  
7 adequacy of investigative resources for one  
8 stakeholder or another.

9           Since then, the staff drafted proposed  
10 findings and recommendations, which we have  
11 already referred to as Tab 9 of your read-ahead  
12 materials.

13           The draft language was based on your  
14 deliberation session on February 24th, and it  
15 also reflects the fact that since the  
16 subcommittee issued a report to you there was a  
17 DoD policy that took effect on March 22nd of this  
18 year which essentially allows -- which touches on  
19 the essence of the subcommittee's first  
20 recommendation about military -- or MCIOs getting  
21 assistance from other agencies in the  
22 investigation of sexual assault.

1           So that DoD policy was incorporated  
2 into the first JPP recommendation listed in the  
3 investigations report.

4           Since we sent you the draft executive  
5 summary and recommendations, the staff received  
6 comments and edits from several of the members.  
7 The staff has made those changes, and in your Tab  
8 9 you will see that those changes are highlighted  
9 in track changes, and there is a comment with a  
10 label next to it, so you know who -- that your  
11 changes were made and, where there was room, an  
12 explanation for the change.

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

21           So today's deliberation session can  
22 focus on the language of the JPP recommendations



1 and the draft executive summary, with the  
2 understanding that the subcommittee's report  
3 would form the body of the JPP's report on  
4 investigations.

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

13 MS. PETERS: Yes, ma'am.

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

20 MS. PETERS: Yes, ma'am.

21 HON. HOLTZMAN: -- we're supposed to  
22 do? Okay. So if it's okay with everybody,

1       should we just go through the edits one by one,  
2       or is there a quicker way to do it? I don't  
3       know. Anyone have a suggestion?

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

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

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

22              MS. FRIED: So, Mr. Stone, the

1 subcommittee has conducted preparatory work  
2 sessions where they went on fact-finding missions  
3 at these sites to bring this information back to  
4 the panel. The panel can, as I said in my  
5 opening remarks, accept, reject, or adopt  
6 anything the subcommittee does.

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

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

1 presented to us.

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

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

14 HON. HOLTZMAN: Okay. All right.

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

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

19 MS. FRIED: Right.

20 HON. HOLTZMAN: I'm not --

21 MS. FRIED: No, I appreciate that,  
22 ma'am. Yeah. No, I think --

1 HON. HOLTZMAN: No. Thanks for  
2 clarifying that. Okay. So we could -- one  
3 option, then, just to make sure I understand the  
4 options, one option is to adopt the subcommittee  
5 report and issue it as the JPP report.

6 MS. FRIED: Correct.

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

9 MS. FRIED: Correct.

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

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

22 MS. FRIED: And there's one more

1 option.

2 HON. HOLTZMAN: Okay.

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

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

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

17 MR. STONE: First question?

18 HON. HOLTZMAN: Have I fairly stated  
19 it?

20 MR. STONE: Yeah.

21 HON. HOLTZMAN: Okay. So I guess --

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

1 right?

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

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

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

18 MS. PETERS: Yes, ma'am.

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

21 MR. STONE: The reason it's an issue  
22 is because I thought we were adopting the fact

1 that this is what they sent to us. I did not  
2 understand what was just clarified for us, that  
3 that means -- whether that means we pick and  
4 choose what we want or that that automatically  
5 becomes a JPP report. That to me are two  
6 entirely different things. I fully agree that a  
7 subcommittee can send us what they want to send  
8 us, which is what I thought I was voting on.

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

19 And I would expect an opportunity to  
20 figure out which portions of the report, as a  
21 JPP, I would be willing to sign onto, keeping in  
22 mind that an awful lot of that report says



1 several people have told us, many have told us,  
2 some have told us, without eliciting a specific  
3 number and a service -- which is why I asked the  
4 question earlier, without saying two-thirds of  
5 the defense counsel we spoke to said this, or  
6 one-third of the prosecutors said that, without  
7 giving us numbers, which is why I was hoping we  
8 might get a tabular version of the questions we  
9 asked to have answered.

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

20           So it puts me in a funny position.  
21 No, as a whole, I can't endorse that today. If I  
22 saw what was behind it, our questionnaire and a

1 tabulation, I think there's probably parts of it  
2 I wouldn't have any trouble with.

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

12 MR. STONE: As a JPP report.

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

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

19 MS. PETERS: Yes, ma'am.

20 HON. HOLTZMAN: Okay. Mr. Stone is  
21 going to have the opportunity to reconsider his  
22 vote in light of the new clarification. Anybody

1 else wants to reconsider his or her vote in light  
2 of that clarification is also welcome to do that,  
3 and then we can -- but not hearing from anybody  
4 else, I guess we just have Mr. Stone's, and  
5 Barbara is stuck.

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

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

13 HON. HOLTZMAN: Clarify what your vote  
14 --

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

17 HON. HOLTZMAN: Right.

18 MR. STONE: Not as a subcommittee  
19 report.

20 HON. HOLTZMAN: Right. So that -- I  
21 want to give you that opportunity to clarify your  
22 vote.

1 MR. STONE: Will I get that tabular  
2 whatever it is, either yes or no, between now and  
3 then, so I have it to look at? Because that will  
4 help me figure out what I have here.

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

7 MR. STONE: Oh, great. Fine.  
8 Terrific.

9 HON. HOLTZMAN: So then you can make

10 --

11 MR. STONE: That will help.

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

14 MR. STONE: Right.

15 HON. HOLTZMAN: -- how you want to  
16 cast your vote.

17 MR. STONE: Correct.

18 HON. HOLTZMAN: Okay. That being  
19 said, so now we are up to what to do about the  
20 executive summary. Okay. So I suggest we  
21 proceed, unless somebody has got some better  
22 option. I'm always open to that, just going

1 through the various edits and saying yes or no.

2 MS. PETERS: Yes, ma'am.

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

5 MS. PETERS: The first edit in the  
6 executive summary is on Tab 9. It's labeled page  
7 2 because page 1 is the title. It's the second  
8 paragraph. Ms. Holtzman, you suggested adding  
9 "actually," so that it says "how policies have  
10 actually affected the military justice system."

11 The second edit in the --

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

20 HON. HOLTZMAN: Well, they -- well,  
21 first of all, I was about to say I withdraw the  
22 comment. But not to obviate your concern, I want

1 to make sure that it is reflected in here, and I  
2 think we have said it, that this is not intended  
3 to be anything other than a reflection of what we  
4 -- of the site visits that we did, and not  
5 purporting to be a survey of every single person  
6 in the military who is involved in the military  
7 justice system. I mean --

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

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

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

21 MR. STONE: I'm sorry. Could you come  
22 up? I can't hear you.

1 MS. FALK: That in their view this  
2 happened.

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

8 MR. STONE: That's better.

9 HON. HOLTZMAN: Okay.

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

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

22 HON. HOLTZMAN: Yes. So we just say

1 that report -- we don't have to say "included"  
2 here. That report is issued as a JPP report.  
3 That report is adopted by the JPP and issued as  
4 its -- as its report.

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

9 HON. HOLTZMAN: Right.

10 MR. TAYLOR: -- the observations.

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

14 MS. PETERS: Okay.

15 HON. HOLTZMAN: Meghan, are you  
16 keeping track?

17 MS. PETERS: Yes, ma'am.

18 HON. HOLTZMAN: Okay.

19 MS. PETERS: So "much of" --

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

22 MR. STONE: No. I don't mind having



1 "much of." I mean, that's -- that's fine. I  
2 mean, to the extent we're doing -- again,  
3 recognizing that I haven't voted to adopt the  
4 introduction --

5 HON. HOLTZMAN: Okay. So my --

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

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

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

18 I think the crux of this edit, Ms.  
19 Holtzman, you suggested is to say that problems  
20 were identified with regards to investigations in  
21 the course of these site visits. And I think the  
22 word "problems" was not highlighted. Before it

1 said that the site -- that the subcommittee  
2 discussed information gathered.

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

8 MS. PETERS: Yes, ma'am.

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

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

13 MR. STONE: You like "issues"?

14 HON. HOLTZMAN: Yeah.

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

16 HON. HOLTZMAN: All right.

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

19 HON. HOLTZMAN: Yeah.

20 MR. STONE: So it says "issues."

21 HON. HOLTZMAN: Right.

22 MS. PETERS: The next sentence --

1           HON. HOLTZMAN: I want to withdraw the  
2 word "tremendous."

3           MS. PETERS: Okay.

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

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

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

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

22           HON. HOLTZMAN: Not a big deal. I

1 agree to footnote.

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

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

12 The other --

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

18 MS. PETERS: Okay. So the next  
19 sentence just rewords I think a similar concept  
20 to address the DoD -- there was a new DoD policy  
21 that came about after the subcommittee report was  
22 issued, and that DoD policy is incorporated -- is

1 factored into the JPP's recommendations, meaning  
2 it's a positive development that the JPP approves  
3 of.

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

7 HON. HOLTZMAN: Yeah, sure.

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

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

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

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

15 MR. STONE: Yeah.

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

18 MS. PETERS: Yes, ma'am.

19 HON. HOLTZMAN: -- right here?

20 MS. PETERS: We'll make that edit. So  
21 that sentence -- if you'd like me to read back  
22 the first two sentences?

1 HON. HOLTZMAN: No.

2 MS. PETERS: Okay.

3 HON. HOLTZMAN: We edit; you follow  
4 it.

5 MS. PETERS: Well, we're good then.  
6 That is the first three sentences. The last  
7 sentence has an edit to say, "The JPP approves of  
8 DoD's implementation of that DoD policy."

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

11 HON. HOLTZMAN: Where are you?

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

14 MR. TAYLOR: Yes. I agree with that.  
15 It should be "concur with."

16 VADM(R) TRACEY: Right.

17 MS. PETERS: "Concurs with"?

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

1 sure if anyone has any issues with that language.

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

5 MS. PETERS: Yes, ma'am.

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

11 MR. STONE: Working to --

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

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

20 HON. HOLTZMAN: Okay.

21 VADM(R) TRACEY: So it's now "if it is  
22 reducing the burden," is that --

1 MR. STONE: No. I think it's "if it  
2 is improving investigative resources."

3 HON. HOLTZMAN: Yeah. Or --

4 MS. PETERS: In sexual assault cases.

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

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

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

13 MS. PETERS: Yes, ma'am.

14 MR. STONE: That's better.

15 HON. HOLTZMAN: All right.

16 MR. STONE: That's good.

17 MS. PETERS: The last edit to the  
18 executive summary is from Mr. Stone, and it  
19 reflects changes he has suggested to the wording  
20 of recommendations. So the old language  
21 referenced "barriers from initial victim  
22 interviews," and the suggested change would say



1 "any unwarranted restriction on prompt initial  
2 victim interviews."

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

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

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

17 MS. PETERS: The fact that --

18 HON. HOLTZMAN: The unwarranted  
19 restrictions point?

20 MS. PETERS: Yes, ma'am.

21 HON. HOLTZMAN: Anybody have a problem  
22 with that?

1 VADM(R) TRACEY: No.

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

3 MR. TAYLOR: No, that's fine.

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

5 Then what is the second one?

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

10 HON. HOLTZMAN: We just approved that.

11 MS. PETERS: In both instances?

12 HON. HOLTZMAN: Oh, we have it twice?

13 MS. PETERS: Yes, ma'am.

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

17 VADM(R) TRACEY: No.

18 MR. TAYLOR: No.

19 MS. PETERS: Then the last change is  
20 that the sentence, as drafted, would remove  
21 reference to recommendation 46, which regards  
22 MCIO access to tangible evidence in the

1 possession of sexual assault victims.

2 HON. HOLTZMAN: What language are we  
3 focused on?

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

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

10 MS. PETERS: Yes, ma'am.

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

13 MS. PETERS: Yes, ma'am.

14 HON. HOLTZMAN: Okay. So --

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

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

1 MS. PETERS: Mm-hmm.

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

5 MS. PETERS: Yes, ma'am.

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

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

10 MS. PETERS: The question --

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

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

22 HON. HOLTZMAN: Oh, okay. Fine.

1 MR. STONE: -- standing on that.

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

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

7 MR. STONE: Right.

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

11 Okay. Now we're up to page 5?

12 MS. PETERS: Yes, ma'am. And I think  
13 the question from the staff on these changes is  
14 by changing the language barriers in this last  
15 sentence to "unwarranted restrictions," you  
16 wanted to keep that twice in the last sentence.  
17 That is reflective of language in the  
18 recommendations, meaning the corresponding  
19 recommendation says "barriers to prompt victim  
20 interviews" not "unwarranted restrictions."  
21 Should we change the language of the  
22 recommendation based on what you have just

1 discussed?

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

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

8 MR. TAYLOR: I agree with that.

9 MS. PETERS: Make them consistent?

10 HON. HOLTZMAN: Yeah.

11 MS. PETERS: So that means the staff  
12 will change the word "barriers" in recommendation  
13 45 to "any unwarranted restrictions on thorough  
14 questioning" and --

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

17 HON. HOLTZMAN: Well, Mr. Stone had  
18 proposed "unwarranted restrictions," which  
19 originally I thought was okay. But now the staff  
20 says that that language is not consonant with the  
21 --

22 VADM(R) TRACEY: That's what I'm

1 saying is you want to change back to "barriers."

2 HON. HOLTZMAN: Correct.

3 VADM(R) TRACEY: In the executive  
4 summary.

5 HON. HOLTZMAN: Correct.

6 MS. PETERS: Okay.

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

9 MS. PETERS: Okay. Understood.

10 HON. HOLTZMAN: Okay. All in favor?

11 MR. STONE: Opposed.

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

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

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

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

20 HON. HOLTZMAN: There are no changes  
21 on that.

22 MS. PETERS: Right. There is no

1 changes on that, and I guess so we are on -- we  
2 are on 5, and recommendation 44 presents an item  
3 from Mr. Taylor adding "or other law enforcement  
4 agencies."

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

8 HON. HOLTZMAN: No objection. Any  
9 objection?

10 VADM(R) TRACEY: No.

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

20 MR. STONE: Maybe it doesn't belong  
21 there because the MCIO still has to do the  
22 initial?



1 MS. PETERS: That's one implication,  
2 potentially, for your consideration.

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

7 MS. PETERS: Yes, ma'am.

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

10 MR. TAYLOR: Yes. Thank you.

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

13 HON. HOLTZMAN: Okay.

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

20 VADM(R) TRACEY: You have an extra  
21 "that" in that sentence, right? So you're going  
22 to take that out.

1 MS. PETERS: Yes, ma'am. I see that.  
2 I took that out.

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

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

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

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

18 HON. HOLTZMAN: Yeah. But it's after  
19 the -- that's fine. I'm not disagreeing with  
20 you. I think that's a very -- I think it's  
21 appropriate what you've suggested. I just think  
22 -- I don't want to get into a fight over it

1 because we don't have that much time, but I would  
2 just suggest "important." If you think "helpful"  
3 is sufficient, I'm guided by Mr. Taylor, Admiral,  
4 who are both wordsmiths here, you can --

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

7 MR. TAYLOR: So am I.

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

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

17 HON. HOLTZMAN: My objection here is  
18 that I think there is a factual point. Maybe  
19 "often" is not 100 percent correct in terms of  
20 the site visit reports, but it's more than  
21 "sometimes." So I think either you ought to say  
22 "a number of times" or "many times," but

1 "sometimes" makes it sound too -- reduces the --  
2 it really doesn't accurately reflect what we  
3 heard. So I would suggest -- I mean, I don't  
4 mind changing "often" to something that is "a  
5 number of times" or "many times" or -- but  
6 "sometimes" I object to. I object to that.

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

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

22 MR. STONE: Another option is to say,

1 in that second line, "Victim interviews may be  
2 substantially delayed because" and skip -- take  
3 out the word "often" and "sometimes," but point  
4 out that it's maybe substantially delayed.

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

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

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

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

1 problem.

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

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

11 MR. STONE: That's fine with me.

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

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

17 HON. HOLTZMAN: I'm just saying --

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

21 HON. HOLTZMAN: Right.

22 VADM(R) TRACEY: However often it's

1 happening, it's a problem when it happens.

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

5 HON. HOLTZMAN: Right. Fine. Okay.  
6 That's fine. Then I'd leave out the "may." I  
7 like what -- how you resolved it, Ms. Fried.  
8 Well, somebody --

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

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

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

18 HON. HOLTZMAN: Right.

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

21 HON. HOLTZMAN: Right. Or you could  
22 leave that in, too.

1 MR. STONE: Now you can leave out  
2 "often" and "sometimes."

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

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

9 MR. TAYLOR: I do, too.

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

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

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

18 HON. HOLTZMAN: Provided to the JPP  
19 subcommittee.

20 MS. PETERS: From there, ma'am?

21 HON. HOLTZMAN: Well, we'd have the  
22 whole -- the whole first clause here.



1 MS. PETERS: Okay. "According to the  
2 site visit feedback provided to the JPP  
3 subcommittee, the MCIOs interviewed indicated the  
4 MCIO's initial victim interviews are being  
5 substantially delayed, often because special  
6 victims' counsel or victims' legal counsel are  
7 unavailable to attend the interview."

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

10 MS. PETERS: Okay.

11 HON. HOLTZMAN: If you leave the whole  
12 sentence the way it was originally, except you  
13 add in the "MCIOs interviewed," isn't that really  
14 --

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

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

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

22 HON. HOLTZMAN: Right.

1                   VADM(R) TRACEY: That's how it was  
2 originally.

3                   HON. HOLTZMAN: Right. Right.

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

6                   HON. HOLTZMAN: Mr. Taylor?

7                   MR. TAYLOR: Yes.

8                   HON. HOLTZMAN: Admiral?

9                   VADM(R) TRACEY: Yes.

10                  HON. HOLTZMAN: Mr. Stone?

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

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

22                  MR. STONE: There's a comment on the

1 third bullet, the next bullet.

2 HON. HOLTZMAN: Oh, okay.

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

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

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

15 MR. STONE: We heard just the  
16 opposite. We heard testimony before us that the  
17 trauma was such that it is often the case that  
18 victims remember more a month or two later or  
19 three months later than they do in the week  
20 following the traumatic event when they are  
21 blocking out everything. They can't even tell  
22 you where they were.

1 HON. HOLTZMAN: Okay. That's --

2 MR. STONE: So that's why there's no  
3 data for that.

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

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

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

16 HON. HOLTZMAN: You know, I personally  
17 think that it's a real waste of time and printing  
18 resources, not to mention paper, to repeat that  
19 at every circumstance. I think that that should  
20 be made -- that point needs to be made very clear  
21 at the outset, that this report is based only on  
22 these interviews. It's not purporting to be a

1 comprehensive report of the -- of that, and  
2 sometimes that should be very clear. I mean,  
3 that concern of Mr. Stone's I think is perfectly  
4 legitimate.

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

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

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

1       because --

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

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

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

17                  MS. FRIED:   No, that's okay.

18                  HON. HOLTZMAN:   -- asked you about  
19      Okay.

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

22                  MR. STONE:   Aye.

1 HON. HOLTZMAN: Opposed?

2 VADM(R) TRACEY: No.

3 MR. TAYLOR: No.

4 HON. HOLTZMAN: Okay. Not adopted.

5 Are we up to 45?

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

10 HON. HOLTZMAN: It has been adopted  
11 already.

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

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

20 HON. HOLTZMAN: Where are you?

21 MS. PETERS: In the second bullet  
22 below recommendation 45. This regards the

1 thorough questioning of sex assault victims and  
2 the issues the subcommittee found. The second  
3 bullet --

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

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

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

9 MS. PETERS: Yes, ma'am.

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

15 MS. PETERS: Well --

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

22 MS. PETERS: The text of the report



1 says, "Many agents explained that they're  
2 required to obtain a supervisor approval, which  
3 was viewed by them as a deterrent." That's what  
4 the subcommittee report says.

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

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

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

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

16 HON. HOLTZMAN: Okay. Those opposed?

17 VADM(R) TRACEY: No.

18 MR. TAYLOR: No.

19 HON. HOLTZMAN: Okay. The no's have  
20 it.

21 All right. Then we are up to  
22 bullet 3.

1 MS. PETERS: Yes, ma'am. Mr. Stone  
2 recommended deleting entirely bullets 3 and 4  
3 below recommendation 45.

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

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

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

21 And in terms of whether or not SVCs  
22 can limit the scope of questions or object to

1 requests for follow-up interviews, that's their  
2 job. And it seems to me putting that in here  
3 chills them from making objections when they  
4 think questions might be going towards maybe  
5 collateral misconduct they don't think is  
6 relevant or other issues that they don't think  
7 the victim should answer.

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

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

16 MR. STONE: The last bullet?

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

22 MR. STONE: Since I don't think

1 rapport has anything to do with it, I have to  
2 dispute that bullet because --

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

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

19 MR. TAYLOR: So when I read these two  
20 bullets, I just saw them as a statement of fact,  
21 basically, as a statement of what their -- what  
22 their conversations indicated were facts that

1 support the general recommendation. And I  
2 certainly didn't take it as an indictment or  
3 criticism of the roles that they were playing.

4 VADM(R) TRACEY: Same here.

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

15 And so if you could train the SVCs or  
16 VLCs on that kind of technology, assuming that it  
17 exists, which we were told at the subcommittee  
18 meeting that they do, that that is -- that's a  
19 way of alleviating the problem. It's a way of  
20 resolving the concerns of the SVC and the victim,  
21 as well as resolving the concerns of the  
22 prosecutor or the trial counsel and the MCIOs.

1 So it's not necessarily that we are even talking  
2 about a conflict here. We're talking about a way  
3 of resolving conflict.

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

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

17 It makes absolutely no difference  
18 whether or not there are now electronic ways to  
19 image only part of a cell phone, because if that  
20 information gets used a trial, a defense counsel,  
21 on the grounds of completeness, is going to have  
22 a right to the whole cell phone.

1           I can't imagine a judge not giving  
2           that to them, and certainly not previewing  
3           everything on the cell phone. Therefore, it's  
4           very much like a Fifth Amendment privilege. You  
5           cannot start to answer a question and then say,  
6           "Oh, I claim my Fifth." You waived your Fifth  
7           Amendment privilege on the stand if you begin to  
8           answer a question. You have to completely  
9           refuse, or on the grounds of completeness you're  
10          out of luck. It's waived.

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

17           And so I think that one has to look at  
18          the legal consequences of these bullets, as well  
19          as what the MCIOs who typically are not lawyers  
20          would love to have. I mean, I'm sure they would  
21          love to have a completely candid statement from  
22          every defendant about everything that happened,

1 but many times they are not going to get it. The  
2 defendant is going to claim the Fifth or say, "I  
3 really don't want to talk to you."

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

17 So, yes, I think that those two  
18 bullets are misleading. I don't think they  
19 reflect an understanding of the legal merits of  
20 what's going on and what the military services  
21 have done by giving people their own counsel to  
22 decide.



1 I'm really not interested in rapport  
2 on behalf of the MCIOs. That's not what they're  
3 supposed to be doing, developing rapport. They  
4 are supposed to be gathering the facts. And if  
5 an attorney for any witness, not just a victim,  
6 says to their client, "I don't think it serves  
7 your interest to answer this question," that's  
8 why they have an attorney.

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

16 So I -- for that reason, I have  
17 objections to those two bullets, and that's  
18 basically my concerns on Fourth Amendment ground,  
19 constitutional grounds, Article 6b grounds that  
20 say victims now have a right to be treated with  
21 respect, and their privacy has to be protected,  
22 and the additional statutes that give them

1 counsel, all of those are demeaned by these  
2 comments that suggest MCIOs can invade those  
3 rights.

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

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

22 Secondly, no one is saying to

1       undermine any of the amendments of the  
2       Constitution because, first of all, even if we  
3       wanted to we couldn't, and some of us wouldn't  
4       want to do that. But what we are saying here is  
5       sometimes you may have an SVC who is not fully  
6       trained.

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

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

22                All we're saying is if there are ways

1 to reconcile two very laudable objectives, we  
2 ought to try to do that in light of the concerns  
3 that were raised. That's all that is being said  
4 here, Mr. Stone, and I think you're envisioning  
5 dragons that just don't exist, that were not  
6 intended to exist. So I object to your --

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

15 If you don't like what a counsel is  
16 doing, like an SVC, there are -- there is a chain  
17 of command in the military, and the MCIO can  
18 certainly go over his head to the supervisor of  
19 that SVC, whether they're on base or they're at  
20 some other location and say, "I think the SVC  
21 here is not giving sufficient or correct advice  
22 to his client. Do you want to please counsel

1 him?"

2 That's as far as it goes. They don't  
3 get to -- they don't know more than the SVC does  
4 in their relationship with their victim. They  
5 keep out of that relationship. That's not their  
6 business. Their business is to gather facts, and  
7 the SVC's business is to advise their client.

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

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

22 So we have two bullets. We'll take

1       them in order. The page -- the bottom of page 5,  
2       to eliminate bullet -- the last bullet on page 5,  
3       Mr. Stone's recommendation, Mr. Stone -- all in  
4       favor of deleting bullet -- the last bullet on  
5       page 5, say aye.

6               MR. STONE: Aye.

7               HON. HOLTZMAN: Opposed?

8               VADM(R) TRACEY: No.

9               MR. TAYLOR: No.

10              HON. HOLTZMAN: The no's have it.

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

14              MR. STONE: Aye.

15              HON. HOLTZMAN: Opposed?

16              VADM(R) TRACEY: No.

17              MR. TAYLOR: No.

18              HON. HOLTZMAN: The no's have it.

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

21              MS. PETERS: Yes, ma'am. That's the  
22       only --

1           HON. HOLTZMAN: Okay. So let's vote  
2 on that. Those in favor -- I think we've had a  
3 discussion of that. I mean, I'm sorry, anybody  
4 want to say anything else about that? Okay.  
5 Those in favor, say -- of Mr. Stone's  
6 recommendation to delete recommendation --

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

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

19           So if there was no process, military  
20 process, that would be one thing, but there is a  
21 military process, and this recommendation  
22 recommends getting rid of the current military

1 sanctioned process which is sanctioned in the  
2 military rules of evidence, UCMJ, and no longer  
3 using military search authorization based upon  
4 probable cause. That's completely missing from  
5 here.

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

10 MR. STONE: Aye.

11 HON. HOLTZMAN: Those opposed?

12 VADM(R) TRACEY: No.

13 MR. TAYLOR: No.

14 HON. HOLTZMAN: The no's have it.

15 Recommendation 47.

16 MS. PETERS: The first edit, Mr. Stone  
17 would delete "more" before "expeditious."

18 HON. HOLTZMAN: Mr. Stone, do you want  
19 to explain that?

20 MR. STONE: Yeah. We don't have  
21 expeditious testing now, so the word -- having a  
22 modifier in there doesn't make any sense. We



1 want to ensure expeditious testing. I don't know  
2 how you can ensure more expeditious when we don't  
3 have a schedule. Again, we don't have data to  
4 know how long it is taking, so we just want to  
5 recommend that it's expeditious.

6 VADM(R) TRACEY: I have no objection  
7 to the change.

8 MR. TAYLOR: I have no objection.

9 HON. HOLTZMAN: Me either. Okay. So  
10 the change is adopted, bullet 1.

11 MR. TAYLOR: You know, I would just  
12 explain that bullet 1 modified simply to add the  
13 other law enforcement agencies, the MCIOs, and  
14 just recommending that we reorder them in a way  
15 that I thought made more chronological sense.

16 HON. HOLTZMAN: Any objection?

17 VADM(R) TRACEY: No.

18 HON. HOLTZMAN: Without objection,  
19 that is accepted.

20 And what do we have, on page 7?

21 MS. PETERS: Yes, ma'am. That's where  
22 the bullet originally was, so that deletion is

1 already consistent with moving it to the first  
2 bullet --

3 HON. HOLTZMAN: Okay.

4 MS. PETERS: -- on 45.

5 HON. HOLTZMAN: Are we finished?

6 MS. PETERS: Yes, ma'am.

7 HON. HOLTZMAN: Great. So let's take  
8 a 10-minute break now, and then we're up to  
9 victims' appellate rights, right?

10 MS. PETERS: Yes, ma'am.

11 HON. HOLTZMAN: Wow, moving right  
12 along. Okay. Thank you. We're going to take a  
13 10-minute break now.

14 (Whereupon, the above-entitled matter  
15 went off the record at 2:38 p.m., and resumed at  
16 2:48 p.m.)

17 HON. HOLTZMAN: Since the staff is  
18 trying to throw me out of here early, and they  
19 put me on an earlier flight, I think we'll try to  
20 speed through this even more quickly than we were  
21 thinking about before. I think we're up to --  
22 what are we up to?

1 MR. STONE: Tab 12.

2 HON. HOLTZMAN: Tab 12, right,  
3 victims' appellate rights. Let me just say, I  
4 think it's really important to address Mr.  
5 Stone's concern about leaving any misimpression  
6 that this report purports to be a comprehensive  
7 survey of the problem.

8 So I'm thinking of -- maybe we can  
9 circulate some language, if we can't agree on it  
10 today, to the effect that this report does not  
11 purport to be a universal comprehensive analysis  
12 of the problems or concerns identified. On the  
13 other hand, it does not reflect the concerns of a  
14 single individual or single service, that these  
15 were concerns broadly brought to our attention  
16 across all site visits that were made, something  
17 to that effect.

18 MR. STONE: Okay. Send them to me and  
19 I'll be happy to look at it and consider it with  
20 whatever data I'm getting and what the revised  
21 report looks like, in order to decide what  
22 comments, if any, I will put into writing before

1 the next meeting and get back to the --

2 HON. HOLTZMAN: Right. And if you  
3 have any comments on that disclaimer --

4 MR. STONE: Right.

5 HON. HOLTZMAN: -- for the members of  
6 the panel, but I think it would be, given the  
7 concerns that were raised, I don't think that we  
8 should in any way be misleading about this report  
9 to anybody.

10 MR. STONE: Okay. And I have -- I may  
11 have no comments when I see it all, so --

12 HON. HOLTZMAN: Right.

13 MR. STONE: -- I'll wait to see it.

14 HON. HOLTZMAN: Okay. So, Captain?

15 CAPT. TIDESWELL: Yes, ma'am. We're  
16 at Tab 12. This is the deliberations portion  
17 of --

18 HON. HOLTZMAN: Before you start, can  
19 I just say thank you for having -- for you -- for  
20 the work that you and the staff, under your  
21 direction, has done for us.

22 CAPT. TIDESWELL: Thank you, ma'am.

1 Appreciate that.

2 HON. HOLTZMAN: Really, we know that  
3 you are working under tight restrictions and we  
4 really appreciate what you've been doing for us,  
5 so thank you.

6 CAPT. TIDESWELL: Thank you. Thank  
7 you so much.

8 Yes, ma'am. So we're at Tab 12. It's  
9 the Victims' Appellate Rights Report, and it was  
10 previously sent to all the members for potential  
11 changes or edits.

12 Mr. Taylor was kind enough to provide  
13 us with several copy edits, but if you don't  
14 mind, Chair Holtzman, I thought I would focus the  
15 panel on what I would consider more of the  
16 substantive changes.

17 HON. HOLTZMAN: Yes, ma'am.

18 CAPT. TIDESWELL: And those start on  
19 page 10, and the first change is a recommendation  
20 by Mr. Stone. And on page 10, it's paragraph 3,  
21 and it's the last sentence of that paragraph.  
22 Mr. Stone is recommending an edit that reads,

1 "Neither of these cases discuss the rights of the  
2 holders of privileged records as those rights now  
3 appear in MRE 511a or MRE 1101c, formerly  
4 subsection b."

5 HON. HOLTZMAN: Captain, do you want  
6 to give an analysis, or, Mr. Stone, do you want  
7 to first speak to it?

8 CAPT. TIDESWELL: I'm just going to  
9 defer to you.

10 MR. STONE: I'll just explain that the  
11 cases that were -- were cited and referred back  
12 to deal with confidential or sealed materials,  
13 not privileged materials. That's all.

14 And I make that same comment in a  
15 couple of places, just so it's clear to the  
16 reader that the reason we're making some of the  
17 recommendations we are is because we are trying  
18 to distinguish now carefully between when prior  
19 context -- the prior context only dealt with  
20 sealed materials and when it dealt with  
21 privileged materials, which do sometimes overlap.  
22 So that's why that sentence is in there and

1 actually why the sentence that's on the next  
2 page, on page 11, is in there, too. That's just  
3 for clarification purposes.

4 HON. HOLTZMAN: Any objection?

5 VADM(R) TRACEY: No objection.

6 MR. TAYLOR: No objection.

7 HON. HOLTZMAN: Okay. It's adopted.

8 CAPT. TIDESWELL: And then, as Mr.  
9 Stone pointed out, there is a similar  
10 recommendation that is contained on page 11,  
11 paragraph 3. And I believe it's --

12 VADM(R) TRACEY: No objection.

13 HON. HOLTZMAN: Let me just ask a  
14 question. Would these -- would these materials  
15 be privileged under MRE 511 or 1101?

16 MS. GALLAGHER: 511 is a rule of  
17 admissibility for privileged material that has  
18 been disclosed already. So I'm not really  
19 certain where it's --

20 HON. HOLTZMAN: Whether it's relevant?

21 MS. GALLAGHER: -- helping a  
22 proposition.

1 MR. STONE: 511a, right, is whether  
2 they have previously been litigated.

3 MS. GALLAGHER: Right. Admissibility  
4 of already disclosed material versus the material  
5 we're addressing here, which we're saying  
6 shouldn't be disclosed without --

7 MR. STONE: Well, do you have any  
8 problem with the comment?

9 MS. GALLAGHER: I guess I'm just  
10 confused as to why 511 is relevant.

11 MR. STONE: Well, because 511 is in  
12 there because 511 is the one that says, "Unless  
13 you allow holders of privileged material to  
14 contest that material, it's not admissible at  
15 trial." It covers all the privileges. And  
16 absent a prior opportunity to contest it, none of  
17 it is admissible.

18 HON. HOLTZMAN: What does that have to  
19 do with appellate rights?

20 MR. STONE: Well, that's what I'm  
21 saying, that it didn't consider that. It's not  
22 considering whether --



1                   HON. HOLTZMAN: Well, why would we  
2 consider something --

3                   MR. STONE: -- they were also  
4 privileged.

5                   HON. HOLTZMAN: Well, wait a minute.  
6 I'm just trying to understand this. I'm not  
7 trying to be argumentative. But is this  
8 relevant, 511a, to the appellate rights that we  
9 are discussing? Because if it's not, why are we  
10 considering this here at this time?

11                   MS. GALLAGHER: It's a proposal Mr.  
12 Stone made for your consideration.

13                   HON. HOLTZMAN: I understand, but I'm  
14 raising you the question --

15                   CAPT. TIDESWELL: We do not believe  
16 that it's relevant, but we defer to Mr. Stone.  
17 It's his recommendation.

18                   HON. HOLTZMAN: And why do you believe  
19 it's not relevant? Would you explain that to me,  
20 please?

21                   MS. CARSON: We haven't received any  
22 testimony or discussed this issue.

1                   CAPT. TIDESWELL: That's one part of  
2 it.

3                   MS. GALLAGHER: 511 -- the material  
4 we're talking about, they have already invoked  
5 the privilege. The privilege occurred at the  
6 trial level, and it has been invoked already.  
7 And 511 is a rule of admissibility of already  
8 disclosed evidence.

9                   HON. HOLTZMAN: At a trial. The 511  
10 has nothing to do with --

11                   CAPT. TIDESWELL: At a trial.

12                   HON. HOLTZMAN: -- this appellate  
13 issue?

14                   CAPT. TIDESWELL: I do not believe --

15                   HON. HOLTZMAN: Is that the issue that  
16 we discussed where the -- the military came back  
17 and said that they had some issues with the issue  
18 that was raised?

19                   MS. GALLAGHER: Right. I believe they  
20 addressed --

21                   CAPT. TIDESWELL: 1101.

22                   MS. GALLAGHER: -- MRE 1101c. I don't

1 recall 511 coming up before Mr. Stone's proposed  
2 addition.

3 HON. HOLTZMAN: Here, in this  
4 document.

5 MS. GALLAGHER: Yes.

6 CAPT. TIDESWELL: Yes.

7 HON. HOLTZMAN: Okay. So we haven't  
8 considered 511a?

9 MS. GALLAGHER: Not to my knowledge,  
10 ma'am.

11 MR. STONE: 511a simply is the  
12 mechanism by which you determine that something  
13 is privileged at the trial level, and all I'm  
14 saying is you can -- we can drop the reference to  
15 MRE 511a. That just clarifies whether they were  
16 also privileged. That's how they were  
17 privileged, because they were found privileged  
18 under MRE 511a.

19 So if you want to drop under MRE 511a,  
20 it isn't going to make any substantive  
21 difference. Basically, the point is, they follow  
22 its plain language as to sealed documents without

1 considering whether the documents were also  
2 privileged.

3 HON. HOLTZMAN: I'm still not  
4 following it. So let's just take -- so you say  
5 we can drop 511a. What's the point of 1101c?  
6 Did we have -- do we have the same issue with  
7 regards to, did we discuss that with this  
8 committee how --

9 CAPT. TIDESWELL: Yes, ma'am. You  
10 received a letter, a comment from Colonel Jeffrey  
11 Palomino and Mr. Brian Mizer. They're at the Air  
12 Force appellate defense shop, and they've opined  
13 that they do not believe that 1101 -- that even  
14 applies at the appellate level, and that was  
15 something that was put before the panel.

16 MR. STONE: And that was in response  
17 to my comments that the plain language of 1101c  
18 says that at all stages of the proceeding the  
19 privilege rights of the holder have to be  
20 honored. And all this is saying is that the CCAs  
21 did not consider that, and that's correct. The  
22 CCAs didn't consider 1101c. There is no

1 discussion of it in any of the opinions that are  
2 being quoted as cited.

3 HON. HOLTZMAN: But doesn't this  
4 language say that there is the holder of a  
5 privilege -- doesn't this imply that there is a  
6 privilege under MRE 1101c here? I mean, if --  
7 I'm sorry that I didn't catch this earlier. I  
8 guess it's just late in the day, and we've been  
9 considering a lot of different things.

10 But I guess what I'm hearing is that,  
11 number 1, we did not substantively consider the  
12 1101 -- I mean, you're dropping the MRE 511a, but  
13 the 1101 issue, we didn't substantively consider  
14 it, and we've had an objection to this point from  
15 the Air Force.

16 MR. STONE: I brought it up several  
17 times.

18 HON. HOLTZMAN: Right. And you  
19 brought it up. We haven't -- aside from you, we  
20 haven't heard from any other experts on this.

21 MR. STONE: Yeah, we did. Because I  
22 asked some of the experts who were in front of

1 us. I asked them each whether or not they  
2 thought 1101c would affect the outcome, and they  
3 basically said they hadn't really thought about  
4 it.

5 HON. HOLTZMAN: Well, I understand  
6 that, and that's -- I mean, that's not to say  
7 that you haven't thought of an issue that they --  
8 I mean, that you've thought of an issue that they  
9 haven't. But, still, I think before the panel  
10 can take a position on something, we need to have  
11 -- even if they haven't thought about it, we need  
12 to ask their opinion of the subject before we  
13 make a decision or a ruling on it, particularly  
14 given that the Air Force counsel took a contrary  
15 position to you.

16 So I just don't know whether this is  
17 a --

18 MR. STONE: I have no problem lining  
19 out the latter half of the phrase "under 511a or  
20 MRE 1101c, formerly b." You can take all of that  
21 out, and then it should be less controversial.  
22 And all it does is restate what is correct.

1                   HON. HOLTZMAN: Well, then, what do we  
2 need it for?

3                   MR. STONE: What? Those two -- those  
4 two references or --

5                   HON. HOLTZMAN: Why do we need the --  
6 why do we need -- neither of these cases discuss  
7 the rights of the holder of privileged records.

8                   MR. STONE: I'm talking about the next  
9 comment. You're back on 10. I thought you were  
10 on 11. You went back to 10. I thought you were  
11 already passed --

12                   HON. HOLTZMAN: Aren't they the same?  
13 Okay. Sorry. Well, okay, I'm on 10 -- I'm on 10  
14 and 11, because I think the same issue applies to  
15 both of them, that we have not heard from -- I  
16 mean, that we haven't heard from -- aside from  
17 your comments on this, and the fact -- well, we  
18 heard about this issue from our expert panelists  
19 as, one, they haven't thought about it; or, two,  
20 they were opposed to it.

21                   And I don't -- I mean, just as a  
22 matter of prudence, I think we ought to have more

1 of a basis for us as a panel to make a decision  
2 on these -- on matters than just that.

3 MR. STONE: I am perfectly willing to  
4 strike the phrase "as those rights now appear in  
5 MRE 551a or MRE 1101c, formerly subsection B" on  
6 page 10, and "under MRE 551a or MRE 1101c,  
7 formerly B" on page 11, if you find those  
8 confusing.

9 I actually think they are helpful to  
10 people, but if you think those are confusing,  
11 that's fine. None of the cases before then or  
12 the courts discussed specifically the rights of  
13 holders of privileged records. They only talked  
14 about sealed records. That's why the comments  
15 are in there.

16 I believe it's a matter of urgency,  
17 since this is the fourth meeting that we've had  
18 trying to get this report out, and that if we  
19 don't get it out soon it may be too late. And,  
20 therefore, I believe I'm willing to strike those  
21 phrases as long as we clarify what the CCA's and  
22 the CAAF's prior decisions discussed, which was



1 sealed documents, not privileged documents. You  
2 won't find the word "privileged" in any of their  
3 decisions.

4 HON. HOLTZMAN: Well, I'm not sure I  
5 understand what your position is now. Are you  
6 willing to withdraw your comments to both 10 and  
7 11?

8 MR. STONE: No. The second half of  
9 the comments.

10 HON. HOLTZMAN: So you --

11 MR. STONE: The substantive comment,  
12 neither of these cases discussed the rights of  
13 the holders of privileged documents, and the  
14 first one is accurate and it can stop there, and  
15 the second one can say, "As to sealed documents,  
16 without considering whether those documents were  
17 also privileged" on page 11. Those are purely  
18 descriptive comments.

19 MR. TAYLOR: Well, I guess the  
20 question I have, Mr. Stone, is are you implicitly  
21 saying that they should have considered those?  
22 And if I understood the chair's questions, is

1 that an area that we have spent enough time on  
2 that we want to comment on? Is that what we're  
3 implicitly saying?

4 It may be. I'm sure it is because you  
5 were very careful in -- a very careful lawyer,  
6 but it is a factually accurate statement that  
7 they did not discuss it. But if by saying it we  
8 are implying that they should have, then isn't  
9 that a slightly different statement?

10 MR. STONE: I was just trying to  
11 describe historically what happened. I think  
12 that we look more complete by describing what  
13 historic -- actually, in some ways, it says they  
14 are not to be blamed, because they didn't discuss  
15 it.

16 HON. HOLTZMAN: Well, are they to be  
17 blamed because they didn't discuss it?

18 MS. GALLAGHER: It shouldn't --

19 MR. STONE: No. It wasn't in front of  
20 them.

21 MS. GALLAGHER: -- an issue before the  
22 court.

1           HON. HOLTZMAN: Right. So I don't  
2 understand why we need to raise it at this point,  
3 since we ourselves can't take a position, in my  
4 opinion, because we have not personally gotten  
5 expert testimony aside from your view on this  
6 subject. So I'm concerned about raising this  
7 issue at all. That's my concern.

8           And I think there's -- you know, I  
9 think Mr. Taylor raises also an issue that I  
10 would have, too. That's why I don't know why we  
11 need to raise it. I mean, there's nothing  
12 inaccurate about what the staff has put together  
13 in terms of this report, is there, without this  
14 comment in it?

15           MR. STONE: I think it makes it more  
16 intelligible. If people don't want it, I'll be  
17 guided by the majority vote.

18           HON. HOLTZMAN: Well, just in light of  
19 the fact that the substance of it is something  
20 that we really haven't considered in the normal  
21 way that we consider things with the expert  
22 testimony, we have -- aside from the views of the

1 very distinguished members of this panel, I would  
2 -- my own view is that we should just not accept  
3 these two suggestions on page 10 and 11.

4 MR. STONE: I would point out that I  
5 absolutely recall asking retired Judge Orr  
6 whether or not those cases involve privilege  
7 material, among other experts who testified, and  
8 he said, no, they didn't. So I think we did  
9 discuss it. I think we did get testimony. I  
10 asked that of other individuals when there were  
11 -- I don't think they're crucial sentences. I  
12 think we should vote on them. If the majority  
13 don't think they clarify what's going on, then  
14 you won't adopt one. Shall I call for a vote on  
15 10 and 11?

16 HON. HOLTZMAN: Okay. So in favor of  
17 Mr. Stone's suggestions on page -- well, I guess  
18 let's do -- page 10, I think we already voted,  
19 but since I want to change my position on it, on  
20 10, those in favor of Mr. Stone's suggested  
21 amendment, say aye.

22 MR. STONE: Aye.

1 HON. HOLTZMAN: Those opposed.

2 VADM(R) TRACEY: No.

3 MR. TAYLOR: No.

4 HON. HOLTZMAN: I think the no's have  
5 it. On page 11, those in favor of Mr. Stone's  
6 amendment, please say aye.

7 MR. STONE: Aye.

8 HON. HOLTZMAN: Those opposed?

9 VADM(R) TRACEY: No.

10 MR. TAYLOR: No.

11 HON. HOLTZMAN: The no's have it.

12 Okay.

13 CAPT. TIDESWELL: Yes, ma'am. The  
14 next issue is on page 13, subparagraph C,  
15 proposals and considerations. In the first  
16 paragraph, Mr. Stone is recommending in two  
17 places the insertion of the word "privileged."

18 MR. STONE: Again, all of my comments  
19 on page 13 are meant for clarification. And if  
20 panel members think that they don't provide  
21 clarification, or are confusing, then feel free  
22 to vote against them. I believe it clarifies

1 what we're trying to say, but if you don't,  
2 that's fine. It's whether you think it  
3 clarifies. I do.

4 HON. HOLTZMAN: Well, can I have some  
5 view of the staff about any issues with regard to  
6 this language?

7 MS. GALLAGHER: I don't have any --

8 CAPT. TIDESWELL: I have no objection  
9 to that language.

10 HON. HOLTZMAN: Mr. Taylor?

11 MR. TAYLOR: No objection.

12 HON. HOLTZMAN: Do we know -- I would  
13 have a question, which is how do we know that  
14 these records are in fact privileged?

15 MR. STONE: We know that because all  
16 mental health records in the military are  
17 privileged.

18 HON. HOLTZMAN: Well, suppose they  
19 have already been released in some form.

20 VADM(R) TRACEY: Well, the sentence  
21 deals with only those that were reviewed in  
22 camera but were not released to counsel at trial.

1 That's the whole point of these changes is to  
2 separate out the things that were already  
3 released from those that were not.

4 HON. HOLTZMAN: Right. I'm not  
5 talking about released to counsel. I'm talking  
6 about released in some other format or some other  
7 forum or something like that.

8 MS. GALLAGHER: Right. But if they  
9 have been released in some other format, the  
10 privilege has been waived.

11 HON. HOLTZMAN: Fine. So that's not  
12 -- all right. So I have no objection either. So  
13 I don't think anybody has an objection to the  
14 words "privileged." And what about "of all  
15 kinds," is there any issue with regard to that  
16 one?

17 VADM(R) TRACEY: No issue.

18 HON. HOLTZMAN: Any objection, panel  
19 members, to that one? So those are adopted.

20 MR. STONE: My next comment is on  
21 page 19.

22 CAPT. TIDESWELL: Yes, ma'am. The

1 next comment is in the second paragraph. Mr.  
2 Stone would like to add the words or a sentence  
3 that states, when referring to the Pacer system,  
4 "Registered litigants are separately notified via  
5 electronic filing and titled with each new  
6 document by email."

7 HON. HOLTZMAN: Is there any issue  
8 with regard to that language? Any objection to  
9 that language?

10 VADM(R) TRACEY: No.

11 HON. HOLTZMAN: I have no objection.  
12 It is adopted.

13 CAPT. TIDESWELL: Yes, ma'am. I  
14 believe the last issue is on page 28.

15 HON. HOLTZMAN: Wow.

16 VADM(R) TRACEY: I have a question on  
17 page 21.

18 HON. HOLTZMAN: Sure.

19 VADM(R) TRACEY: Under the JPP  
20 findings and recommendations, the last sentence  
21 on page 21, "JPP believes that development of  
22 these procedures should be left to the Services,



1 each of its because positions," and so forth. I  
2 thought that the language under our support for  
3 the Pacer equivalent system was -- suggested that  
4 we favored a unitary system.

5 So do we mean that the JPP believes  
6 that the development of these interim procedures?

7 CAPT. TIDESWELL: No. I think we --  
8 I think you've hit an excellent point, and  
9 perhaps we should consider changing the language,  
10 because I would think you would want a common  
11 system throughout. But I think it's also the --  
12 I'm sorry, ma'am.

13 VADM(R) TRACEY: I think in this  
14 section what we're talking about is the fact that  
15 that process is going to take until 2020 or  
16 thereabouts. And in the interim, there should be  
17 such a process, and I thought what we were saying  
18 is that the Services should be free to develop a  
19 process in the interim that works for them.

20 CAPT. TIDESWELL: Yes, ma'am.

21 VADM(R) TRACEY: And then they need to  
22 align to the defense --

1                   CAPT. TIDESWELL: The overall -- yes,  
2                   ma'am.

3                   VADM(R) TRACEY: So I think the JPP  
4                   believes that the development of these interim  
5                   procedures should be left to the Services.

6                   MR. STONE: That's fine with me.

7                   HON. HOLTZMAN: And do you want to add  
8                   "and that the final system should be a  
9                   uniform" --

10                  VADM(R) TRACEY: Should have its own  
11                  legal organization structure until the Pacer-  
12                  equivalent system is implemented, and that's not  
13                  the right way to describe that, but I'm told  
14                  that --

15                  CAPT. TIDESWELL: We've got it. Yes,  
16                  ma'am.

17                  HON. HOLTZMAN: A uniform system is --  
18                  similar to the Pacer system is adopted for the  
19                  entire military.

20                  VADM(R) TRACEY: Yes.

21                  HON. HOLTZMAN: Something like that.  
22                  Okay.

1 MR. STONE: Okay. Good.

2 HON. HOLTZMAN: All right. So page 28  
3 is our next --

4 CAPT. TIDESWELL: We're in paragraph  
5 D, JPP findings and recommendations, first  
6 paragraph. Mr. Taylor had made a suggestion that  
7 perhaps we should provide more information,  
8 basically the rationale behind the  
9 recommendation. The staff has, in fact, drafted  
10 that language per Mr. Taylor's request. In doing  
11 so, we really relied strongly on Mr. Stone's  
12 dissent.

13 MR. TAYLOR: I would just add that  
14 leading up to that, the arguments pretty much  
15 laid out pro and con, and then we just come up  
16 with the recommendation. And I just thought that  
17 it would be more logical to at least rely upon  
18 Mr. Stone's analysis of it, which I found  
19 persuasive, to put together some words that would  
20 explain why those of us who voted for this  
21 recommendation did.

22 VADM(R) TRACEY: I thought so.

1 MR. STONE: Are you fine, Mr. Taylor,  
2 with those words? Because it was your choice to  
3 add it in.

4 MR. TAYLOR: Well, I thought the words  
5 pretty well captured the discussions that we had,  
6 so I was fine with it. But since you were the  
7 author of most of it --

8 MR. TAYLOR: I'm willing to --

9 MR. STONE: -- I'll defer to you.

10 HON. HOLTZMAN: Okay. Okay.

11 CAPT. TIDESWELL: That's it. Yes,  
12 ma'am. So staff will make the changes and send  
13 it back out to the Panel for review.

14 MR. STONE: Do we vote on this report  
15 now?

16 HON. HOLTZMAN: We can, yes. All in  
17 favor of adopting the report, as amended?

18 MR. STONE: Aye.

19 VADM(R) TRACEY: Aye.

20 MR. TAYLOR: Aye.

21 HON. HOLTZMAN: Aye. Opposed? No  
22 opposed? Hearing no opposition, it is adopted.

1                   CAPT. TIDESWELL: Yes, ma'am. That's  
2 all we have for this meeting.

3                   HON. HOLTZMAN: Subject, of course, to  
4 the --

5                   CAPT. TIDESWELL: To the changes.

6                   HON. HOLTZMAN: -- to the changes,  
7 which you'll send out promptly, and we'll get  
8 them approved promptly, and then --

9                   CAPT. TIDESWELL: Yes, ma'am.

10                  MR. STONE: And I guess a signature  
11 letter, too, that --

12                  CAPT. TIDESWELL: The transmittal  
13 letter, yes, sir.

14                  HON. HOLTZMAN: Okay. Great.

15                  MS. FRIED: If that's all, ma'am.

16                  HON. HOLTZMAN: I think so.

17                  MS. FRIED: Okay. Thank you. The  
18 record is closed.

19                  HON. HOLTZMAN: Thank you very much.  
20 Thanks, panel members.

21                               (Whereupon, the above-entitled matter  
22 went off the record at 3:12 p.m.)

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