

UNITED STATES DEPARTMENT OF DEFENSE

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JUDICIAL PROCEEDINGS PANEL

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PUBLIC MEETING

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FRIDAY
JUNE 16, 2017

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The Panel met in the Video Conference Room, Suite 150, One Liberty Center, 875 North Randolph Street, Arlington, Virginia, at 9:00 a.m., Hon. Elizabeth Holtzman, Chair, presiding.

PRESENT

Hon. Elizabeth Holtzman, Chair

Hon. Barbara Jones

Mr. Victor Stone

Mr. Tom Taylor

VADM(R) Patricia Tracey

WITNESSES

Colonel (Retired) Don Christensen - Former Air
Force Chief Prosecutor; President, Protect
Our Defenders

STAFF

Ms. Meghan Peters - Attorney Advisor
Ms. Stayce Rozell - Senior Paralegal
Ms. Terri Saunders - Attorney Advisor
Captain Tammy P. Tideswell, U.S. Navy - Staff
Director

DESIGNATED FEDERAL OFFICIAL

Ms. Maria Fried - Designated Federal Official
(DFO)

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

2 9:02 a.m.

3 MS. FRIED: Good morning, everyone.

4 Welcome to the Judicial Proceedings Since Fiscal
5 Year 2012 Amendments Panel. I am Maria Fried,
6 the Designated Federal Official for JPP today.
7 Captain Tammy Tideswell, United States Navy, is
8 the Staff Director for the JPP.

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

19 As with past meetings, today's meeting
20 agenda was published in the Federal Register.
21 The agenda has been subsequently modified and a
22 revised agenda was posted on the website. Due to

1 technical difficulties with microphones and the
2 sound system, the location of the meeting that
3 was originally posted in the Federal Register has
4 changed to a different floor and the staff has
5 posted a sign at the prior location and on the
6 website indicating the new meeting location.

7 Additionally, we received one request
8 for oral comment from Mr. Don Christensen from
9 Protect Our Defenders. In accordance with the
10 federal notice, Mr. Christensen is allotted five
11 minutes for his oral presentation.

12 The Department has appointed the
13 following distinguished members to the Panel: the
14 Honorable Elizabeth Holtzman, who serves as the
15 Chair of the JPP, the Honorable Barbara S. Jones,
16 Vice Admiral Retired Patricia Tracey, Professor
17 Tom Taylor, and Mr. Victor Stone. Member
18 biographies are available at the JPP website,
19 which is jpp.whs.mil.

20 This Panel is a Federal Advisory
21 Committee and must comply with the Federal
22 Advisory Committee Act and the Sunshine Act.

1 Publicly available information provided to the
2 JPP is posted on the website, to include
3 transcripts of meetings. Any information
4 provided by the public to Panel Members must be
5 made available to the public. Madam Chair, thank
6 you.

7 CHAIR HOLTZMAN: Thank you very much,
8 Ms. Fried. And good morning, I'd like to welcome
9 everyone in attendance today to the 31st meeting
10 of the Judicial Proceedings Panel. All five of
11 the Panel Members are supposed to be present here
12 today, Judge Jones is on her way and she'll be
13 here shortly. Today's meeting is being
14 transcribed and the full written transcript will
15 be posted on the JPP website.

16 The Judicial Proceedings Panel was
17 created by the National Defense Authorization Act
18 for Fiscal Year 2013, as amended. Our mandate is
19 to conduct an independent review and assessment
20 of judicial proceedings conducted under the
21 Uniform Code of Military Justice involving adult
22 sexual assault and related offenses since the

1 most recent amendments to Article 120 of the UCMJ
2 in 2012.

3 Today's meeting will include Panel
4 deliberations on four pending reports: the JPP
5 Report on Barriers to the Fair Administration of
6 Military Justice in Sexual Assault Cases, the JPP
7 Report on Sexual Assault Investigations in the
8 Military, the JPP Final Report, and the JPP
9 Report on Fiscal Year 2015 Statistical Data
10 Regarding Military Adjudication of Sexual Assault
11 Offenses.

12 Each public meeting of the Judicial
13 Proceedings Panel includes time to receive input
14 from the public. The JPP received one request
15 for public comment at today's meeting from Mr.
16 Don Christensen, President of Protect Our
17 Defenders.

18 Thank you very much for joining us
19 today. We're ready to begin the meeting. Ms.
20 Saunders, would you please walk us through the
21 deliberation outline for the JPP Report on
22 Barriers to the Fair Administration of Military

1 Justice in Sexual Assault Cases?

2 MS. SAUNDERS: Yes, ma'am. Ms.
3 Holtzman and Members of the Panel, good morning.
4 Just, first, I will orient you to your materials
5 that are related to the Subcommittee report on
6 Barriers to the Fair Administration of Military
7 Justice in Sexual Assault Cases.

8 In your bound materials at Tab 2 is
9 the deliberation outline. And you'll note on the
10 cover of that outline, it discusses the three
11 options that will be before you today. Number 1
12 is to adopt the entire Subcommittee report and
13 all recommendations with or without modification
14 and forward to Congress as the JPP Report.

15 The second option would be to adopt
16 portions of the Subcommittee report or
17 recommendations with or without modifications and
18 forward to Congress as the JPP Report. Or to
19 reject the Subcommittee report and its
20 recommendations in its entirety.

21 Also, at Tab 3 of your materials is
22 the Subcommittee report for your reference. And

1 at Tab 4 is a Court of Appeals for the Armed
2 Forces case of United States v. Boyce that
3 relates to the topic of this report.

4 MS. FRIED: Can I interrupt real fast?
5 I would also note that the report gets forwarded
6 to the Secretary of Defense.

7 MS. SAUNDERS: Oh, I'm sorry, yes.

8 MS. FRIED: And that, if any Committee
9 Member chooses, they can write separately from
10 the rest of the Panel with regards to the
11 position of the report with their views.

12 MS. SAUNDERS: Thank you, Ms. Fried.
13 Ms. Holtzman, would you like me to walk through
14 the report for you to kind of refresh everyone's
15 recollection?

16 CHAIR HOLTZMAN: I think that's a good
17 idea.

18 MS. SAUNDERS: Okay. As you recall, at
19 the last JPP public meeting, several Members of
20 the Subcommittee presented its report on Barriers
21 to the Fair Administration of Military Justice.
22 And walking through that briefly, the report

1 itself is based on, number one, information
2 obtained from counsel and others during military
3 installation site visits that were conducted last
4 summer. I would note --

5 CHAIR HOLTZMAN: Excuse me, Ms.
6 Saunders, are you on Tab 2, Page 1? More or
7 less?

8 MS. SAUNDERS: Not yet, ma'am.

9 CHAIR HOLTZMAN: Oh, not yet?

10 MS. SAUNDERS: Yes, we'll --

11 CHAIR HOLTZMAN: Okay, fine.

12 MS. SAUNDERS: I'm sorry. We'll get to
13 that in just a moment, I'm just going to --

14 CHAIR HOLTZMAN: Okay.

15 MS. SAUNDERS: -- walk through and
16 summarize the JPP Subcommittee report at this
17 point.

18 CHAIR HOLTZMAN: Okay.

19 MS. FRIED: Which is at Tab 3.

20 MS. SAUNDERS: Which is at Tab 3. But
21 I'm just summarizing it at this point.

22 CHAIR HOLTZMAN: But at Tab 2, there's

1 a --

2 MS. SAUNDERS: Yes, we're going to --

3 CHAIR HOLTZMAN: -- part of --

4 MS. SAUNDERS: As soon as I summarize
5 this --

6 CHAIR HOLTZMAN: Yes, good.

7 MS. SAUNDERS: -- my intention would be
8 to go through recommendation by recommendation --

9 CHAIR HOLTZMAN: Okay.

10 MS. SAUNDERS: -- and discuss each, so
11 that you can deliberate on each separately. But
12 I wanted to point out that during the -- the
13 information that was gained or gathered during
14 the site visits was from a lot of senior and
15 junior counsel. At every single location, there
16 were senior trial counsel, senior defense
17 counsel, as well as others from which this
18 information came from.

19 Also, testimony before the JPP at the
20 January 2017 public meeting, testimony before the
21 Subcommittee meeting from military service
22 prosecutors and ethics officials, court-martial

1 data from documents, from the Court-martial Data
2 Report gathered and analyzed by Dr. Cassia Spohn.

3 Also, Service responses to a request
4 for information on elevated review of disposition
5 decisions, and other research into statutory and
6 policy provisions and case law related to the
7 topics in the report.

8 A brief summary of the report, the
9 Subcommittee found that, while there have been
10 numerous statutory and policy provisions related
11 to sexual assault over the past few years, most
12 of which have been very helpful to victims, some
13 of them have had some negative consequences to
14 the military justice process.

15 Beginning with the Article 32 hearing,
16 there were some major statutory changes made to
17 Article 32 of the UCMJ in the FY14 National
18 Defense Authorization Act. Some of the major
19 provisions that changed are that the Article 32
20 scope is now limited to a determination of
21 whether there is probable cause to go forward,
22 the Article 32 hearing no longer serves as a

1 discovery mechanism for the defense, and victims
2 can no longer be compelled to testify at Article
3 32 hearings.

4 The Subcommittee members heard at site
5 visits, and I think you heard also at the January
6 public meeting, that typically what is happening
7 now, since these changes have gone into effect,
8 are that, often no witnesses will testify at the
9 Article 32 hearing in sexual assault cases.

10 Typically, paper evidence is
11 submitted, statements of witnesses and so forth,
12 and that is usually what is considered by the
13 preliminary hearing officer in making a
14 recommendation to the convening authority.

15 Many counsel felt that the -- they
16 actually referred to this as a paper drill and
17 they felt that the Article 32 hearing no longer
18 serves the purpose that it once did, which was to
19 -- as a means for evaluating the strength of a
20 case.

21 Typically, what they said would happen
22 prior to the changes would be that they would

1 send a case to the Article 32 hearing, the victim
2 would testify, and other evidence and perhaps
3 other witnesses would testify, and based on the
4 strength of the case, that would go to the
5 convening authority for a decision.

6 Many counsel, most counsel actually
7 said that this is no longer serving that
8 function, because it's simply paper evidence.
9 Often -- they also told the Subcommittee members
10 and you heard here that, often the Article 32
11 preliminary hearing officer's recommendations are
12 not followed by the staff judge advocate and
13 convening authority, even where the preliminary
14 hearing finds there is no probable cause.

15 Moving on into disposition guidance,
16 Article 34 of the UCMJ requires that the staff
17 judge advocate provide a written pretrial advice
18 to the convening authority before charges can be
19 referred to a general court-martial. The rules
20 also state that this pretrial advice must be
21 provided to the defense, if charges are referred
22 to trial.

1 What we heard from counsel is that
2 often -- and we have seen in, actually, some of
3 the documents that were provided by the Services
4 for cases, is that often the pretrial advice from
5 the staff judge advocate to the convening
6 authority does not go at great length and talk
7 about the strengths or weaknesses of the case,
8 because they know that it will then be turned
9 over to the defense and they don't want to tip
10 their hand, so to speak.

11 Numerous counsel on site visits and
12 those who spoke to the JPP expressed concern
13 that, because of the limited scope of the Article
14 32 hearing and because of the limited information
15 that they may be getting, although we did hear
16 that often staff judge advocates may go into
17 strengths and weaknesses of the case orally with
18 the convening authority, that cases are now being
19 referred to court that might not have been
20 referred to court prior to this.

21 And speaking in terms of sexual
22 assault cases, that they're using a standard of

1 the low -- a low standard of probable cause in
2 deciding whether a case should be referred to
3 court. And many counsel felt that this was too
4 low and that cases with weak evidence are being
5 referred to court, which is resulting in a very
6 high acquittal rate.

7 Counsel perceived that, if the victim
8 wants the case to go forward to court, the
9 convening authority will refer the case,
10 regardless of the strength of the evidence.

11 Prosecutors and defense counsel on site visits
12 also overwhelmingly perceived that there is a
13 great deal of pressure on convening authorities
14 to refer sexual assault cases to trial, pressure
15 from Congress, pressure from the public, pressure
16 from the media, because of the high profile that
17 these cases have taken in the last few years.

18 Several statutory provisions from the
19 Fiscal Year 2014 and 2015 NDAA's have provisions
20 that require elevated review of a convening
21 authority's decision not to refer a sexual
22 assault case to trial, that it will either have

1 to go up to the next higher level convening
2 authority or to the Secretary of the Service,
3 depending on the circumstances of that. So, many
4 counsel perceive that cases are being forwarded
5 because of this pressure.

6 There's a provision in the FY17 NDAA
7 that creates a new Article 33 of the UCMJ, which
8 directs the Secretary of Defense to issue non-
9 binding guidance for SJAs and convening
10 authorities to consider in determining an
11 appropriate disposition for the case.

12 The new Article 33 guidance is
13 required to take into account the principles
14 contained in the official guidance of the
15 Attorney General with respect to case
16 disposition. The U.S. Attorneys' Manual, to
17 which it refers, states that probable cause is a
18 threshold consideration, but it also uses the
19 standard for prosecution if the admissible
20 evidence will probably be sufficient to obtain
21 and sustain a conviction.

22 Many of the counsel on the site visits

1 and who testified before the Subcommittee
2 advocated a higher standard than just probable
3 cause for referring a case. One counsel
4 suggested a standard of whether there is
5 reasonable probability of success at trial.

6 There were also several other issues
7 that the Subcommittee heard information on. One,
8 that prosecutors complained that SVCs, the
9 special victim's counsel and victim's legal
10 counsel, sometimes prevent prosecutors from
11 having access to victims in preparing for trial
12 and some counsel stated that this was problematic
13 for them.

14 There was also complaints from several
15 counsel that military members are receiving an
16 excess of training from Sexual Assault Prevention
17 and Response personnel on intoxication and
18 consent that may be inaccurate and it's tainting
19 panels when it comes time for them to hear cases
20 regarding sexual assault. Commanders also
21 complained about the frequency of this training
22 and that it's causing training fatigue.

1 Commanders and counsel also expressed
2 concern about the expedited transfer policy.
3 Some were concerned that it's being abused in
4 order to obtain transfers to more favorable
5 locations.

6 Some prosecutors stated that this
7 creates a hardship for them when they are trying
8 to prepare for trial and a victim has been
9 transferred to a faraway location and they don't
10 have access to that victim to be able to help
11 prepare. So, those are -- that's, in a nutshell,
12 the summary of the report.

13 There were nine recommendations that
14 the Subcommittee made in relation to some of
15 these topics. I will state up-front that most of
16 the recommendations, the Subcommittee realized
17 that they were running out of time and did not
18 have time to take a deeper dive into some of
19 these issues, so they are recommending for most
20 of these -- in most of these recommendations,
21 they are recommending that the JPP's follow-on
22 Panel, the DAC-IPAD, take a closer look at these

1 and determine what, if any, solutions there might
2 be to some of these problems.

3 So, if I can -- unless there are any
4 questions about the report itself, if I can
5 direct you to Tab 2 of your materials, and
6 turning past the cover page on what's marked as
7 Page 1, this begins with Recommendation 1. And
8 below the recommendation, you'll see references
9 to the report on where this material -- things
10 that pertain to this recommendation.

11 Recommendation 1 reads: the JPP
12 Subcommittee recommends that the Defense Advisory
13 Committee on Investigation, Prosecution, and
14 Defense of Sexual Assault in the Armed Forces,
15 the DAC-IPAD, continue the review of the new
16 Article 32 preliminary hearing process, which, in
17 the view of many counsel interviewed during
18 military installation site visits and according
19 to information presented to the JPP, no longer
20 serves a useful purposes.

21 Such a review should look at whether
22 preliminary hearing officers in sexual assault

1 cases should be military judges or other senior
2 judge advocates with military justice experience
3 and whether a recommendation of the preliminary
4 hearing officer against referral based on lack of
5 probable cause should be binding on the convening
6 authority.

7 This review should evaluate data on
8 how often the recommendation of preliminary
9 hearing officers regarding case disposition are
10 followed by convening authorities and determine
11 whether further changes to the process are
12 required.

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

21 CHAIR HOLTZMAN: So, I think we should
22 take these recommendations in order. And I guess

1 our first order of business is whether or not we
2 want to adopt this recommendation.

3 MS. SAUNDERS: Yes, ma'am.

4 CHAIR HOLTZMAN: Is there discussion?

5 PROF. TAYLOR: I just have a procedural
6 question --

7 CHAIR HOLTZMAN: Yes.

8 PROF. TAYLOR: -- to make.

9 CHAIR HOLTZMAN: Sure.

10 PROF. TAYLOR: Was it your intent by
11 creating these sub-bullets to extract from the
12 report the points that you thought would be most
13 relevant for us to consider on the
14 recommendation?

15 MS. SAUNDERS: Yes, sir.

16 PROF. TAYLOR: That's what I thought.

17 MS. SAUNDERS: Yes, sir.

18 PROF. TAYLOR: And was it your further
19 intention to perhaps use this as the JPP Report
20 to describe in shorthand fashion what they meant?

21 MS. SAUNDERS: Yes, sir. What would
22 happen if the Panel elects to adopt some or all

1 of the report and recommendations and forward
2 them, what I would then do would be to prepare a
3 short executive summary, similar to what happened
4 on the military investigations report.

5 And some of these might then become
6 the sub-bullets that would go under the
7 recommendations. So, that would be relevant for
8 that. But that -- assuming that that -- if you
9 all elect to forward the report in whole or in
10 part, then I would have that executive summary
11 out to you next week.

12 MR. STONE: We haven't seen this list
13 of bullets before this morning, have we? Because
14 I don't recognize it.

15 MS. SAUNDERS: No. Well, this was
16 forwarded to you in your read-ahead materials,
17 Mr. Stone. And, really, this just refers to
18 points that were taken out of the Subcommittee --
19 I was trying to be helpful, to orient you to the
20 points in the Subcommittee report that I thought
21 related to this specific recommendation.

22 CHAIR HOLTZMAN: Right. In other

1 words, this is not -- the recommendation is the
2 recommendation that's --

3 MS. SAUNDERS: No --

4 CHAIR HOLTZMAN: -- been reviewed by
5 the Subcommittee and forwarded to us.

6 MS. SAUNDERS: Right.

7 CHAIR HOLTZMAN: This is just the
8 staff's way of summarizing the body of the
9 material that supports the recommendation.
10 That's really basically what it does.

11 MR. STONE: So, these --

12 CHAIR HOLTZMAN: But it's not --

13 MR. STONE: -- aren't the bullets were
14 adopting today? These are just --

15 CHAIR HOLTZMAN: No, we're not --

16 MR. STONE: -- discussion points?

17 MS. SAUNDERS: No, not at all.

18 CHAIR HOLTZMAN: These are just --

19 MR. STONE: These are just discussion
20 points?

21 MS. SAUNDERS: No.

22 CHAIR HOLTZMAN: -- help to guide the

1 discussion and help us to understand --

2 MS. SAUNDERS: Absolutely.

3 CHAIR HOLTZMAN: -- the background of
4 the recommendation. So, we can still, as I
5 understand it and following up on the very fine
6 point that Professor Taylor made, we can still
7 look at the recommendation, we could modify words
8 in the recommendation --

9 MS. SAUNDERS: Certainly.

10 CHAIR HOLTZMAN: -- we could also
11 modify words in the backup material of the
12 report, or we can't do that?

13 MS. SAUNDERS: Right.

14 MS. FRIED: Yes, ma'am.

15 CHAIR HOLTZMAN: We may do that? So,
16 we can -- so I would -- right. So, we could --
17 if we -- so, first, we would look at the, my
18 suggestion is, first we would look at the
19 recommendation and see if we agree with it or not
20 and if we want to modify the language or not.

21 And then, we could look at the backup
22 material and see if there is any, if we adopt the

1 recommendation, if there is anything that needs
2 to be changed in the backup material that we --
3 not these little bullet points, Mr. Stone, but
4 the backup material that we got from the
5 Subcommittee.

6 MS. FRIED: Right.

7 CHAIR HOLTZMAN: Because these bullet
8 points are just guidance.

9 MR. STONE: Okay.

10 CHAIR HOLTZMAN: All right. Then -- am
11 I wrong?

12 MS. FRIED: When you say backup
13 material, you could -- you can't modify the
14 Subcommittee report --

15 CHAIR HOLTZMAN: Okay.

16 MS. FRIED: -- itself --

17 CHAIR HOLTZMAN: All right.

18 MS. FRIED: -- but you can, for the JPP
19 Report --

20 CHAIR HOLTZMAN: Oh, okay.

21 MS. FRIED: -- modify what you think
22 you --

1 CHAIR HOLTZMAN: I got it.

2 MS. FRIED: -- want to add.

3 CHAIR HOLTZMAN: All right. Fine.

4 Okay. So --

5 MS. SAUNDERS: And my proposal, Ms.

6 Holtzman --

7 CHAIR HOLTZMAN: All right.

8 MS. SAUNDERS: -- and the Panel --

9 CHAIR HOLTZMAN: So, then you've --

10 MS. SAUNDERS: Okay.

11 CHAIR HOLTZMAN: -- enlightened me.

12 Thank you. So, basically, we vote on

13 Recommendation 1 --

14 MS. SAUNDERS: Right.

15 CHAIR HOLTZMAN: -- we adopt that, it

16 takes everything that the Subcommittee

17 recommended with it. If we want to make any

18 other points about that, we can.

19 MR. STONE: So, today, we should make

20 points about the bullets? I was under the --

21 CHAIR HOLTZMAN: Which bullets?

22 MR. STONE: These. In other words, we

1 should talk about these bullets.

2 CHAIR HOLTZMAN: Well, we could --

3 MR. STONE: Yes.

4 CHAIR HOLTZMAN: -- but we don't have
5 to.

6 MS. SAUNDERS: You could create
7 bullets.

8 MR. STONE: I guess -- okay. Let me
9 just follow up on Ms. Fried's point, because that
10 was the one I didn't quite understand. I was
11 under the impression, and it sounds like I was
12 wrong, that we were going to go line by line
13 through the Subcommittee's report. But it sounds
14 like the Subcommittee's report is the
15 Subcommittee report --

16 MS. SAUNDERS: Right.

17 MR. STONE: -- and we're not voting to
18 change a word in that, we're just deciding if
19 we're going to do something on top of it, like we
20 did with the last report --

21 MS. SAUNDERS: Exactly.

22 MS. FRIED: Correct.

1 MR. STONE: -- which is, we will talk
2 about these bullets and have a draft sent to us
3 of what our report would be --

4 MS. SAUNDERS: Exactly.

5 CHAIR HOLTZMAN: Right.

6 MR. STONE: -- and it may or may not
7 overlap exactly or a little bit or not at all
8 with the Subcommittee report? Okay, because I
9 spent quite a bit of time on that and that's my
10 fault. All right.

11 CHAIR HOLTZMAN: Okay. All right. So,
12 okay. So, I think we should, since you've just
13 discussed Recommendation 1, I think we should
14 have a discussion of Number 1 and a vote on
15 Number 1.

16 MS. SAUNDERS: Yes, ma'am.

17 CHAIR HOLTZMAN: Okay. Is there any
18 discussion on Recommendation 1?

19 VADM TRACEY: So, if I may, I believe
20 this is a topic that deserves further
21 examination. So, that part of the
22 recommendation, I agree with. It isn't clear to

1 me how the appointment of a judge is going to
2 make the outcome any different, if in fact there
3 is a procedure in place that really limits the
4 material that's coming before the Article 32.

5 And in combination with Recommendation
6 2, if Article 33 standard is limited to probable
7 cause without an evaluation of the probability of
8 winning at trial, so Recommendation 1 as
9 formulated in isolation from Recommendation 2, to
10 me, I'm not sure what that accomplishes. That
11 said, I agree that this topic deserves further
12 examination and that that examination is not
13 going to be completed by the JPP.

14 MS. SAUNDERS: I don't know if this
15 answers your point or not, ma'am, but the Article
16 33 guidance has already been passed by Congress.
17 And that's saying that in order to refer the
18 case, you should look at guidance contained in
19 the U.S. Attorneys' Manual.

20 So, that would be probable cause, and
21 what they're recommending is something higher
22 than that, which is likelihood of success at

1 trial. So, there are two different things,
2 whereas, the Article 32 hearing itself is limited
3 to a probable cause determination.

4 However, they also do make a
5 recommendation as to the disposition. Should
6 this go to a general court-martial? Should this
7 be resolved at a lower level? Should the charges
8 be dismissed?

9 So, the Services, what they found and
10 what's in the report is, the Services do it
11 differently. Some of the Services use more
12 senior counsel, like military judges, others use
13 more junior counsel.

14 CHAIR HOLTZMAN: Admiral, maybe to
15 respond to your point, it could be that the
16 Subcommittee was thinking that, if you had more
17 seasoned and more expert preliminary hearing
18 officers, that the recommendations would be more
19 likely to be followed by the convening authority.
20 And I can't --

21 VADM TRACEY: Okay.

22 CHAIR HOLTZMAN: -- necessarily infer

1 that that's the case, but that could have been --

2 VADM TRACEY: But then there's an --

3 CHAIR HOLTZMAN: -- part of the

4 thinking.

5 VADM TRACEY: -- underlying assumption

6 that the recommendations are sound. But our

7 whole theory is that the Article 32 isn't

8 actually doing anything, so why do we think the

9 recommendations make sense?

10 MS. SAUNDERS: Well, I think the

11 thoughts of the Subcommittee on that were that

12 the perceptions right now, it's still -- the

13 changes for this took effect in December of 2014,

14 that right now things are still in flux. So, I

15 think their perceptions are that this no longer

16 serves a purpose.

17 I think what -- but they did not look

18 at the data, they did not pull Article 32

19 reports, they did not look at -- compare how

20 often, for example, recommendations made by the

21 investigating officers in the older 32s were

22 followed versus how often recommendations for the

1 --

2 CHAIR HOLTZMAN: What's changed, right.

3 MS. SAUNDERS: -- new ones are
4 followed. So, they did not have time to do all
5 that. So, I think they were thinking that,
6 perhaps, that would be helpful for the follow-on
7 panel to do --

8 CHAIR HOLTZMAN: Right. But --

9 MS. SAUNDERS: -- to determine.

10 CHAIR HOLTZMAN: But to follow up on
11 your point, I mean, one of the points that, I
12 don't know if it's discussed here or later, the
13 statistic that, when the preliminary hearing
14 officer recommends against proceeding, that there
15 -- 45 out of the 54 cases in which that was the
16 case, there was an acquittal.

17 MS. SAUNDERS: Right.

18 CHAIR HOLTZMAN: Where the -- and so,
19 I think, just to follow up on the point I'm
20 making, maybe, Ms. Peters or Ms. Saunders, you
21 remember better than I do about the thinking
22 behind this, but I guess some of the thinking

1 behind it may have been simply that it would give
2 more weight to the recommendation against going
3 forward or the absence of probable cause, even on
4 this limited hearing, if you had more expert
5 hearing officer or more experienced hearing
6 officers.

7 MS. SAUNDERS: Right. I don't think --

8 CHAIR HOLTZMAN: Is that --

9 MS. SAUNDERS: That's exactly --

10 CHAIR HOLTZMAN: -- right?

11 MS. SAUNDERS: -- right, ma'am. And I
12 don't think they knew the answer to that, but I
13 thought that they felt that it deserved a deeper
14 look than what they were able to give.

15 CHAIR HOLTZMAN: So, I don't think --

16 VADM TRACEY: And I agree in principle
17 with that --

18 MS. SAUNDERS: Okay.

19 VADM TRACEY: -- what I'm challenging
20 is the recommendation actually says, and you
21 should look specifically at assigning this duty
22 to a more experienced cadre of people. What

1 difference is that going to make?

2 If the JPP recommends that, we assume
3 that it's going to make a difference, at least to
4 my mind that's what our endorsement of that
5 specific part of the recommendation would
6 suggest, we think that would make a difference.

7 MS. SAUNDERS: Or that it could.

8 VADM TRACEY: Yes.

9 MR. STONE: So, would you stop after
10 the first sentence, is that it? And let the next
11 Panel --

12 VADM TRACEY: Or I would --

13 MR. STONE: -- do what they want to do?

14 VADM TRACEY: -- at least soften or
15 explain what's the relevance of the hiring of a
16 more senior PHO.

17 MS. SAUNDERS: So, perhaps in a bullet
18 underneath that could be --

19 VADM TRACEY: Explain why that might
20 matter.

21 MS. SAUNDERS: Okay.

22 VADM TRACEY: Okay?

1 MS. SAUNDERS: Okay.

2 VADM TRACEY: Secondly, I know that
3 we've done this pattern of passing the further
4 investigation on to the follow-on Panel. And
5 that makes some sense, but in fact whether the
6 Secretary agrees that that Panel should take that
7 responsibility or not, the JPP believes that this
8 is a topic that needs to be further investigated
9 and that that Panel might be a place that could
10 do it.

11 But if the Secretary doesn't want them
12 to do it, we don't want the Secretary off the
13 hook on the fact that this isn't -- this appears
14 not to be working as expected. So, I would
15 suggest that we might, again, want to modify the
16 wording around who it is we're saying do this.
17 We recommend that it be done, we think it might
18 be a topic that the DAC-IPAD could follow up on -
19 -

20 MS. SAUNDERS: Okay.

21 VADM TRACEY: -- we agree that there is
22 not enough data, probably, yet, because of how

1 recent the change is and so, it's something
2 that's going to have to be looked at over time in
3 order to get to it. I think those are factors
4 that we certainly have in the write-up --

5 MS. SAUNDERS: Right.

6 VADM TRACEY: -- and might modify the
7 language of the recommendation somewhat.

8 MS. SAUNDERS: Okay.

9 CHAIR HOLTZMAN: Is there any further
10 discussion on this?

11 MR. STONE: Yes, I've got a couple
12 things.

13 CHAIR HOLTZMAN: Okay.

14 MR. STONE: It seems to me that the
15 first line of the first bullet emphasizes that
16 what --

17 CHAIR HOLTZMAN: Wait a minute --

18 MR. STONE: -- we are suggesting here
19 is that the next Committee should reexamine the
20 Article 32 statutory changes from Fiscal Year
21 2014 NDAA, is that correct?

22 MS. SAUNDERS: I think they are

1 recommending that the process itself be looked
2 at, not that the -- I'm not sure if I understood
3 your question, Mr. Stone.

4 MR. STONE: Well, those changes were
5 made by an NDAA, so this --

6 MS. SAUNDERS: Right.

7 MR. STONE: -- is a recommendation that
8 we think you should reexamine the NDAA, right?

9 CHAIR HOLTZMAN: No.

10 MS. SAUNDERS: Well, they should
11 examine the changes and how they affect the
12 process as a whole. I don't think there was any
13 suggestion from the Subcommittee or thought from
14 them that, for example, that that statute be
15 repealed or that things go back to the way that
16 it used to be.

17 MR. STONE: Well, that leads to my next
18 question. Do you agree with what Admiral Tracey
19 just said as characterizing what you're saying,
20 that the process appears not to be working as
21 expected? That's what she said. Because that --
22 is that the tenor of this?

1 MS. SAUNDERS: I don't think that's
2 exactly right, Mr. Stone. I think what they're
3 saying is that, it did change. One of the
4 purposes that counsel pointed out for the old
5 Article 32 hearing, and I mean before this NDAA
6 change, was that it was often used as a tool to
7 examine the strength of a case and convening
8 authorities relied on the additional information
9 that that provided to help, for them, to help
10 make that decision. They feel that this is no
11 longer as useful a tool for that, because, for
12 example, victims are not testifying, often other
13 witnesses do not testify, and simply paper
14 evidence.

15 So, I think they just felt that this
16 is not the same tool that it used to be and that
17 it needs to be examined for a determination of
18 whether it is still a useful tool, whether
19 changes could be made to the process that would
20 help it to become more useful, things along those
21 lines.

22 I think they felt they did not have

1 the solution to this problem, they did not have -
2 - they had not had an opportunity to examine all
3 the data. And so, I think they identified it as
4 a problem that warranted a further look.

5 MR. STONE: But wasn't it identified --
6 weren't all these considerations you just told me
7 made public at the time that the NDAA 2014 made
8 these changes? I mean, I think that these
9 changes were expected and there were views
10 expressed both ways, so this is not something
11 new.

12 Am I right? Isn't that in the
13 legislative history? Do I have to find it?
14 Because we don't refer to it here, we make it
15 sound like this is something brand new and I'm
16 saying, I don't think this is brand new, I think
17 this is asking for a reexamination of what was
18 expected. Am I wrong?

19 MS. SAUNDERS: I think in terms of --
20 it was expected that victims would no longer be
21 required to testify, that was --

22 MR. STONE: Okay.

1 MS. SAUNDERS: -- in the legislation.
2 It was expected that this would no longer be a
3 discovery tool --

4 MR. STONE: Okay.

5 MS. SAUNDERS: -- for the defense, that
6 was --

7 MR. STONE: Okay.

8 MS. SAUNDERS: -- in the legislation.

9 MR. STONE: Okay, good. I can --

10 MS. SAUNDERS: So, all of those things
11 were expected --

12 MR. STONE: Right.

13 MS. SAUNDERS: -- you're absolutely
14 right. I think what they're seeing and what
15 they're -- it's one thing to have something in
16 legislation, but then to see how that is
17 affecting the practice of --

18 MR. STONE: Okay. But our bullets
19 don't say, it's worked out as expected, but there
20 are some, as we said before, inadvertent
21 consequences. We haven't said that in any of the
22 bullets. And --

1 CHAIR HOLTZMAN: Excuse me, Mr. Stone.
2 Just one point. I think, just to clarify your
3 own thinking, these bullets are not the final
4 bullets --

5 MS. SAUNDERS: Right.

6 CHAIR HOLTZMAN: -- okay?

7 MR. STONE: I know, but to the extent
8 she's going to use this to write a report, I'm
9 trying to give her --

10 CHAIR HOLTZMAN: But I --

11 MR. STONE: -- some flesh to put on the
12 bones --

13 CHAIR HOLTZMAN: But can we --

14 MR. STONE: -- of what she's going to
15 send us.

16 CHAIR HOLTZMAN: Can we focus on this
17 in two ways? I'd like to focus first on the
18 recommendation, first, itself.

19 MR. STONE: Right.

20 CHAIR HOLTZMAN: And then, if we want
21 to add or subtract ideas from the bullets as
22 opposed to the words in the bullets --

1 MR. STONE: Okay.

2 CHAIR HOLTZMAN: -- that's what I --

3 MR. STONE: I'll focus on the
4 recommendation. I think that the --

5 CHAIR HOLTZMAN: So, let's start --

6 MR. STONE: -- recommendation has to
7 say whether or not the JPP is recommending that
8 the NDAA Fiscal Year 2014 changes to Article 32
9 should be or shouldn't be reexamined. That's
10 what I'm -- that's why I brought that up. In
11 other words, I think we have to be up-front if
12 that's what we're saying.

13 It is -- it does appear to be working
14 as expected and I thought, correct me if I'm
15 wrong, that in our last report on investigations,
16 we specifically relied on that fact to say, for
17 that reason, we think it's very important, as did
18 the Response Systems Panel, that the defense gets
19 some independent investigations.

20 MS. SAUNDERS: Right.

21 MR. STONE: So, I thought -- and I
22 don't see that mentioned in the bullets --

1 CHAIR HOLTZMAN: But this is --

2 MR. STONE: -- so it seems to me, if
3 we're going to say what you want to say, we've
4 got to say, the recommendation is that we
5 reexamine it in addition to perhaps giving
6 defense counsel independent investigators.
7 Because I think that's what you're telling me, if
8 I'm wrong, please correct me.

9 VADM TRACEY: The recommendation, I'm
10 sorry, is that the process, the hearing process
11 be reviewed. That's not the same as the NDAA
12 change. You've got a law and then the
13 implementation of process. And that's what the
14 Panel was -- or the Subcommittee was
15 recommending, is that the hearing process be
16 reviewed.

17 CHAIR HOLTZMAN: Right. Plus, I think,
18 to add to Admiral Tracey's point, you're
19 focusing, Mr. Stone, on the issue of
20 investigations and Ms. Saunders focused on that.
21 But this recommendation doesn't focus only on
22 that point, it focuses on such other points as

1 the status of the preliminary hearing officer.
2 The question is to whether the preliminary
3 hearing officer's determinations should be
4 binding.

5 These are different points from the
6 investigation and I'm not sure that -- I didn't
7 examine the legislative history, but these are
8 issues that come out of the concerns that were
9 raised during the Subcommittee visits and
10 otherwise. So, I think that focusing solely on
11 the investigations part is not necessarily an
12 accurate reflection of what this recommendation
13 is about.

14 MR. STONE: And maybe I can ask Admiral
15 Tracey, is that what you meant by process? I
16 wasn't sure what you meant just now by process,
17 I'd like to know more.

18 VADM TRACEY: That is what I meant by
19 process.

20 MR. STONE: Okay.

21 VADM TRACEY: Is the fact that you
22 cannot -- that the practitioners believe that you

1 can't make a determination from the Article 32
2 process today as to whether the case is winnable
3 or not and, therefore, things are going to trial
4 that wouldn't otherwise have gone to trial?
5 That's a process issue, that isn't the NDAA.

6 MR. STONE: Okay.

7 VADM TRACEY: Unless the NDAA specified
8 exactly how it would be conducted, and I doubt
9 that it did, that's an implementation decision
10 that was made by the Department or by the
11 Services that has now resulted in practitioners
12 believing that they can't get out of this the
13 basic element of whether this is a chargeable
14 offense and it's winnable at trial.

15 PROF. TAYLOR: That's the same point
16 that I was about to make, and that is that, the
17 way I think of it, you've got the statute and
18 then you've got the implementation and then
19 you've got how Services are actually operating.
20 Once the rubber meets the road, how is it
21 actually working? So, I think all of that is
22 part of the process.

1 But to your point, Mr. Stone, about
2 independent investigators, no one is backing away
3 from that, because in the last paragraph and in
4 the last sentence, we reiterate our previous
5 recommendation regarding the need for the defense
6 to have independent investigators.

7 MR. STONE: No, I know that. I just --

8 PROF. TAYLOR: Okay.

9 MR. STONE: -- thought that that was
10 part of the response, the -- as I understand it,
11 not only today, but never in the past has the
12 point of an Article 32 proceeding contained a
13 binding recommendation, it's always been non-
14 binding, isn't that right?

15 MS. SAUNDERS: That's correct.

16 MR. STONE: And it's never been focused
17 legally on whether the case was winnable, it was
18 focused on whether there was probable cause,
19 isn't that right?

20 CHAIR HOLTZMAN: That's --

21 MR. STONE: The determination by --

22 CHAIR HOLTZMAN: No --

1 MS. SAUNDERS: No --

2 MR. STONE: -- the presiding officer --

3 CHAIR HOLTZMAN: No --

4 PROF. TAYLOR: I don't think --

5 MR. STONE: -- was on probable cause?

6 PROF. TAYLOR: -- that that's accurate.

7 CHAIR HOLTZMAN: No.

8 MS. SAUNDERS: The scope of the 32 has
9 actually been narrowed by this legislation to a
10 determination of whether there is probable cause.

11 MR. STONE: You're telling me that,
12 before this, the recommendation dealt with
13 something other than probable cause?

14 MS. SAUNDERS: It -- I mean, I'm happy
15 to pull the Article 32, but it looked at -- it
16 was a broader discussion of -- it was basically
17 an investigation of --

18 MS. PETERS: The truth and form of the
19 charges.

20 MS. SAUNDERS: -- the truth and form of
21 the charges. I was going to say, I think I've
22 got the actual --

1 MS. PETERS: Right.

2 MS. SAUNDERS: -- language here. It
3 was a thorough and impartial investigation by an
4 investigating officer into the truth and form of
5 the charges. And it also did specifically state
6 that it was also as a -- could be used as a
7 discovery mechanism for the defense.

8 MR. STONE: So, in effect, though,
9 we're asking to have -- so, we're suggesting that
10 there should be a reexamination of the FY14 NDAA
11 changes, isn't that the bottom line?

12 MS. SAUNDERS: I don't -- I mean, I'm
13 speaking for the Subcommittee on this point,
14 having been there for all their deliberations and
15 discussion on this, but for example, I don't
16 think -- it was never mentioned by them that they
17 should repeal this statute, that they should go
18 back and force victims to go back and testify,
19 that they should force back into law the idea
20 that it's a discovery mechanism for the defense.

21 I think what they were thinking is,
22 these changes have happened, they were

1 intentional changes, as you pointed out, Mr.
2 Stone, by Congress, but here are the effects that
3 they've had and is there some way we can
4 alleviate some of these effects? For example,
5 the law says it's not a discovery mechanism for
6 the defense. One way to potentially alleviate
7 that would be to provide defense investigators.

8 MR. STONE: And now, you just got away
9 from the process. Let's stay with the process.
10 What's the way you want to alleviate it in the
11 process, like you just said to me?

12 MS. SAUNDERS: Well, that is part of
13 the recommendation, which is why I recommended
14 that one. But also, I think that's what they're
15 asking the DAC-IPAD, the follow-on Panel, to look
16 at.

17 For example, would it be helpful to
18 have more senior attorneys serving as preliminary
19 hearing officers? Would it be helpful to have a
20 -- if the preliminary hearing officer finds that
21 there's no probable cause for an offense, would
22 be beneficial to the process to have that be a

1 binding decision? They're not saying yes or no
2 to this, they're saying they don't know, they
3 don't have all the evidence, but they think that
4 this should be looked at.

5 MR. STONE: And the non-binding nature,
6 that would change the way Article 32 reads today,
7 right?

8 MS. PETERS: Yes. Yes, it would --

9 MS. SAUNDERS: Yes. I mean --

10 MS. PETERS: -- transform it from a
11 recommendation --

12 MS. SAUNDERS: Right.

13 MS. PETERS: -- to something --

14 MS. SAUNDERS: But I think what they're
15 recommending is that there be a holistic look at
16 this process. And not just the Article 32
17 process, as you'll see with some of the other
18 recommendations, but the whole pretrial hearing
19 process to determine, is the convening authority
20 getting the information that he or she needs to
21 make a determination whether a charge should be
22 referred to court?

1 MR. STONE: Last time, and I guess I'll
2 say this, this goes to the language of the
3 recommendation, but also to the two bullets on
4 Page 2, because I stated this for the record, but
5 they showed up again and I certainly wouldn't
6 want these bullets in there.

7 The bullets on Page 2 talk about data
8 from Fiscal Year 2015, case files in all 54 cases
9 were recommended to a general court-martial. In
10 45 of the 54 cases, the accused was acquitted of
11 the offenses in which there was disagreement -- I
12 don't know what that means -- though the accused
13 may have been convicted of other offenses.

14 We heard testimony last time that they
15 were in fact convicted in, I think it was 47 of
16 the other cases, of what would have to be related
17 offenses or they wouldn't be able to be charged
18 in the same proceeding. And we also -- there was
19 a footnote in the report that in five of those 54
20 cases, the Subcommittee did not receive, was not
21 able to find in the files whether or not there
22 had been a recommendation to proceed forward.

1 And then, I made the additional point
2 that as to the cases where there was an
3 acquittal, the acquittal comes about on a
4 completely different and much higher standard,
5 meaning it just means the jury couldn't find
6 proof beyond a reasonable doubt.

7 It doesn't mean that the investigating
8 officer was correct and there wasn't probable
9 cause to go forward. I mean, the -- I'm sorry,
10 the SJA or whoever it was that disagreed with the
11 PHO and that the PHO wasn't wrong.

12 So, there were so many unanswered
13 questions as to those 54 cases and we have not
14 heard -- had a presentation here directly, only a
15 second-hand presentation, and that's why I raised
16 that, to see if somebody was going to come back
17 and explain that to me, but we have run out of
18 time to do that, that it seems to me, I think
19 it's not correct for us to hold that up as
20 something useful.

21 At a minimum, therefore, in the
22 language of the recommendation, where the last

1 sentence of the first paragraph says, starts,
2 this review should evaluate data on how often,
3 and I would insert there, and the reasons why,
4 the recommendations of the preliminary hearing
5 officers regarding case disposition are followed
6 by convening authorities, comma, and then I would
7 add, irrespective of acquittals, because they
8 invoke the highest standard of proof, i.e., proof
9 beyond a reasonable doubt, comma, and determine
10 whether further changes to the process are
11 required.

12 It seems to me we don't want to
13 mislead the next Panel to think that we've
14 examined this data in a way, in any detail,
15 because we haven't, we've just pointed out that
16 there were problems with that data, which are
17 unresolved. And I think we need to be careful
18 about it and not have that bullet there.

19 CHAIR HOLTZMAN: Okay. Is there any
20 further discussion on this? Because if not, I'd
21 like to go, first, to Admiral Tracey's proposal
22 and then to Mr. Stone's proposal. Any further

1 discussion on Recommendation 1? Okay. Admiral
2 Tracey, do you want to -- can you restate your
3 proposal for us, please?

4 VADM TRACEY: I'm not sure I had a
5 proposal, I had some --

6 CHAIR HOLTZMAN: Well, you had some
7 thoughts. Okay. Formulate them into a proposal,
8 if you don't mind.

9 VADM TRACEY: When the JPP Report is
10 done, will the recommendation -- the
11 recommendation won't be from the Subcommittee,
12 right?

13 MS. SAUNDERS: That's correct, ma'am.

14 VADM TRACEY: Okay. So, my thought is
15 that the JPP recommends that the Secretary
16 continue to review the new Article 32 preliminary
17 hearing process. So, I'd modify who it is we're
18 recommending do that review.

19 CHAIR HOLTZMAN: All right.

20 VADM TRACEY: As I said, I don't want
21 the review not to happen if he decides that's --

22 CHAIR HOLTZMAN: Okay.

1 VADM TRACEY: -- not what he wants the
2 DAC-IPAD to do.

3 CHAIR HOLTZMAN: Okay. So, your first
4 proposal is that, instead of saying that the JPP
5 Subcommittee recommends that the Defense Advisory
6 Committee, blah, blah, blah, continue the review,
7 recommends that the Secretary -- we strike that
8 language up to, continue the review, after the
9 DAC-IPAD, and insert instead of that that the
10 Secretary of Defense, whether through the Defense
11 Advisory Committee, blah, blah, blah, or
12 otherwise, continue the review. Is that --

13 VADM TRACEY: That would work.

14 CHAIR HOLTZMAN: -- a fair summary?

15 VADM TRACEY: That would work. Yes,
16 absolutely.

17 CHAIR HOLTZMAN: Okay. Everybody --

18 JUDGE JONES: Yes.

19 CHAIR HOLTZMAN: Okay. So, with
20 respect to Admiral Tracey's proposal, all those
21 in favor say aye?

22 (Chorus of aye.)

1 CHAIR HOLTZMAN: Opposed?

2 (No audible response.)

3 CHAIR HOLTZMAN: It's carried.

4 Admiral, did you have another proposal with
5 regard to -- I think you had another proposal
6 with regard to this section.

7 VADM TRACEY: I do think in the
8 explanatory remarks that come behind the JPP
9 recommendations, I do believe we should explain
10 what we think the benefit is of appointing a more
11 senior preliminary hearing officer, or more
12 experienced preliminary hearing officer. To Mr.
13 Stone's point, do we want to be clear that we
14 believe it's important that the convening
15 authority is armed with an assessment of
16 winnability of the case --

17 CHAIR HOLTZMAN: Isn't that in a later
18 point?

19 VADM TRACEY: -- by some means?

20 MS. SAUNDERS: That is in one of the
21 other recommendations regarding this new Article
22 33 guidance.

1 VADM TRACEY: But that's why we think
2 -- that's the benefit we think there is to having
3 a more senior --

4 MS. SAUNDERS: Okay.

5 VADM TRACEY: -- PHO, right?

6 MS. SAUNDERS: So, perhaps they should
7 look at that, in addition to these other things,
8 they should look at having them make
9 recommendation on the winnability, is that what
10 you're --

11 VADM TRACEY: Yes.

12 MS. SAUNDERS: -- suggesting? Okay.

13 VADM TRACEY: I don't think there's a
14 problem with the explanatory remarks then being
15 covered in a recommendation later, right?

16 CHAIR HOLTZMAN: Right.

17 MS. SAUNDERS: Would you want that --

18 VADM TRACEY: Is there any --

19 MS. SAUNDERS: -- included in the
20 recommendation, ma'am? Where we list some of
21 these other things, like having a more senior
22 counsel, would you want that language included,

1 and whether or not they should be able to make a
2 recommendation on the winnability? Or, I mean,
3 different language, but --

4 VADM TRACEY: No, all I'm suggesting is
5 we need to explain what's the use of --

6 MS. SAUNDERS: Right.

7 VADM TRACEY: -- if this is an unuseful
8 process, then putting a more senior person in
9 charge of it doesn't, by itself, make it more
10 useful --

11 CHAIR HOLTZMAN: Okay.

12 MS. SAUNDERS: Okay.

13 VADM TRACEY: -- right?

14 CHAIR HOLTZMAN: Right. And then,
15 you're thinking that one of the uses might be to
16 help enlighten the convening authority on the
17 winnability of the case? I'm using that as
18 shorthand of it --

19 VADM TRACEY: Right.

20 CHAIR HOLTZMAN: -- reasonable
21 likelihood of success. Okay, so --

22 VADM TRACEY: And I personally don't

1 support a binding recommendation. So, I don't
2 know how to deal with that in the way that this
3 process works.

4 PROF. TAYLOR: Could I just comment on
5 that? It seems to me that one thing we don't
6 want to do is usurp the traditional and statutory
7 role of the staff judge advocate. And it seems
8 to me that that person is the commander's counsel
9 and should be the one who makes that ultimate
10 call.

11 So, while I understand the point, I
12 think I understand the point, it seems to me that
13 what we're really talking about is developing a
14 more complete record, so that a decision can be
15 made, not only as to referral, but also the other
16 standards that we'll talk about earlier that the
17 commander should consider in determining whether
18 to send a case to trial or not. Does that -- is
19 that okay with you, Admiral Tracey?

20 VADM TRACEY: Yes, it is.

21 MR. STONE: That really makes a lot of
22 sense to me. Can you put any of that language in

1 the recommendation?

2 PROF. TAYLOR: Well, I think it can go
3 in the discussion without touching the
4 recommendation. That's, at least, my thought.

5 MS. SAUNDERS: Certainly.

6 CHAIR HOLTZMAN: But I think, Mr.
7 Taylor, just to respond to your point, I think,
8 and Judge Jones, you can correct me here, and the
9 staff could too, that one of the concerns that
10 the Subcommittee had was countering what is
11 perceived to be the pressure on the convening
12 authority under the existing -- under these new
13 changes.

14 JUDGE JONES: I agree.

15 CHAIR HOLTZMAN: And so, if you just
16 continue same old, same old, how is that going to
17 counter? Now, this may not be a suggestion,
18 having a binding recommendation by the
19 preliminary hearing officer may not be a good
20 solution to the problem, but I think it's
21 important to try to understand what the thinking
22 was behind that thought.

1 That doesn't mean you need to adopt
2 it. And I think the language is pretty -- it
3 just says, to consider whether that should be a
4 result. But I think that that was the reasoning
5 or thinking behind it.

6 VADM TRACEY: I thought I understood
7 that and that's -- but I'm not sure I can support
8 language coming out of the JPP that suggests that
9 that's an acceptable solution under any
10 circumstances, for the reasons that Mr. Taylor
11 described.

12 CHAIR HOLTZMAN: Okay. So --

13 VADM TRACEY: And I would support, if
14 it's not, and I think it isn't, I would support
15 perhaps an additional recommendation from the JPP
16 that suggests that this perception that there's a
17 rush to trial for a lot of different reasons
18 should be addressed by the Secretary.

19 That that is potentially corrosive to
20 the trust in the military justice system to the
21 extent that that's believed to be true or it is
22 actually true. And that, by itself, deserves

1 further work by the Secretary and a stand-alone
2 recommendation to that effect might be --

3 CHAIR HOLTZMAN: So, for purposes --

4 VADM TRACEY: -- important.

5 CHAIR HOLTZMAN: -- of this
6 recommendation, what are you suggesting, Admiral
7 Tracey and Mr. Taylor? What's your joint and
8 several proposal?

9 MR. STONE: We'll fight. Do you want
10 to strike, after military justice experience, the
11 last five lines of that paragraph, and just say,
12 and if there is a rush to trial? Something like
13 that?

14 VADM TRACEY: No, I would suggest that
15 that's an issue in a separate --

16 MR. STONE: Oh, okay.

17 VADM TRACEY: -- recommendation.

18 MR. STONE: Okay.

19 VADM TRACEY: I would put a period
20 after the --

21 MR. STONE: Experience?

22 VADM TRACEY: Yes, experience.

1 CHAIR HOLTZMAN: Where are you?

2 MR. STONE: Okay.

3 VADM TRACEY: In the, let's see, such
4 a review, so it's the second full sentence, such
5 a review should look at whether preliminary
6 hearing officers, I would keep that part up to
7 experience.

8 MR. STONE: Right, seventh line.

9 CHAIR HOLTZMAN: All right.

10 VADM TRACEY: And, perhaps, and whether
11 -- I can't capture Mr. Taylor's words, but I
12 would support language that suggested, and
13 whether the reports produced for the general
14 court-martial convening authority provides
15 sufficient -- I've lost your eloquent language
16 there, Mr. Taylor.

17 PROF. TAYLOR: Well, I can just try
18 again on that. What I had in mind actually ties
19 together those two thoughts. And that is that if
20 you had a more senior judge advocate with
21 military justice experience or a military judge
22 who could develop a more complete record, then if

1 that happened, I would be more comfortable with
2 the recommendation of the preliminary hearing
3 officer against referral having more weight.

4 Because that means this is based on
5 the considered judgment of someone who presumably
6 has more experience than many who end up serving
7 as PHOs today. Does that make sense?

8 VADM TRACEY: I do, it does.

9 CHAIR HOLTZMAN: How about this as a
10 recommendation, and whether -- so, we get to with
11 military experience, and whether a recommendation
12 of such a preliminary hearing officer --

13 PROF. TAYLOR: That's what I was
14 thinking of, yes.

15 CHAIR HOLTZMAN: -- should be given
16 more weight, as opposed to binding.

17 PROF. TAYLOR: Yes.

18 VADM TRACEY: Okay.

19 CHAIR HOLTZMAN: Or something like
20 that.

21 VADM TRACEY: Good.

22 CHAIR HOLTZMAN: I'm still going to

1 vote against it, but --

2 (Laughter.)

3 CHAIR HOLTZMAN: I'm trying to get
4 something that you can both agree on. Okay. So,
5 any other -- are we ready to vote on this
6 proposal of Admiral Tracey and Mr. Taylor? Do we
7 have some line -- do we have it written down?

8 MS. PETERS: Ma'am, I think we have the
9 language. My question regards the change to the
10 beginning of the recommendation that the
11 Secretary of Defense continue to review the
12 process, whether the DAC-IPAD does or not. The
13 staff undertook some research after the last
14 meeting regarding how you bring a recommendation
15 to the next Panel. The RSP's recommendations --

16 CHAIR HOLTZMAN: Excuse me, can we just
17 --

18 MS. PETERS: Yes, ma'am?

19 CHAIR HOLTZMAN: -- do this point right
20 now that we're focused on --

21 MS. PETERS: Yes, ma'am.

22 CHAIR HOLTZMAN: -- so we don't forget

1 that and then we'll go back to your point?

2 MS. PETERS: Yes, ma'am.

3 CHAIR HOLTZMAN: Thank you. So, do we
4 have the language that we just talked about?

5 MS. SAUNDERS: I did, I do. Would you
6 like me to read that back to you?

7 CHAIR HOLTZMAN: Yes, that would be
8 great.

9 MS. SAUNDERS: Okay. So, I'll just
10 start at the beginning of the sentence. Such a
11 review should look at whether preliminary hearing
12 officers in sexual assault cases should be
13 military judges or other senior judge advocates
14 with military justice experience and whether a
15 recommendation of such a preliminary hearing
16 officer against referral based on lack of
17 probable cause should be given more weight by the
18 convening authority. Does that sound right?

19 VADM TRACEY: Yes.

20 MS. SAUNDERS: Okay.

21 CHAIR HOLTZMAN: All in favor?

22 (Chorus of aye.)

1 CHAIR HOLTZMAN: Opposed? No. Okay,
2 carried. Okay. Meghan, do you want to give us
3 your concern that you just raised?

4 MS. PETERS: The issue the staff wanted
5 to examine was, how does a recommendation get
6 formulated to transfer to the next Panel? The
7 RSP's recommendations that the -- given to the
8 JPP, they're not mandatory tasks like the
9 Congressional tasks.

10 They do not contain wording that says,
11 the Secretary of Defense has to charge the JPP
12 with this before they look at it. So, without --
13 so, they lack any reference to the Secretary of
14 Defense being the mechanism or the conduit to the
15 next Panel, they merely say, we think the next
16 Panel should look at this. And then, the next
17 Panel, it is up to them to consider whether and
18 how far they want to go with that recommendation.

19 So, I would just -- want to make sure
20 that the staff provides clear language that
21 reflects the Panel's intent. Do we want the
22 Secretary of Defense to undertake a review

1 regardless of what the DAC-IPAD does and we hope
2 the --

3 CHAIR HOLTZMAN: I think that was our
4 --

5 MS. PETERS: -- DAC-IPAD does something
6 regardless of what the Secretary decides to do in
7 its own right.

8 CHAIR HOLTZMAN: Okay.

9 MS. SAUNDERS: Right. My takeaway was
10 that you want the Secretary of Defense to do
11 something and perhaps that's through the DAC-
12 IPAD, perhaps not, but you want the Secretary of
13 Defense to evaluate this. Was that --

14 CHAIR HOLTZMAN: Yes.

15 MS. SAUNDERS: Okay.

16 VADM TRACEY: That was my intent.

17 MS. SAUNDERS: Okay, great.

18 CHAIR HOLTZMAN: And I guess the
19 follow-up point though, which I hadn't thought
20 about and maybe you had thought about it,
21 Admiral, but I didn't, suppose the Secretary of
22 Defense decides to do nothing, do we want to

1 recommend that the DAC-IPAD itself undertake it?
2 Can we?

3 MS. PETERS: Yes, ma'am.

4 CHAIR HOLTZMAN: Is that --

5 MS. FRIED: The DAC-IPAD can only do
6 what it's tasked to by the --

7 CHAIR HOLTZMAN: By the Secretary?

8 MS. FRIED: -- or what's determined by
9 the chairperson.

10 CHAIR HOLTZMAN: I see. Okay.

11 MS. SAUNDERS: So, the chair could look
12 at your recommendation, and will --

13 VADM TRACEY: Right.

14 CHAIR HOLTZMAN: So, is that
15 objectionable to anybody, that if the Secretary
16 of Defense does not refer this to the DAC-IPAD,
17 that they should feel free to do it? Or are we
18 just saying nothing about it?

19 VADM TRACEY: If there's a way to do
20 that, I think that's --

21 MS. PETERS: Okay, ma'am

22 VADM TRACEY: -- the perfect answer.

1 MS. SAUNDERS: We can work with the
2 language on that.

3 CHAIR HOLTZMAN: Okay.

4 MS. FRIED: So, to be clear, can you
5 repeat the recommendation, if you don't mind,
6 that is being proposed? And then, Judge Jones --
7 Ms. Holtzman, you did not agree, is that correct?
8 Or --

9 MS. SAUNDERS: Just for that one
10 change, right?

11 CHAIR HOLTZMAN: But that's further
12 down. That's not this proposal about the
13 Secretary of Defense, I agree with that.

14 MS. FRIED: But what about this -- I'm
15 trying to understand the recommendation, where we
16 are with that right now.

17 MS. SAUNDERS: Should I read the whole
18 recommendation as it's been altered? Would that
19 be helpful?

20 MS. FRIED: I think so.

21 MS. SAUNDERS: And --

22 CHAIR HOLTZMAN: Well, just read what

1 we changed.

2 MS. SAUNDERS: Okay.

3 CHAIR HOLTZMAN: I mean, we don't have
4 to go --

5 MS. SAUNDERS: So, the recommendation
6 itself would be the same, except for the language
7 at the beginning will be changed to reflect that
8 the JPP recommends that the Secretary of Defense
9 or the DAC-IPAD, and I'll have some language to
10 that effect for your review next week.

11 And then, it begins, continue the
12 review of the new Article 32 preliminary hearing
13 process, which in the view of many counsel
14 interviewed during military installation site
15 visits and according to information presented to
16 the JPP no longer serves a useful purpose.

17 Such a review should look at whether
18 preliminary hearing officers in sexual assault
19 cases should be military judges or other senior
20 judge advocates with military justice experience
21 and whether such a preliminary hearing officer --

22 CHAIR HOLTZMAN: No, whether --

1 MS. SAUNDERS: -- whether a
2 recommendation of such a preliminary hearing
3 officer against referral based on lack of
4 probable cause should be given more weight by the
5 convening authority. And then, it would continue
6 with, this review, and the rest would remain as-
7 is.

8 CHAIR HOLTZMAN: Ms. Fried, are you --

9 MR. STONE: Now, it's up to my comment.

10 CHAIR HOLTZMAN: Yes, I just want to
11 make sure, Ms. Fried, are you okay now with where
12 we are?

13 MS. FRIED: Yes.

14 CHAIR HOLTZMAN: Everybody else okay
15 with where we are? Meghan, you're okay with --

16 MS. PETERS: Yes, ma'am, we are.

17 CHAIR HOLTZMAN: -- where we are?

18 Okay. Mr. Stone?

19 MR. STONE: Okay. In that next
20 sentence, it would say, this review should
21 evaluate data on how often and the reasons why
22 the recommendations of, and that's in there

1 because --

2 MS. SAUNDERS: Okay.

3 MR. STONE: -- of the confusion that
4 arose with that last box and I want them to know
5 we understand that. And the reasons why the
6 recommendations of preliminary hearing officers
7 regarding case disposition are followed by
8 convening authorities, comma, but taking into
9 account that acquittals involve the much higher
10 standard of proof, i.e., beyond a reasonable
11 doubt, comma, and determine whether further
12 changes to the process are required.

13 Because apparently, despite what the
14 Subcommittee was focusing on, somehow that got
15 lost and not mentioned and so, I think that if
16 we're going to refer it, we want to be as clear
17 as we can.

18 CHAIR HOLTZMAN: Can I just ask a
19 question? How are we going to find out what's in
20 the convening authority's mind so that we can get
21 the reasons?

22 MR. STONE: Well, we're not actually

1 going to do that, they are.

2 CHAIR HOLTZMAN: How is anybody --

3 MR. STONE: I mean, whether they're
4 going to --

5 CHAIR HOLTZMAN: -- going to do that?

6 MR. STONE: Whether they're going to do
7 the --

8 CHAIR HOLTZMAN: How is anybody --

9 MR. STONE: -- same thing --

10 CHAIR HOLTZMAN: How is anybody going
11 to do that?

12 MR. STONE: They're going to do it the
13 same way the Subcommittee did if they want,
14 they'll hold hearings on a non-attribution basis
15 in closed, non-public setting, if they wish, and
16 ask them to give them what they think is going
17 on.

18 Or they could, in terms of a process,
19 ask these more senior officials, and this could
20 be the process in any of the Services, to please
21 use a check sheet. Or they could ask them to
22 give a two sentence explanation when they do it.

1 But I think that if we're going to
2 look at that, recommend that somebody look at it,
3 we should give them some guidance in that
4 direction. If you want to say, how often and the
5 reasons why, if available, but I don't think
6 that's necessary. We're just saying, and the
7 reasons why, they should be asking the question
8 if they can. It's a meaningful question, it
9 avoids confounding two issues, which is what I
10 think happened here.

11 PROF. TAYLOR: Mr. Stone, I'd like to
12 comment on that if I may?

13 MR. STONE: Yes, maybe you can --

14 PROF. TAYLOR: Okay. So, I certainly
15 --

16 MR. STONE: -- even clarify it for me.

17 PROF. TAYLOR: I certainly understand
18 why you would like to know that, on the one hand.
19 On the other hand, when the convening authority
20 is exercising his or her discretion to make one
21 of these decisions, in effect they're exercising
22 quasi-judicial prosecutorial authority, which I

1 think in the past the Department has generally
2 not encouraged people to try to penetrate to any
3 significant extent.

4 For example, there have been cases
5 where, during my time at the Pentagon, members of
6 Congress disagreed with decisions by convening
7 authorities and asked to have the convening
8 authorities come to the Hill and explain them.

9 And, again, during my time, in
10 general, we resisted that because we wanted to
11 ensure commanders, as they were making these
12 decisions, that it was their independent
13 discretion that was being exercised and not
14 subject to some sort of reviewability assessment
15 that would determine whether they got promoted in
16 the future or what their next assignment might
17 be. So, it really gives me a little pause for
18 concern.

19 MR. STONE: I guess where that came
20 from -- let's see if I can find it here -- is we
21 got the SAPRO flowchart at an earlier meeting,
22 perhaps you recall it, and there's a whole -- on

1 that flowchart -- if I can find it here, give me
2 one second -- it seems to be an analysis of the
3 various reasons why cases didn't go forward.

4 And so, they must be getting some data
5 -- here it is -- must be getting some data,
6 because there's things like -- this is the DoD
7 Sexual Assault Prevention and Response Office
8 Fiscal Year 2015 Report of Sexual Assault
9 Completed Investigations and Subject
10 Dispositions.

11 And this flowchart has all kinds of
12 reasons, subject died or deserted, is a civilian
13 or foreign national, no covered sexual assault
14 offense alleged. Here's one, insufficient
15 evidence of any offense, victim declined to
16 participate, victim died before completion of
17 action, statute of limitations expired,
18 allegation unfounded by command legal review.

19 I mean, they have all of these
20 explanations and it seems to me, to the extent
21 that they exist and they're putting them in a
22 flowchart and numbering them for us, they may be

1 able -- they can ask the question.

2 Now, whether they'll get a useful
3 response or not, I'd agree, it may be that they
4 don't give them a useful response, but they may
5 be willing to say, no PC, no probable cause. Or
6 they may be willing to say something else,
7 statute of limitations expired or insufficient
8 testimony, even via hearsay, from victim.

9 Let's say they make the point that the
10 victim wouldn't talk to even the investigator or
11 the prosecutor. All I'm saying is they -- that's
12 why I didn't want to specify it more and I'm
13 certainly willing to clarify it, but they came up
14 with reasons before and otherwise we just get
15 into this counting against acquittals, which is
16 too problematic.

17 And I also don't think it's that
18 helpful. I mean, if we got a whole bunch back,
19 were they just -- even if they just checked off,
20 no probable cause or other, I would find that
21 very helpful when I went back and I looked. That
22 alone would be enough for me.

1 VADM TRACEY: But the difference in the
2 list that you just run through and --

3 MR. STONE: Yes.

4 VADM TRACEY: -- I think what you're
5 asking for here is, that's a list that's -- those
6 are facts that are determinable without asking a
7 commander --

8 JUDGE JONES: For an opinion, right.

9 VADM TRACEY: -- to describe the whole
10 thought process.

11 JUDGE JONES: Right.

12 VADM TRACEY: If there's no probable
13 cause, if that's what the recommendation is, then
14 they followed the recommendation.

15 MR. STONE: The recommendation may be
16 that there is probable cause, but they decided
17 afterwards there isn't.

18 VADM TRACEY: I think --

19 MR. STONE: In fact, five of the cases,
20 some of those cases --

21 VADM TRACEY: But that --

22 MR. STONE: -- remember --

1 VADM TRACEY: But that is now the view
2 of the court-martial convening authority, whereas
3 those are all facts.

4 MR. STONE: Well, do you think there's
5 some other formulation that helps us --

6 JUDGE JONES: Could I just suggest that
7 --

8 MR. STONE: -- look at that data?

9 JUDGE JONES: I think that if you want
10 to take a deeper dive on this, or not us anymore,
11 but the next Panel, the idea would be to look at
12 these individual cases and, to the extent you
13 can, compare them and do a case analysis.

14 But I don't -- I agree that all of
15 those other things, whether the victim died or
16 there was a statute of limitations or it was an
17 alien, not a citizen or whatever it was, those
18 are all facts. And I am concerned about trying
19 to ask questions of the commanders with respect
20 to their thought process.

21 CHAIR HOLTZMAN: Yes, I'm concerned
22 about where that takes us. And I don't know that

1 making that a suggestion here is really -- I'm
2 just concerned about it.

3 Because I think we can -- we're
4 concerned about some of the things we saw, the
5 pressure on the convening authority, but I don't
6 know that we want to start and we certainly as
7 the JPP haven't looked at it and I don't even
8 think the Subcommittee looked at what it would
9 mean to start questioning convening authorities
10 and requiring them to describe their decision
11 making process. So, I think that's a big, big,
12 big leap and I don't know that we have enough
13 evidence to warrant going down that road at all.

14 MR. STONE: Well, let me respond to
15 Judge Jones. How about I change that and it
16 says, this review should evaluate, and I'll use
17 the language you just said, case data --

18 JUDGE JONES: If they want to do it at
19 all --

20 MR. STONE: -- where the --

21 JUDGE JONES: If they want to do it
22 all, I think the better way is to look at one

1 where the hearing officer says, there's no
2 probable cause here, but the commander goes
3 ahead. Then you have a trial record and you have
4 the report of the reviewing officer. I'm not
5 suggesting we need to recommend that, but I
6 wouldn't recommend looking into what the
7 commanders --

8 MR. STONE: Okay.

9 JUDGE JONES: -- involving the
10 commander.

11 MR. STONE: Okay. That's why I was
12 looking for other language. You want to say, the
13 trial record? Because it says -- I don't want to
14 just count numbers, I want to recommend something
15 else, data and the trial record, where the
16 recommendations are followed or not followed.

17 JUDGE JONES: Well, I don't know. I
18 don't know whether we should -- I would recommend
19 they do that. I mean, I'm not opposed to that,
20 if they want to do any kind of analysis though, I
21 think they may want to decide for themselves.

22 CHAIR HOLTZMAN: Okay. I would make,

1 if we wanted to go there at all --

2 JUDGE JONES: Right.

3 CHAIR HOLTZMAN: -- I would make the
4 following suggestion, which is, after the word
5 determine, so it says, the review should evaluate
6 data on how often recommendations of preliminary
7 hearing officers regarding case dispositions are
8 followed by convening authorities and determine,
9 not just determine whether further analysis of or
10 changes to the process are required.

11 JUDGE JONES: I think that works.

12 CHAIR HOLTZMAN: Does that solve the
13 problem or is that an exercise in futility? Mr.
14 Taylor, you have any views on this?

15 PROF. TAYLOR: Well, that certainly
16 satisfies my concern.

17 VADM TRACEY: Same here.

18 CHAIR HOLTZMAN: Does that satisfy you,
19 Mr. Stone?

20 MR. STONE: I can live with that
21 language, but I would still like to have some
22 language that says, taking into account that

1 acquittals involve the much higher standard of
2 proof, i.e., beyond a reasonable doubt.

3 CHAIR HOLTZMAN: Okay. Let's break
4 that into two points and then vote on both of
5 them so we get results. So, we take my language
6 first.

7 MS. SAUNDERS: Okay.

8 CHAIR HOLTZMAN: So, you'd add --

9 MS. SAUNDERS: Determine whether --

10 CHAIR HOLTZMAN: -- further analysis --

11 MS. SAUNDERS: Of or changes to --

12 CHAIR HOLTZMAN: To, yes.

13 MS. SAUNDERS: -- the process?

14 CHAIR HOLTZMAN: Right. Anyone -- all
15 in favor, say aye.

16 (Chorus of aye.)

17 CHAIR HOLTZMAN: Opposed?

18 (No audible response.)

19 CHAIR HOLTZMAN: It's carried. Mr.
20 Stone, would you give us your language, please?

21 MR. STONE: Yes. At the very end of
22 the sentence, it would say, taking into account

1 that acquittals involve a much higher standard of
2 proof, i.e., beyond a reasonable doubt.

3 CHAIR HOLTZMAN: Okay. All in favor,
4 say aye?

5 MR. STONE: Aye.

6 VADM TRACEY: Aye.

7 CHAIR HOLTZMAN: Opposed?

8 JUDGE JONES: No.

9 CHAIR HOLTZMAN: No.

10 PROF. TAYLOR: No.

11 CHAIR HOLTZMAN: Noes have it. Okay.

12 Are we finished now? We're finished now with
13 Recommendation 1, right?

14 MS. FRIED: We are. With respect to
15 Admiral Tracey and Mr. Stone, do they plan -- are
16 they going to have a dissenting opinion or --

17 CHAIR HOLTZMAN: Why do we need --

18 MS. FRIED: -- comments on --

19 CHAIR HOLTZMAN: -- to know that now?

20 We're only on Recommendation 1.

21 MS. FRIED: Right, but they're

22 disagreeing or not agreeing to --

1 CHAIR HOLTZMAN: Whether they want to
2 write one, why do we have to know that after
3 every single recommendation? Do we need --

4 MS. FRIED: Just for the staff, if they
5 need to know that. So they can get --

6 CHAIR HOLTZMAN: Oh, I'm sorry. Yes,
7 sure, for the staff, yes, definitely.

8 VADM TRACEY: I don't.

9 MR. STONE: I don't think I can answer
10 that question until, again, we've got to the end
11 and I see what everything looks like --

12 MS. FRIED: That's fine.

13 VADM TRACEY: I agree.

14 MR. STONE: -- and I see whether taken
15 as a whole, that matters to me or not. Because
16 some of these concerns we may address in the
17 course of the other related recommendations, just
18 like we were talking a minute ago that the
19 standard relates to the other. So, I think --

20 CHAIR HOLTZMAN: Okay.

21 MR. STONE: -- all I can say is I
22 reserve that --

1 MS. FRIED: That's fine.

2 MR. STONE: -- question. And --

3 CHAIR HOLTZMAN: Okay.

4 MR. STONE: -- when I see what the
5 staff sends me as their recompiled version --

6 CHAIR HOLTZMAN: All right.

7 MR. STONE: -- in a week or two --

8 CHAIR HOLTZMAN: Let's --

9 MR. STONE: -- I'll be in a better
10 position --

11 CHAIR HOLTZMAN: Okay. Let's --

12 MR. STONE: -- to decide.

13 CHAIR HOLTZMAN: -- go to

14 Recommendation 2.

15 MS. SAUNDERS: Okay. Recommendation 2
16 reads --

17 CHAIR HOLTZMAN: So, we've supported
18 Recommendation 1 with the amendments, right?

19 MS. SAUNDERS: Have you -- I'm sorry,
20 I guess I should do some housekeeping. Have you
21 voted on the recommendation as a whole with the
22 amendments?

1 CHAIR HOLTZMAN: No, that's what I was
2 asking. Let's do that.

3 MS. SAUNDERS: Okay, let's do that.

4 CHAIR HOLTZMAN: Okay. All in favor of
5 Recommendation 1 as amended, say aye.

6 (Chorus of aye.)

7 CHAIR HOLTZMAN: Opposed?

8 (No audible response.)

9 CHAIR HOLTZMAN: Ayes have it, so
10 adopted. Recommendation 2?

11 MR. STONE: Now, that didn't include
12 the bullets, though --

13 CHAIR HOLTZMAN: No, definitely --

14 MR. STONE: -- that's just the
15 recommendation?

16 CHAIR HOLTZMAN: -- not the bullets.

17 MR. STONE: Got you, okay.

18 CHAIR HOLTZMAN: The bullets will be
19 circulated and --

20 MR. STONE: Okay. Right, got it.

21 CHAIR HOLTZMAN: Okay.

22 MS. SAUNDERS: Recommendation 2 reads:

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

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

19 CHAIR HOLTZMAN: Is there discussion of
20 this recommendation?

21 MR. STONE: Yes. Unless somebody else
22 wants to go first.

1 CHAIR HOLTZMAN: Mr. Stone, the floor

2 --

3 MR. STONE: Sure.

4 CHAIR HOLTZMAN: -- is yours.

5 MR. STONE: I guess, let's see, this is
6 going to -- this is the one that talks about the
7 U.S. Attorneys' Manual and some other standards.

8 CHAIR HOLTZMAN: That's in the bullets
9 though.

10 MR. STONE: Yes, I know.

11 CHAIR HOLTZMAN: Okay.

12 MR. STONE: But that's the relevant --

13 CHAIR HOLTZMAN: Right.

14 MR. STONE: -- part from the report.

15 And when you go to Page 10, I have at least two
16 comments from the report that inform this -- that
17 then will get to my comments. The first is that,
18 as I read the report -- let me see if I can find
19 this here -- it says that, and this would be on
20 Page 15 of the Subcommittee's report, it starts
21 by saying, Fiscal Year 2017 NDAA created a new
22 Article 33 under the UCMJ, which directs the

1 Secretary of Defense to issue non-binding
2 guidance to be considered --

3 CHAIR HOLTZMAN: What page are you on?
4 I'm sorry, but --

5 MS. SAUNDERS: It's actually Page 10.

6 MR. STONE: Page 15.

7 CHAIR HOLTZMAN: Oh, he's saying 15.

8 MS. SAUNDERS: On the -- in the report
9 that you have at Tab 3, it's --

10 CHAIR HOLTZMAN: It's on Page 10?

11 MS. SAUNDERS: -- on Page 10.

12 CHAIR HOLTZMAN: Okay, thank you.

13 MR. STONE: Well, I'm using the --

14 MS. SAUNDERS: Okay.

15 MR. STONE: -- one that we got before.

16 It starts, Item 2, legislation and the --

17 CHAIR HOLTZMAN: Right.

18 MR. STONE: -- U.S. Attorneys' Manual.

19 CHAIR HOLTZMAN: That's on Page 10 in
20 our --

21 MR. STONE: Okay. Well, I'm reading
22 from the one --

1 CHAIR HOLTZMAN: Yes, okay.

2 MR. STONE: Okay. Fiscal Year -- it
3 directs the Secretary of Defense to issue non-
4 binding guidance to be considered by convening
5 authorities and judge advocates when exercising
6 their duties with the respect to the disposition
7 of charges.

8 This gets exactly back to the point
9 that was made a few minutes ago when we did the
10 other one that this is a non-binding
11 recommendation and there's nothing in the first
12 sentence that says that and emphasize that it's
13 non-binding. And on its face, it appears to me
14 to be easily read as suggesting that it's a
15 binding recommendation. So, that's the first
16 issue that I have to address.

17 The second issue is the specific
18 language of -- it's the last four or five -- the
19 last two lines of that measure, the last three,
20 charges as brought by probable cause and there is
21 a reasonable likelihood of proving the elements
22 of each offense beyond a reasonable doubt. Okay.

1 Since the -- on viewing Article 33,
2 going back to, again, what you call Page 10, the
3 next sentence states that this guidance should
4 take into account the principles contained in the
5 official guidance of the Attorney General, blah,
6 blah, blah.

7 I think that it's pretty clear on the
8 very next page that the Air Force and, for that
9 matter, the Coast Guard and the Navy, already
10 have, and their standard is trial counsel should
11 not institute or permit the continued pendency of
12 criminal charges in the absence of admissible
13 evidence to support a conviction. That takes
14 that into account, it's language that three
15 Services are using, according to the
16 Subcommittee's report.

17 And I think that not only takes into
18 account the other guidance, I think it meets the
19 new Article 33 and it avoids us using terms like
20 reasonable likelihood and beyond a reasonable
21 doubt in the standard, both of which I think at
22 that early stage, at a minimum are confusing and

1 at a maximum don't belong there.

2 Now, there's a third problem with that
3 first sentence, I mean that language about the
4 standard. And this goes to the second paragraph
5 of the Subcommittee's report in Item 2, where
6 they quote from the U.S. Attorneys', United
7 States Attorneys' Manual.

8 In case some of you don't know, the
9 United States Attorneys' Manual is volumes and
10 volumes long. It is now not even reprinted
11 anymore, it's electronic. I know because, having
12 been an Assistant U.S. Attorney, I was supposed
13 to know it, but it was very hard to know what was
14 in this encyclopedic collection. And each of the
15 items in there are long, they're not short, and
16 they have a lot of stuff.

17 And I went back and looked, because I
18 used the U.S. Attorneys' Manual all the time when
19 I was a prosecutor at the Department of Justice,
20 and I see that under the paragraph that's being
21 quoted here, which is 9-27.200, and Chapter 9-27
22 goes on and on and on and on, there is a

1 subparagraph called 9-27.230(b)(8).

2 And (b)(8), after the items you just
3 said here, continues and I'll quote, despite a
4 negative assessment of the likelihood of a guilty
5 verdict -- and this would be based on facts,
6 excuse me, extraneous to an objective view of the
7 law and the facts, close parenthesis, the
8 prosecution may properly conclude that it is
9 necessary to and appropriate to commence or
10 recommend prosecution.

11 And it goes on to make the point that
12 no weight is assigned by -- it says, no weight is
13 assigned by this internal guideline to the
14 strength or weakness of a victim's demeanor.
15 That's my comment, because at 9-27.230(b)(8), it
16 says, it is appropriate for the prosecution to
17 take into account such matters as, quote, the
18 seriousness of the harm inflicted, unquote, and
19 also the victim's desire for prosecution.

20 So, the U.S. Attorneys' Manual goes
21 into issues which are not discussed here as the
22 standard for prosecution. They go beyond this

1 and, because I don't think I want to get into all
2 of that and since it's non-binding, for all of
3 those reasons, I would just try and use what the
4 Air Force has already decided is a stricter
5 standard and the Coast Guard and the Navy noted
6 informally to us that they're using the same
7 thing.

8 Trial counsel should not institute or
9 permit the continued pendency of criminal charges
10 in the absence of admissible evidence to support
11 a conviction. Now, going -- I don't know if
12 you're ready to hit the second paragraph yet, and
13 I'll wait --

14 CHAIR HOLTZMAN: Why don't --

15 MR. STONE: -- to do that if you're not
16 ready for that yet.

17 CHAIR HOLTZMAN: -- we do Paragraph 1?

18 MR. STONE: Okay.

19 CHAIR HOLTZMAN: Is there any -- I have
20 some thoughts, but I want to let other people
21 respond if they want.

22 MR. STONE: I might just add, just one

1 little footnote to that and that is, not only do
2 I like what the Air Force and the Navy and the
3 Coast Guard have done, but I haven't heard from
4 all the other Services, ourselves, their official
5 position on a change like that.

6 So, in the absence of the JPP asking
7 the Services to show up and give us their
8 official position as to whether they -- how they
9 would modify it, whether they would use it, if it
10 would create problems, that makes me more
11 willing, absent that, since I'm relying on stuff
12 that was done before without them coming in here,
13 that makes me more amenable to using a
14 formulation that three of the five are already
15 using --

16 CHAIR HOLTZMAN: Okay.

17 MR. STONE: -- that's stricter.

18 CHAIR HOLTZMAN: So, I have a
19 suggestion that could solve point one, which is
20 the use of the word require, since the language,
21 as you point out, of the Article 33 is
22 discretionary, not mandatory. What about using

1 the word include so we're not saying requires?

2 MR. STONE: I couldn't do that, because
3 that would just mean it could be more than this.

4 CHAIR HOLTZMAN: Well, what do you want
5 then?

6 MR. STONE: I told you, I want to use
7 the standard that the Air Force and the Navy --

8 CHAIR HOLTZMAN: I'm not going --

9 MR. STONE: -- and the Coast Guard are
10 using.

11 CHAIR HOLTZMAN: -- there, I'm just up
12 to the word require. I'm just changing the word
13 require, that's all I'm doing, to have the word
14 include, so that we're not mandating something
15 that actually Article 33 doesn't mandate. I
16 thought that was the point you were making.
17 That's all I'm doing, so that --

18 MS. SAUNDERS: I think the require as
19 intended to be what the guidance would say, but
20 that the guidance would also make it clear that
21 it was non-binding. That's a little confusing.

22 MR. STONE: I guess we could use the

1 word suggest, instead of require.

2 CHAIR HOLTZMAN: Well, what's wrong
3 with include?

4 MR. STONE: Because I think include
5 still carries the notion that it's mandatory and
6 that --

7 CHAIR HOLTZMAN: No, it doesn't. The
8 word include just means include the following
9 standard, it doesn't indicate whether the
10 standard is mandatory or discretionary.

11 JUDGE JONES: Just that it's not the
12 only one.

13 CHAIR HOLTZMAN: That it's not the only
14 one.

15 JUDGE JONES: Which is what I think the
16 more important point is here, that there are
17 still other considerations --

18 CHAIR HOLTZMAN: Right.

19 JUDGE JONES: -- in addition to --

20 CHAIR HOLTZMAN: Right.

21 JUDGE JONES: -- what we're saying
22 here. I mean, I like the Air Force language, but

1 basically it's a shorthand for what's being said
2 right here, which may give more guidance.

3 CHAIR HOLTZMAN: Right. Then, on the
4 second point, which is -- I also share the
5 concern about giving a specific prescription for
6 the standard, given that, one, the point you
7 made, Mr. Stone, that the U.S. Attorneys' Manual
8 has got a lot of different standards in it. And,
9 number two, we seem to have at least one, maybe
10 more, different standards in the Services.

11 So, I would require -- and maybe
12 something to the effect of, include a standard
13 for referral to court-martial, such as is
14 advocated by the -- that's too wordy, but such
15 as, maybe, which would give you some wiggle room
16 there, and then, quote the Air Force standard.

17 But I don't know if that solves the
18 problem for you. And I'm just thinking off the
19 top of my head. Barbara, do you have -- Judge
20 Jones, do you have a solution or do you think
21 we're okay with this? I mean --

22 MR. STONE: So, we even put, such as,

1 right after advocates, instead of required?

2 Because that would --

3 CHAIR HOLTZMAN: No.

4 MR. STONE: -- be good, such as the Air
5 Force standard?

6 CHAIR HOLTZMAN: Yes, right, that could
7 be something, sure. Include --

8 MR. STONE: That could do all of that.

9 VADM TRACEY: So, it would say --

10 CHAIR HOLTZMAN: So, it --

11 VADM TRACEY: -- disposition guidance
12 for convening authority and staff judge advocates
13 that include --

14 MR. STONE: No, I think it would just
15 say advocates, such as, the --

16 VADM TRACEY: Okay.

17 MR. STONE: -- Air Force standard, and
18 quote it if you want or --

19 VADM TRACEY: Okay.

20 MR. STONE: -- it in a bullet below.

21 JUDGE JONES: And take out the charges
22 are supported by probable cause and --

1 CHAIR HOLTZMAN: Right.

2 JUDGE JONES: -- in this draft?

3 MR. STONE: Right. That's all
4 basically repeated in that Air Force standard, I
5 mean, in slightly different words.

6 JUDGE JONES: I mean, I do think the
7 Air Force standard is a better way of saying all
8 this, it's shorthand. I'm not opposed to that as
9 a -- in writing advocacy, I suppose. I just
10 think this is a little more understandable. I
11 mean, if you take it element by element, it gives
12 more guidance --

13 CHAIR HOLTZMAN: All right, so this
14 one?

15 JUDGE JONES: -- as to what's meant,
16 what we have there already.

17 CHAIR HOLTZMAN: Okay. Well, I'm not
18 necessarily opposed to that, although I think it
19 may be too limiting. Well, the other way to do
20 it is to leave this present language and say,
21 include the following standard for consideration
22 before referral for court-martial or for

1 referral, so that you're considering the standard
2 as opposed to actually applying it. I don't know
3 if that works either, just throwing out ideas.

4 JUDGE JONES: What's the quick Air
5 Force line, again, Mr. Stone?

6 CHAIR HOLTZMAN: Do you have it --

7 JUDGE JONES: What's the quick Air
8 Force --

9 MR. STONE: The Air Force one?

10 VADM TRACEY: Trial counsel should not
11 institute or permit the continued pendency of
12 criminal charges in the absence of admissible
13 evidence to support a conviction.

14 MR. STONE: And three Services
15 apparently are using it now. After the Air Force
16 did it, the Navy and the Coast Guard liked it.

17 MS. SAUNDERS: I think I should clarify
18 that a bit. I think they use some version of
19 that, I don't think they -- they do not have any
20 kind of formalized --

21 MR. STONE: Right. Right, they said it
22 wasn't formal, but --

1 MS. SAUNDERS: Right.

2 MR. STONE: -- they were using in
3 effect the same thing.

4 MS. SAUNDERS: I think the Navy, I
5 think it was a commander who came and spoke to
6 the Subcommittee advocated for the reasonable
7 likelihood of -- I think I actually quote that in
8 here under Number 7, information presented to the
9 JPP and Subcommittee. Actually, I might even --

10 PROF. TAYLOR: Number 7 of what?

11 MS. SAUNDERS: -- have quoted it in
12 here.

13 PROF. TAYLOR: What page are we on?
14 Page 4?

15 MS. SAUNDERS: On Page 4 --

16 MR. STONE: Yes.

17 MS. SAUNDERS: -- of your outline. He
18 advocates a standard for referral of whether
19 there is probable cause and a reasonable
20 likelihood of success at trial. That was what
21 the Navy commander testified to before the
22 Subcommittee. He, again, explained that this was

1 not formalized in any kind of --

2 MR. STONE: Right.

3 MS. SAUNDERS: -- policy.

4 MR. STONE: Right.

5 MS. SAUNDERS: But this is what he
6 advocated and --

7 MR. STONE: Correct.

8 MS. SAUNDERS: -- what is often being
9 informally used.

10 JUDGE JONES: So, I think that's
11 shorter, again. But I don't think it's different
12 and it leaves out the notion that, by the way,
13 remember it has to be based on admissible
14 evidence.

15 MS. SAUNDERS: Right.

16 JUDGE JONES: So, I just think this
17 lays out everything and it may be not as elegant
18 or quick.

19 CHAIR HOLTZMAN: I don't object to it,
20 the present formulation. I agree with Mr.
21 Stone's point that we shouldn't be requiring
22 that's not otherwise required, but --

1 JUDGE JONES: And I like the idea that
2 we're only saying that it's something that should
3 be included and there are obviously other reasons
4 a commander will make a decision than just this.

5 MS. SAUNDERS: And I think part of the
6 Subcommittee's thought process on the
7 admissibility language, likely to be found
8 admissible at trial, on the bottom of Page 3, is
9 looking at the current standard in the Rule for
10 Court-Martial 601, it does say that the finding -
11 - this is the finding of the convening authority
12 as to whether to refer the case -- may be based
13 on hearsay in whole or part and the convening
14 authority or judge advocate may consider
15 information from any source.

16 So, I think they were looking at that
17 language to say, no, they should only be
18 considering information that would be admissible
19 or probably admissible at trial.

20 MR. STONE: Except that what the NDAA
21 said was to look at the U.S. Attorneys' Manual,
22 the Attorney General's guidance. And his

1 guidance, as I just read to you from 9-27.230,
2 specifically goes beyond an assessment of the
3 likelihood of a guilty verdict based on the
4 evidence and allows in an appropriate
5 circumstance or appropriate circumstances to go
6 beyond the strength or weakness and consider
7 matters, including the harm inflicted and the
8 victim's desire for prosecution. So, to the
9 extent they went beyond that, it seems to me we
10 have to be careful about going back. I'm --

11 CHAIR HOLTZMAN: Right.

12 MR. STONE: -- trying to avoid all of
13 that by just using what the Air Force does and
14 not getting into that.

15 CHAIR HOLTZMAN: Right.

16 JUDGE JONES: But I think, I don't
17 think -- I don't know why include doesn't do it.
18 Everything you just mentioned is fine, all we're
19 saying is that --

20 MR. STONE: Okay. So, you want to --

21 JUDGE JONES: -- we want to add this --

22 MR. STONE: You want to just say --

1 JUDGE JONES: -- I think.

2 MR. STONE: -- advocate includes the
3 following standard or includes such as?

4 CHAIR HOLTZMAN: I don't think it would
5 be such as. I would --

6 JUDGE JONES: I wouldn't say, such as,
7 no.

8 CHAIR HOLTZMAN: No.

9 MR. STONE: Where do you want to put
10 the Air Force standard? What language --

11 VADM TRACEY: Could we say, this
12 disposition guidance for convening authorities
13 and staff judge advocates should include or
14 include, recommends that it include consideration
15 of whether charges are supported by probable
16 cause, blah, blah, blah.

17 CHAIR HOLTZMAN: Well, he --

18 MR. STONE: Well, can I --

19 CHAIR HOLTZMAN: What I was going to
20 suggest, Admiral Tracey, is exactly along those
21 lines, which is, instead of require, you put
22 include, and then you say, the following standard

1 to be considered before referral to court-
2 martial. It doesn't say, only standard. So,
3 that's another way of doing it, so we just add
4 those four words and replace require with
5 include. I don't know whether that satisfies or
6 not.

7 MR. STONE: Includes the following
8 standard to be considered for referral to court-
9 martial. Okay, I'm fine with that. And now, we
10 get to whether we're just going to put in the Air
11 Force's words or we're going to put in these
12 words.

13 CHAIR HOLTZMAN: Yes. Okay.

14 MR. STONE: Which talk about, beyond a
15 reasonable doubt, which it seems to me is the
16 first time that anybody's inserting reasonable
17 doubt before they got to trial.

18 CHAIR HOLTZMAN: Judge Jones, did you
19 --

20 JUDGE JONES: Well, I mean, that's the
21 long way of saying, likelihood of success at
22 trial.

1 CHAIR HOLTZMAN: Right.

2 JUDGE JONES: If you don't have
3 evidence beyond a reasonable doubt, you're not
4 going to get a conviction. And that would be the
5 beginning of that analysis in any event. I mean,
6 I -- look, again, I think the Air Force, whether
7 that's actually what they use or not --

8 (Laughter.)

9 JUDGE JONES: -- lingo is great and I
10 get the idea. But I think this is the more
11 careful approach if people are trying to read
12 this for guidance.

13 CHAIR HOLTZMAN: Any other comment?
14 Mr. Taylor, where are you on this? What do you
15 think?

16 PROF. TAYLOR: Well, to me, it's two
17 separate issues. One is, what is the standard?
18 The standard is going to be whatever the
19 measuring stick is. And then, you've got all
20 these other factors --

21 JUDGE JONES: Right.

22 CHAIR HOLTZMAN: Right.

1 PROF. TAYLOR: -- to which Mr. Stone
2 and the Attorney General's guidance refer and
3 which are really part of the jurisprudence right
4 now.

5 CHAIR HOLTZMAN: Correct.

6 PROF. TAYLOR: All of the things that
7 he mentioned are part of the jurisprudence right
8 now. So, frankly, I was okay with it the way it
9 was, but I have no objection to changing require
10 to include, except that I think what we're trying
11 to do is actually establish a standard instead of
12 saying, this is one standard of many standards
13 that one might consider. So, that's kind of
14 where I am.

15 CHAIR HOLTZMAN: So, you don't like
16 include?

17 PROF. TAYLOR: Well, I don't know what
18 include really means. Is that one of many
19 standards that we're talking about?

20 JUDGE JONES: How you're saying
21 standard as opposed to --

22 PROF. TAYLOR: Standard for --

1 JUDGE JONES: -- factors?

2 PROF. TAYLOR: Yes. I'm distinguishing
3 between standard for referral, on the one hand,
4 that's this is the mark you've got to meet,
5 probable cause plus, versus disposition guidance,
6 which could include all the factors in the
7 Attorney General's Manual that Mr. Stone referred
8 to.

9 So, it would seem to me in my
10 simplistic way of thinking that the standard was
11 okay as stated and all the rest is under the
12 rubric of disposition guidance. These are all
13 the factors that go into making the determination
14 --

15 JUDGE JONES: The ultimate decision.

16 PROF. TAYLOR: -- using this standard.
17 This is the measuring stick.

18 CHAIR HOLTZMAN: So, what would you
19 want to change? Nothing?

20 PROF. TAYLOR: I liked his first
21 comment about changing, adding the word non-
22 binding disposition guidance. I thought that was

1 good. I --

2 CHAIR HOLTZMAN: Oh, okay.

3 PROF. TAYLOR: -- would put that
4 probably in the second sentence. Case not --
5 somewhere, non-binding case disposition guidance,
6 because I think that's a good reminder --

7 CHAIR HOLTZMAN: Okay.

8 PROF. TAYLOR: -- that this is what it
9 is. And beyond that, I thought that the
10 Subcommittee did a good job of laying out a
11 marker for what the standard was.

12 CHAIR HOLTZMAN: Okay.

13 PROF. TAYLOR: And I do agree with
14 Judge Jones that it's very similar to, but not
15 exactly the same as, the Air Force standard.

16 CHAIR HOLTZMAN: Okay. How do you feel
17 about that, Mr. Stone?

18 MR. STONE: I'm fine with the first
19 comment, before we get to the standard, that he
20 puts in non-binding --

21 CHAIR HOLTZMAN: Yes.

22 MR. STONE: -- case disposition

1 guidance --

2 CHAIR HOLTZMAN: Right.

3 MR. STONE: -- because I never heard
4 from the various Services about what they think
5 of this standard and because I think the way it
6 reads, it is not consistent with the Attorney
7 General's Manual, because this says, likelihood
8 of proving beyond a reasonable doubt.

9 I don't think you can always tell that
10 you're going to have evidence beyond a reasonable
11 doubt. Before you step into the courtroom, you
12 don't know for sure. I think those are the wrong
13 words in there.

14 I mean, if you struck those, maybe a
15 reasonable likelihood of proving the elements of
16 each offense using only evidence likely to be
17 found admissible at trial, maybe that would do
18 it, but I think adding, beyond a reasonable
19 doubt, completely changes it and separates it
20 from anything anybody has seen before.

21 And I don't think it's in the U.S.
22 Attorneys' Manual and those are words are not in

1 the ABA standard. So, to avoid -- I mean, you
2 can strike those four words or you can just use
3 the Air Force standard, if you think that
4 actually, by innuendo, includes it. Either way,
5 I'm fine, I just can't see injecting, beyond a
6 reasonable doubt, into a standard before you've
7 stepped into a courtroom.

8 MS. SAUNDERS: The U.S. Attorneys'
9 Manual uses the words, will probably be
10 sufficient to obtain and sustain a conviction.

11 MR. STONE: Yes, that's much lower
12 standard.

13 PROF. TAYLOR: But just as a point of
14 clarification, the ABA standard does use the word
15 reasonable doubt.

16 MR. STONE: Yes.

17 PROF. TAYLOR: Yes.

18 MR. STONE: No, I mean, some of those
19 do, but what they're directed to look at is the
20 AG's guidelines and the U.S. Attorneys' Manual.
21 And I'm telling you that none of us here have
22 begun to discuss that in the depth, there's

1 probably 30 pages on this in 9-27, because it
2 goes from 9-27.00 all the way up. It's a very
3 long, complicated provision. And they don't just
4 do it on the elements of each offense, there's a
5 million other considerations that go in.

6 MS. SAUNDERS: Right.

7 MR. STONE: So, I'm trying to --

8 MS. SAUNDERS: Those would be --

9 MR. STONE: -- avoid focusing --

10 MS. SAUNDERS: -- the guideline factors

11 --

12 MR. STONE: -- on one, is what I'm
13 trying to do, because I don't think that's what
14 it does.

15 MS. SAUNDERS: But, Mr. Stone, those
16 may be the guideline factors, as Mr. Taylor
17 suggested earlier, that would be more in
18 Paragraph 2, are some of those other
19 considerations in the U.S. Attorneys' Manual,
20 such as the victim's wishes and things like that.

21 MR. STONE: Well, my proposal is we put
22 in the Air Force standard there or we just delete

1 the words, beyond a reasonable doubt. And I
2 could accept either one of those and --

3 CHAIR HOLTZMAN: All right.

4 MR. STONE: -- I guess --

5 CHAIR HOLTZMAN: Admiral Tracey --

6 MR. STONE: -- if we want to take a
7 vote on one or both --

8 CHAIR HOLTZMAN: We will.

9 MR. STONE: -- I'll take whichever one
10 people like.

11 CHAIR HOLTZMAN: Admiral Tracey, do you
12 want to be heard on this?

13 VADM TRACEY: I could go with striking
14 the, beyond a reasonable doubt, adopting the
15 language that's quoted from the Attorneys'
16 Manual, or adopting the Air Force's.

17 CHAIR HOLTZMAN: Okay. Well, let's
18 start, let's break this down into two parts.
19 Number one, I want to withdraw what I had
20 suggested before about changing required to
21 include and I will accept Mr. Taylor's analysis.
22 And I'd like to have a vote on his language about

1 non-binding. Is anyone opposed to that?

2 (Chorus of no.)

3 CHAIR HOLTZMAN: Okay. So, that's
4 carried.

5 MR. STONE: Non-binding case
6 disposition guidance?

7 CHAIR HOLTZMAN: Correct.

8 MR. STONE: Okay.

9 CHAIR HOLTZMAN: And then, the question
10 is whether we alter the standard as Mr. Stone has
11 proposed that's set forth here. So, the standard
12 would either be striking reasonable doubt or
13 using the Air Force language. So --

14 JUDGE JONES: I'm for the language as
15 it is.

16 CHAIR HOLTZMAN: Okay. So, I'm going
17 to propose that. I'm going to propose --

18 JUDGE JONES: Oh, I'm sorry.

19 (Laughter.)

20 CHAIR HOLTZMAN: That's the next vote.
21 You got ahead of me.

22 JUDGE JONES: Rarely.

1 (Laughter.)

2 CHAIR HOLTZMAN: No, no, no, I'm
3 catching up to you. So, the first vote is going
4 to be, do we want Mr. Stone's proposal, and then
5 we'd have to go into which one of those two
6 elements we'd prefer, as opposed to leaving the
7 language as it is. So, those in favor of Mr.
8 Stone's proposal, which we would still have to
9 vote on the elements of, say aye.

10 MR. STONE: Aye.

11 VADM TRACEY: Aye.

12 CHAIR HOLTZMAN: Opposed?

13 PROF. TAYLOR: No.

14 CHAIR HOLTZMAN: No.

15 JUDGE JONES: No.

16 PROF. TAYLOR: Good.

17 CHAIR HOLTZMAN: Noes have it, okay.

18 So --

19 VADM TRACEY: Let me just -- this is --

20 CHAIR HOLTZMAN: Go ahead.

21 VADM TRACEY: -- language which will
22 now be used in forming the decision making of

1 SJs and convening authorities and we've insisted
2 throughout this process that convening
3 authorities are not experienced in judicial
4 practice and now we've stuck this language about
5 a very high standard, beyond a reasonable doubt,
6 into the decision making process they're going to
7 make based on Article 32 products that don't
8 actually address that issue.

9 So, I'm not sure how this language is
10 going to help court-martial convening
11 authorities, whether it's going to drive them to
12 take fewer cases to court, because Article 32
13 can't answer the question of whether you can
14 prove beyond a reasonable doubt.

15 CHAIR HOLTZMAN: Judge Jones, you want
16 to respond to that?

17 JUDGE JONES: Yes. That's a whole
18 different thought. I don't know.

19 MS. SAUNDERS: What --

20 JUDGE JONES: Well, I mean, you do --
21 look, you either do have the proof or you don't,
22 when it's being analyzed by the JAG and the

1 commander, by his lawyer. And if you don't have
2 enough, then you don't send it forward. So, it's
3 not like they --

4 VADM TRACEY: But the other
5 formulations --

6 JUDGE JONES: -- there is a record that
7 they look at.

8 VADM TRACEY: The other formulations
9 sort of get at that, right? Whether they're
10 achievable and sustainable convictions, whether
11 they are -- whether admissible evidence will
12 support a conviction. By implication to the
13 lawyer in that mix, there's a reasonable doubt
14 standard. So, the SJA, the legal advisor to the
15 commander is applying that standard unspoken.

16 If you stick these words in there, are
17 you going to put the general court-martial
18 convening authority, a line officer, into now
19 some calculus about -- this is a deliberate, very
20 deliberate call-out of that standard for me.

21 JUDGE JONES: I just -- Admiral, I know
22 -- I wouldn't even pretend to know as much about

1 what actually happens between the commander and
2 the advice given by his or her lawyer, but beyond
3 a reasonable doubt is so embedded, I would think
4 that certainly the lawyer would discuss it and
5 explain if they thought the admissible evidence
6 wasn't going to pass that standard.

7 So, but I -- maybe in individual
8 instances or maybe they don't go into that kind
9 of detail, but to me, in a criminal case,
10 everybody knows you have to have evidence beyond
11 a reasonable doubt.

12 I think you're worried that, because
13 we're having the word in there now, you're
14 worried it's going to send a signal that they're
15 not already considering whether they have
16 reasonable doubt or not, and maybe it is, because
17 we do want them to consider whether or not
18 there's reasonable doubt.

19 VADM TRACEY: But I think these other
20 formulations --

21 JUDGE JONES: They can get beyond
22 reasonable doubt.

1 VADM TRACEY: I think these other
2 formulations speak well to the common man, not
3 the lawyer, and that's who is actually making
4 this decision in the end, is the common man. And
5 I just -- I'm not sure why you need the, beyond a
6 reasonable doubt, language in guidance that is
7 going to be considered by the court-martial
8 convening authority.

9 JUDGE JONES: Well, if you don't have
10 it in, then it's not really the standard for
11 proof.

12 MR. STONE: I'd just like to add that

13 --

14 JUDGE JONES: The guts of the standard
15 here is reasonable doubt --

16 MR. STONE: I couldn't help noticing --

17 JUDGE JONES: -- beyond a reasonable
18 doubt.

19 MR. STONE: -- in yesterday's
20 Washington Post on Page 3, the article about the
21 Flint water crisis, and they were quoting the
22 fact that they've indicted some people, because

1 there is probable cause to believe that they
2 intentionally did some things that were really
3 improper.

4 And, I mean, that is -- they have the
5 discretion, it's probable cause, and I certainly
6 doubt that, until they get people on the stand,
7 they're going to have beyond a reasonable doubt
8 proof.

9 They may want to think it's more
10 probable than not, they may want to -- they may
11 take a guess, but is it a reasonable likelihood
12 of proving the elements? Well, not beyond a
13 reasonable doubt standard, maybe by a
14 preponderance of the evidence and they have to
15 see how it plays out.

16 But the article emphasized what we all
17 hear, that at that stage, they had probable
18 cause. And this goes back to that U.S.
19 Attorneys' Manual thing I quoted, when the
20 offense is so serious and they think that offense
21 affected the health of 100,000 people, you
22 sometimes have to go forward. And --

1 CHAIR HOLTZMAN: Right. And that's --

2 MR. STONE: -- that's why I --

3 CHAIR HOLTZMAN: But that seems to me
4 is exactly the point about this, which is, the
5 commander may reject the need for following this
6 standard, but the commander should have that
7 standard in mind. That's really the point here.

8 And I think one of the things that was
9 concerning to the Subcommittee was the thought
10 that we didn't have to bother about this whole
11 issue of likelihood of conviction and we didn't
12 have to think about that.

13 This doesn't determine the outcome, it
14 just says, this is a standard that has to be
15 considered. So, I don't think that -- and I
16 think by saying non-binding at the top, it makes
17 it clear that this is still a recommended
18 guidance.

19 But I think that the guidance is still
20 important, because maybe the commander wasn't
21 thinking about, hey, yes, I mean, any chance of
22 getting beyond a reasonable doubt? No, I don't

1 think so. Well, hmm, do I still want to bring
2 this, can I still bring this? And maybe that
3 informs the conversation with the SJA.

4 MR. STONE: I think that --

5 CHAIR HOLTZMAN: But I don't see any
6 problem with making the commander aware that this
7 is a standard out there.

8 MR. STONE: I think I need to make one
9 statement for the record here, that focuses on
10 these sexual assault cases. I think this
11 standard would have a devastating impact on the
12 commanding authorities and the convening
13 authorities, and let me tell you why.

14 Using the narrow focus that we have of
15 sexual assault cases, the vast majority are going
16 to be credibility tests between two people who
17 knew each other and were alone together about
18 whether there was consent or whether there was
19 absolutely no consent when the assault happened.

20 And there's going to be very little
21 corroborating evidence at that time. Sure, you
22 might have whether they texted in the past,

1 whether they were married in the past, or
2 whatever, but as to that event, what you really
3 have is simply the demeanor of your victim versus
4 the demeanor on the stand of the defendant.

5 I don't know what likelihood of
6 proving beyond a reasonable doubt is going to
7 mean in that circumstance. I think you can't say
8 likelihood beyond a reasonable doubt as to
9 demeanor evidence and take any of these cases
10 forward, because it's never likely until you see
11 them on the stand.

12 That's a very high standard for a
13 credibility test between two people, one who
14 says, yes, it happened, and the other who says,
15 no, it didn't. And I think you're going to
16 plunge the commanders into a terrible problem if
17 you put that standard in in what is essentially
18 just competing credibility tests, in a very large
19 number of cases.

20 So, I think for the cases we are
21 focused on, it is an especially problematic use
22 of those four words. And we did not elicit

1 testimony before us, the JPP, from the official
2 representatives of all the Military Services we
3 seek to bind and I think that is a very
4 legitimate and difficult question and, therefore,
5 I wouldn't want to suggest to anybody that the
6 UCMJ guidance should start there.

7 Somebody else wants to take it there,
8 we're out of business, they can take it there.
9 But I don't think we need those words. That's
10 part of the reason I went back to the Air Force
11 standard.

12 I was trying to look for a standard
13 that's already in use and that we didn't hear any
14 complaints about in these strict credibility
15 tests, he said/she said. That's what most of
16 these cases are.

17 I would have trouble, I don't know how
18 I would say I have a reasonable likelihood of
19 beyond a reasonable doubt. I'm just evaluating
20 their credibility. So, for this narrow category,
21 I think it's especially problematic and that's --
22 for the commanding authority, the convening

1 authority, as was pointed out here by the
2 Admiral.

3 CHAIR HOLTZMAN: Well, I think we voted
4 on it. We could have another vote on it, I don't
5 -- we already voted on this, but we can --
6 anybody want to change their vote? Okay. So,
7 nobody wants to change their vote and we've
8 already voted on this and Mr. Stone's proposal
9 was not carried. Okay, Recommendation 3.

10 MR. STONE: No, we're on the second
11 paragraph --

12 CHAIR HOLTZMAN: Oh, I'm sorry.

13 MR. STONE: -- of Recommendation 2.

14 CHAIR HOLTZMAN: Forgive me. Okay.

15 Mr. Stone, do you have --

16 MR. STONE: Yes.

17 CHAIR HOLTZMAN: Okay.

18 MR. STONE: I think that the first
19 sentence, which says, recommends judge advocate
20 and convening authority consider all the
21 prescribed guideline factors, though they should
22 retain discretion, is fine. I think that's right

1 on.

2 I think, though, that the last
3 sentence contradicts the first sentence. The
4 factors should be considered in their totality
5 with no single factor determining the outcome.
6 First of all, it's confusing to me, I don't know
7 what that means, unless it means, no single
8 factor can tip the balance. And when you go to -
9 - that would be inconsistent with the report.

10 And, again, I'm going back to the one
11 that was distributed to us that listed the
12 factors on Page 8. I'm not sure where, in the
13 Tab where it is. But, like, one of the factors
14 was, existence of jurisdictional views used in
15 the offense, that's Factor C. Factor E was,
16 willingness of the victim or others to testify.

17 Factor H was, the availability and
18 likelihood of prosecution of the same or similar
19 and related charges against the accused by
20 another jurisdiction. I think any one of those
21 could be a single determining factor and a proper
22 one.

1 So, I, therefore, think that that last
2 sentence is much too broad and it conflicts with
3 the prior sentence about them having discretion.
4 And I don't think it adds anything, because we've
5 got, consider all the prescribed guideline
6 factors. So, I would -- my proposal is just
7 delete that last sentence.

8 CHAIR HOLTZMAN: Is there anyone who
9 wants to be heard on the other side?

10 JUDGE JONES: No.

11 CHAIR HOLTZMAN: Okay. Let's take a
12 vote. Those in favor of Mr. Stone's proposal
13 about deleting the last sentence on Paragraph 2
14 of Recommendation 2, say aye.

15 (Chorus of aye.)

16 CHAIR HOLTZMAN: Opposed?

17 (No audible response.)

18 CHAIR HOLTZMAN: Carried, Mr. Stone.
19 Okay. I think we're going to take, how about a
20 ten minute break? Okay, thank you.

21 (Whereupon, the above-entitled matter
22 went off the record at 10:51 a.m. and resumed at

1 11:05 a.m.)

2 CHAIR HOLTZMAN: We're up to
3 Recommendation 3.

4 MS. SAUNDERS: Recommendation 3 reads:
5 the JPP Subcommittee recommends that after case
6 disposition guidance under Article 33 UCMJ is
7 promulgated, the DAC-IPAD conduct both military
8 installation site visits and further research to
9 determine whether convening authorities and staff
10 judge advocates are making effective use of this
11 guidance in deciding case dispositions.

12 They should also determine what
13 effect, if any, this guidance has had on the
14 number of sexual assault cases being referred to
15 courts-martial and on the acquittal rate in such
16 cases.

17 CHAIR HOLTZMAN: Is there any
18 discussion on this?

19 VADM TRACEY: My only comment is the
20 same as the first one, the Secretary of Defense -
21 -

22 PROF. TAYLOR: Yes.

1 CHAIR HOLTZMAN: Okay.

2 VADM TRACEY: -- we want to the
3 Secretary of Defense to do that and the DAC-IPAD
4 -- whatever the formulation is we're doing on the
5 first one.

6 CHAIR HOLTZMAN: Any objection to that?

7 JUDGE JONES: I didn't hear it, I'm
8 sorry.

9 CHAIR HOLTZMAN: Oh, Admiral Tracey?

10 VADM TRACEY: So, my recommendation is
11 that these are actions that we want to take place
12 whether the Secretary agrees that the DAC-IPAD do
13 them or not. And so, we had, I think you weren't
14 here yet, but while we were working on the first
15 recommendation, we suggested that we come up with
16 a formulation that recommends the Secretary do
17 this and that the DAC-IPAD might be an
18 appropriate plus to do it, but structured in a
19 way that the DAC-IPAD would take it on.

20 JUDGE JONES: And so, we want to make
21 that same change here?

22 VADM TRACEY: I agree, yes.

1 JUDGE JONES: I do remember that.

2 Okay, thank you.

3 CHAIR HOLTZMAN: Is there any objection
4 to that change?

5 (No audible response.)

6 CHAIR HOLTZMAN: Okay. So, that
7 carries. I guess you'll send us the final
8 language, staff?

9 MS. PETERS: Yes, ma'am.

10 CHAIR HOLTZMAN: Thank you. Any other
11 --

12 MR. STONE: Yes.

13 CHAIR HOLTZMAN: -- points? Yes, Mr.
14 Stone?

15 MR. STONE: Going back to the comment
16 made by Judge Jones, how are they going to do
17 research on whether convening authorities are
18 making effective use of the guidance since they
19 don't write opinions? Does this get back into
20 what Mr. Taylor was saying?

21 I mean, in other words, it seems a
22 little odd if we think that they don't have to

1 make a listing and then, we say in the last line,
2 has had on the number of sexual assault cases
3 being referred to courts-martial and on the
4 acquittal rate

5 Again, I'd stop before, and on the
6 acquittal rate in such cases, but I didn't quite
7 understand, I mean, research that, that was the
8 question that I had as to Recommendation 1 and I
9 gave up on that, because I didn't know, I didn't
10 have a good answer for how they were going to
11 decide if they're making effective use of the
12 guidance in deciding case disposition. So, maybe
13 somebody can tell me how you propose it before
14 convening?

15 CHAIR HOLTZMAN: Madam Chair of the
16 Subcommittee, want to respond?

17 JUDGE JONES: I better respond, let me
18 just see this. I mean, it does suggest that you
19 would go and talk to people, the same way the
20 Subcommittee did. I'm sure -- I'm not quite sure
21 I understand your question. Whether convening
22 authorities and staff judge advocates are making

1 effective use of this guidance, I guess they'll
2 get opinions from the participants in the system
3 at the site visits.

4 CHAIR HOLTZMAN: Isn't --

5 JUDGE JONES: I'm not quite --

6 CHAIR HOLTZMAN: Isn't the --

7 JUDGE JONES: Go ahead, I'm sorry.

8 CHAIR HOLTZMAN: Isn't basically what
9 this is saying is, instead -- I mean, maybe the
10 language isn't the most elegant, but aren't they
11 basically saying, what kind of use are they
12 making of this guidance? Isn't that really what
13 they're looking for, what this recommendation is
14 looking for, is what kind of use of this guidance
15 -- how is this guidance being used in practice?

16 JUDGE JONES: Well, that's how I read
17 it. I didn't --

18 CHAIR HOLTZMAN: I mean, that's how it
19 seems to me, so I don't know that there's any
20 objection. I mean, I guess it could be an
21 objection and it shouldn't be done at all, but I
22 think that's how I read it. But maybe I'm not

1 reading it correctly.

2 PROF. TAYLOR: Well, when I saw it, I
3 took it to mean that if you clarify the standard
4 and you provide new disposition guidelines, then
5 you'll be looking to what actually happens in the
6 courtroom.

7 CHAIR HOLTZMAN: Correct.

8 PROF. TAYLOR: Are more cases actually
9 going to trial or fewer case? And if so, with
10 what results? And you'd probably talk to the
11 trial counsel and defense counsel about how they
12 believe this has changed the system one way or
13 the other, for better or for worse.

14 It would be that kind of review to
15 follow up to see what happened, what was the
16 actual impact of the change in the guidance? Can
17 we measure it in some way? We figured out that
18 there are ways, well, thanks to Ms. Peters, we
19 figured out that there are ways to measure
20 exactly how these decisions might be interpreted.
21 So, I took it to be just that, Mr. Stone.

22 MR. STONE: But the Subcommittee hasn't

1 measured. They did 280-some interviews out of
2 1.3 million people in the military and they took
3 them anonymously and they didn't even suggest
4 that it's statistically significant.

5 So, how would you -- if you want it to
6 be statistically significant, I don't know how
7 you would do this. I mean, we can recommend it,
8 but it sounds, frankly, I guess people would say,
9 it sounds very fuzzy to me. I mean, I know where
10 you want to go, but is it evidence, I mean, I
11 don't know that that's going to show --

12 JUDGE JONES: Well, I mean, they may be
13 more -- have better ideas about how to do this.
14 They may decide that there's some way to do
15 sampling that would better represent what the
16 effects are. They may also just do an analysis
17 of all the cases and will have the time to do it,
18 post the guidance coming into effect as opposed
19 to pre. I don't know --

20 MR. STONE: Okay.

21 JUDGE JONES: -- but I think I'd leave
22 that up to them.

1 CHAIR HOLTZMAN: And, also, the
2 Secretary of Defense may decide, may have some
3 views about how it should be conducted too, so I
4 don't --

5 MR. STONE: Again, I --

6 CHAIR HOLTZMAN: -- this is not
7 prescribing any kind of format for the analysis,
8 it's just asking that it be undertaken. And
9 then, there could be people, such as yourself,
10 who will say, well, it's not statistically
11 significant, or, who cares, or whatever.

12 MR. STONE: Fine. I didn't have a
13 proposal on that, I just brought that to your
14 attention --

15 CHAIR HOLTZMAN: Okay.

16 MR. STONE: -- that it sounded like we
17 were in the same discussion we'd had before, but
18 we at least are as to the five words on the last
19 line that says, and on the acquittal rate,
20 because once you get to the acquittal rate,
21 you've got a different standard of proof and you
22 can't really go back.

1 I might add as an example from my
2 experience, when we had GAO audits to see whether
3 the Federal Witness Security Program was a good
4 program, and I was counsel to that program.

5 Initially, they came in and they said, well, are
6 you getting more convictions, because you're
7 providing protection to certain high-status and
8 difficult witnesses, crime witnesses, and are we
9 getting bang for the buck?

10 And we had to explain to them, we
11 can't go by convictions, because these guys are,
12 themselves, they're admitting they were criminals
13 and high up, but are we getting more
14 prosecutions? Yes. We didn't used to have
15 enough evidence to get us to trial and to a jury.

16 Does a jury want to believe them?
17 Maybe with their parking lot receipts and
18 restaurant receipts, we can corroborate where
19 they are when they said they were in certain
20 places, but we can't necessarily corroborate
21 their testimony that Mr. Big told me to kill
22 somebody and you want to get him and I'm

1 testifying against him.

2 So, we said, if you want to count --
3 make some analysis based on prosecution, sure,
4 but on convictions, that's misleading. We're
5 doing this to show that we can get cases to
6 trial.

7 I think the same thing is true here,
8 that's why, and on the acquittal rate, again,
9 that's proof beyond a reasonable doubt, that
10 involves a jury evaluation of whether the
11 demeanor of the witness, and I can tell you in a
12 lot of those cases, the people in the Witness
13 Security Program had a shaky demeanor, if only
14 because they knew there was a contract on them,
15 and I imagine people who've been sexually
16 assaulted have a shaky demeanor when they have to
17 get up there and recount again all the details of
18 something that was emotionally traumatic to them.

19 So, for those reasons, yes, I'm fine
20 with, has the number of sexual assault cases
21 being referenced to court-martial, they could
22 look at that, but, and on the acquittal rate,

1 that's mixing apples and oranges, so I would move
2 to just delete those words.

3 CHAIR HOLTZMAN: Okay. Let's take your
4 motion to delete the words, and on the acquittal
5 rate in such cases. Any discussion on that,
6 further discussion? Okay. All those in favor,
7 say aye.

8 MR. STONE: Aye.

9 CHAIR HOLTZMAN: Opposed?

10 (Chorus of no.)

11 CHAIR HOLTZMAN: The no's have it.

12 Okay. Are we ready to adopt Recommendation 3?

13 All in favor, say aye.

14 (Chorus of aye.)

15 CHAIR HOLTZMAN: Opposed?

16 MR. STONE: Opposed.

17 CHAIR HOLTZMAN: The ayes have it.

18 MR. STONE: I'm opposed, because --

19 CHAIR HOLTZMAN: Okay.

20 MR. STONE: -- of those five words.

21 CHAIR HOLTZMAN: The ayes have it and
22 the recommendation is agreed to. Recommendation

1 4?

2 MS. SAUNDERS: Recommendation 4 reads:
3 the JPP Subcommittee recommends that the DAC-IPAD
4 review whether Article 34 of the UCMJ and Rule
5 for Court-Martial 406 should be amended to remove
6 the requirement that the staff judge advocate's
7 pretrial advice to the convening authority,
8 except for exculpatory information contained in
9 that advice, be released to the defense upon
10 referral of charges to court-martial.

11 The DAC-IPAD should determine whether
12 any memo from trial counsel that is appended
13 should also be shielded from disclosure to the
14 defense. This review should consider whether
15 such a change would allow the staff judge
16 advocate to provide more fully developed, candid
17 written advice to the convening authority
18 regarding the strengths and weaknesses of the
19 charges, so that the convening authority can make
20 a better informed disposition decision.

21 CHAIR HOLTZMAN: Okay. Any discussion
22 of this recommendation?

1 VADM TRACEY: I'd make the same --

2 CHAIR HOLTZMAN: Yes.

3 VADM TRACEY: -- Secretary of Defense.

4 CHAIR HOLTZMAN: Anybody opposed to the
5 proposal of Admiral Tracey?

6 JUDGE JONES: No.

7 CHAIR HOLTZMAN: Okay. Without
8 objection, that's adopted. Is there any further
9 discussion of Recommendation 4?

10 MR. STONE: Yes. I'd like to --

11 CHAIR HOLTZMAN: Mr. Stone?

12 MR. STONE: -- point out that this, to
13 me, is the most -- the least well-vetted of the
14 recommendations that are in front of us. I don't
15 think we heard any real testimony from anybody
16 that doing that would, any memo would have to be
17 turned over, that it's chilling the candid
18 nature.

19 I mean, I understand that's a rational
20 inference, but even in the Subcommittee report,
21 it said, it may do this. I mean, they heard from
22 some people who worried about it. And in light

1 of that -- and then the fact that this is one
2 that I absolutely would have wanted the official
3 representative of each Service to come in and
4 tell me why they have it one way, whether it
5 would bother them to change it the other way,
6 whether we're affecting the stream of what
7 they're doing.

8 It seems to me -- I'm out of my depth
9 here, I don't think I have enough from the
10 Subcommittee, in the absence of formal opinions
11 from each Service, to see if they object or don't
12 object to make -- to give an intelligent vote.
13 And for that reason -- that's the main reason.
14 It may be rational, but I don't think I'd refer
15 that in the absence of knowing whether it's
16 making a difference.

17 And it talks about Article 34 of the
18 UCMJ and the Rule for Court-Martial 406 should be
19 amended, I don't think based on just sort of what
20 amounted to speculation, I read every one of
21 those interviews and it's people saying what they
22 think it might be, it's opinion evidence, it's

1 not scientific.

2 I can't recommend changing an Article
3 of the UCMJ and the Rule for Court-Martial
4 without at least having given the various
5 Services a chance to come in and tell me that
6 they are in favor of it, they're not in favor of
7 it, they have -- they don't care one way or the
8 other.

9 JUDGE JONES: Well, obviously, all
10 we're saying is review whether Article 34 and 406
11 should be amended. In terms of the Subcommittee,
12 I haven't recently reread those at all, but there
13 was some concern mentioned. I don't know how
14 much or I don't think it was a lot, in terms of
15 interviews.

16 But I think the most important thing
17 within the Subcommittee was the fact that it's so
18 divergent from civil practice. And I don't mean
19 civil practice, I mean civilian practice in
20 criminal cases. The commanding officer in this
21 instance is really the top charging official.

22 And within the structure of -- I don't

1 have to tell you, Mr. Stone, you don't release
2 internal memos of advice between people in the
3 Justice Department, all the way up to the top of
4 decision about bringing charges.

5 So, I think the concern was, one, that
6 most of the Subcommittee was familiar with that
7 and so, this seemed divergent and we all thought
8 it was a good idea to shield those kinds of
9 things.

10 So, that -- really for a good purpose,
11 which is that if you know it's just going to go
12 to the commander and not go to the defense, you
13 may even be more candid. That's the hope.
14 Anyway, that's what went behind it.

15 And I think the very fact that it
16 diverges so much from the civilian criminal
17 justice system makes it worth looking at. In
18 fact, that was the whole beginning of the RSP, we
19 were supposed to be comparing how the criminal
20 justice systems work in the military versus the
21 civilian system.

22 So, I'm not saying that everybody who

1 came in, there was this big groundswell of
2 objections or concern about this, but I think
3 it's a topic worth looking at and all we're
4 asking them to do is review it to see whether or
5 not it should be amended. They may not be
6 impressed and they may not accept it, but it is a
7 practice that's very divergent and it might have
8 a good impact if they were shielded.

9 CHAIR HOLTZMAN: Mr. Taylor, you want
10 to comment?

11 PROF. TAYLOR: Yes. I guess my view of
12 this pretty much echoes that of Judge Jones. I
13 just don't see -- if we think there might be a
14 problem somewhere that someone has identified for
15 us, it just seems to me a responsible thing for
16 us to do, not that it would be irresponsible to
17 follow your suggestion, Mr. Stone, to say, this
18 is a problem that's been highlighted, take a look
19 at it.

20 That's all we're saying. And it's
21 been a problem that's been highlighted and
22 there's a good rationale for taking a look at it,

1 so it seems to me that it's something that's
2 perfectly within the norms that they should take
3 a look at.

4 MR. STONE: I guess this is an
5 appropriate time for me to explain a little bit
6 more why this one struck me as odd and what steps
7 I took this past week to figure this out. Not
8 having heard really any -- not having really had
9 any data at all or any feedback from the
10 Services, and knowing this came to us from the
11 Subcommittee, I was referred to the CFR rules
12 that explain the interaction between
13 Subcommittees and Panels.

14 And one of the statements in those
15 regulations, which I'll read into the record, in
16 Volume 66.139, but it's actually in the Code of
17 Federal Regulations, says, quote, it is not
18 permissible for parent advisory committees simply
19 to rubberstamp the advice or recommendations of
20 their subcommittees, thereby depriving the public
21 of its opportunity to know about and participate
22 contemporaneously in an advisory committee's

1 deliberations.

2 And they cite one case in here and the
3 case is National Anti-Hunger Coalition versus
4 Executive Committee, with some page numbers. So,
5 I looked up the case and I'll just read you two
6 sentences from that case.

7 One sentence that I'd like to read
8 from is 557 F.Supp 524 to page 528 says, in
9 talking about subcommittees, staff would be
10 expected to perform exactly the sort of functions
11 performed by the task forces at issue, gathering
12 information, developing work plans, performing
13 studies, drafting reports, and even discussing
14 preliminary findings with agency employees.

15 But it goes -- on the same page, and
16 this is the key one, it says, before the
17 committee -- this is, in this case, the committee
18 is the FACA committee, the main committee -- can
19 produce final recommendations, it must gather
20 information, explore options with agencies to get
21 comments and reactions, and evaluate
22 alternatives.

1 Well, that leaves me thinking, at
2 least as to this one, that before I can vote on a
3 final recommendation, I would have needed to
4 gather information directly from the Military
5 Services, explore the options with them to get
6 their comments, which we ran out of time, and
7 their reactions, and evaluate alternatives, which
8 they may have offered. Now --

9 VADM TRACEY: Alternatives to
10 conducting a review?

11 MR. STONE: Excuse me?

12 VADM TRACEY: They would have
13 alternatives to conducting a review?

14 MR. STONE: They might have
15 alternatives to whether or not the whole thing,
16 in other words, whether they do two sections,
17 just like an FOIA review, there's some -- or a
18 classified information review --

19 VADM TRACEY: But we're not
20 recommending that.

21 MR. STONE: -- some paragraphs are --

22 VADM TRACEY: We're not recommending

1 that.

2 MR. STONE: -- classified and some are
3 unclassified.

4 VADM TRACEY: We're not recommending
5 that. We're recommending that someone review
6 whether this is a problem that should be
7 remedied.

8 MR. STONE: And I guess my answer to
9 that is, if I had heard anything from people I
10 could ask from the Services whether they object
11 to this or don't, and they might all have come in
12 and said, we don't object, I would feel
13 comfortable making a final recommendation. But
14 not having heard anything on that, except -- and
15 I looked at what was sent to me about some of the
16 anonymous comments, I feel at sea, I don't feel I
17 have a basis to go forward.

18 It's sort of like me recommending,
19 there could be lots of issues I could hypothesize
20 that I hope that the next committee will review,
21 but I don't feel like there's anything in front
22 of me that, as the main committee in a public

1 forum, I have to be able to weigh in on that. I
2 don't oppose it, but I also don't -- I feel at a
3 loss to know how I can vote for it.

4 So, that's my only comment that I just
5 wanted to lay it out, because this one I feel --
6 I mean, frankly, it comes out of left field to
7 me. I would have loved to hear more about it,
8 but we ran out of time.

9 MS. SAUNDERS: Can I -- one piece of
10 information that I should have included under
11 here, and I apologize for not including it, was
12 information you'd already discussed, which is
13 that we had counsel on site visits who, and
14 perhaps in front of the JPP as well, who talked
15 about, with the changes to the Article 32
16 process, they feel that the convening authority
17 is getting less information than he or she would
18 have otherwise gotten under the old process.

19 MR. STONE: I read those.

20 MS. SAUNDERS: Okay.

21 MR. STONE: I say --

22 MS. SAUNDERS: I'm just saying, I

1 didn't include --

2 MR. STONE: I'm not sure against this

3 --

4 MS. SAUNDERS: -- it in this.

5 MR. STONE: -- I might be --

6 MS. SAUNDERS: Okay.

7 MR. STONE: -- in favor of it. I think
8 it's logical, I just don't feel like we got to
9 it. And, therefore, in terms of making, what,
10 nine recommendations, I don't want one of my
11 recommendations to be something I didn't get to,
12 I think that that actually diminishes the value
13 of some of the others which we did get to.

14 CHAIR HOLTZMAN: Okay. Well --

15 MR. STONE: We just didn't get to it,
16 in my view.

17 CHAIR HOLTZMAN: Okay.

18 JUDGE JONES: Well, I just think that
19 because, one, the issue was identified to the
20 Subcommittee and, two, this is a procedural
21 recommendation rather than a substantive one and,
22 three, we can all recognize, with or without,

1 well, the Subcommittee identified it, but with or
2 without that, that this is an issue that is a
3 process treated differently in the military than
4 in the civilian criminal justice system. I think
5 that's enough for our FACA group to determine
6 that we would make this recommendation.

7 CHAIR HOLTZMAN: Okay. I think we're
8 ready to vote on this. All in favor of
9 Recommendation 4, say aye.

10 (Chorus of aye.)

11 CHAIR HOLTZMAN: Opposed?

12 MR. STONE: Abstain, one abstain.

13 CHAIR HOLTZMAN: Okay. The
14 recommendation is adopted. Recommendation 5?

15 MS. SAUNDERS: Recommendation 5 reads:
16 the JPP Subcommittee recommends that Congress
17 repealing provisions from the National Defense
18 Authorization Act for Fiscal Year 2014 and Fiscal
19 Year 2015, Sections 1744 and 541 respectively,
20 that require non-referral decisions in certain
21 sexual assault cases to be forwarded to a higher
22 general court-martial convening authority or to

1 the Service Secretary.

2 The perception of pressure on
3 convening authorities to refer sexual assault
4 cases to courts-martial created by these
5 provisions and the consequent negative effects on
6 the military justice system are more harmful than
7 the problems that such provisions were originally
8 intended to address.

9 CHAIR HOLTZMAN: If no one has
10 something to say, I'd like to say something about
11 this. I should have seen this language before,
12 but I'm not sure I agree with the very last part
13 of this, which is, more harmful than the problems
14 that such provisions were originally intended to
15 address.

16 I think the problems that these
17 provisions were originally intended to address
18 had to do with the perception that the military
19 was not taking sexual assault cases seriously.
20 And I think that perception caused tremendous
21 harm and I don't want to be in the position, a
22 little bit like your concern, Mr. Stone, I don't

1 want to be in the position of weighting the harms
2 here.

3 So, just some language that would just
4 suggest that this is -- I'd be happy to just say,
5 are harmful, that's fine, but not more harmful or
6 that much more harmful, I don't want to be in the
7 position of ranking the harms.

8 There's harm from pushing -- there was
9 tremendous harm from the perception and probably
10 the reality of pushing sexual assault matters
11 under the rug. We know that that -- society was
12 doing that for a long time. So, I don't like to
13 get into the business of ranking. I don't know
14 if you have language that --

15 MR. STONE: Do you want to just say,
16 after it says, created by these provisions, are
17 harmful, period?

18 MS. SAUNDERS: Period and then --

19 CHAIR HOLTZMAN: Yes.

20 MS. SAUNDERS: -- the rest --

21 CHAIR HOLTZMAN: Is harmful, yes,
22 because this says the perception --

1 MR. STONE: Yes, is harmful.

2 CHAIR HOLTZMAN: -- oh, and the
3 consequent negative, yes.

4 MR. STONE: Is --

5 CHAIR HOLTZMAN: Are harmful, period.

6 MS. SAUNDERS: Are harmful, period?

7 MR. STONE: Right, period.

8 MS. SAUNDERS: Okay.

9 CHAIR HOLTZMAN: Okay.

10 MR. STONE: Okay.

11 CHAIR HOLTZMAN: Is there any objection
12 to that?

13 JUDGE JONES: No, I agree completely.

14 CHAIR HOLTZMAN: Okay. Any
15 disagreement? Okay, that's --

16 VADM TRACEY: Not with that change.

17 CHAIR HOLTZMAN: Okay.

18 (Laughter.)

19 MR. STONE: You want your beginning --

20 CHAIR HOLTZMAN: All right.

21 MR. STONE: -- change again, too?

22 VADM TRACEY: No, this is to the

1 Congress.

2 CHAIR HOLTZMAN: Okay.

3 VADM TRACEY: And that is -- I have a
4 question. I mean, I think that the effect is
5 clearly the intent of Congress, it was what they
6 intended to do.

7 CHAIR HOLTZMAN: Right.

8 VADM TRACEY: And we're now saying,
9 repeal that, and I'm asking in my own mind
10 whether it -- was there a way to implement that
11 would have been less harmful? So, for instance,
12 I don't know that this would be fully effective,
13 but if you reviewed all cases in which the PHO's
14 recommendations were ignored, you'd review both
15 those that were referred to trial and those that
16 were not.

17 Is it because we've implemented in a
18 way that only looks at what the Congress
19 literally said, cases that didn't go to trial,
20 that we've then created this intense pressure on
21 convening authorities?

22 If the Department had implemented in

1 a way that was more focused on whether proper
2 justice was being applied, not just whether cases
3 were being tried, would you have mitigated some
4 of that effect? And we're leaping to repealing
5 NDAA provisions without having caused the
6 Department to look at whether they could have
7 implemented in a less pernicious way.

8 CHAIR HOLTZMAN: I mean, and still
9 could, is that --

10 JUDGE JONES: Yes.

11 CHAIR HOLTZMAN: -- your point?

12 JUDGE JONES: Yes.

13 MR. STONE: Yes.

14 CHAIR HOLTZMAN: You're not just
15 putting it in the past, you're saying --

16 JUDGE JONES: Yes.

17 MR. STONE: That we could --

18 CHAIR HOLTZMAN: -- could this be
19 implemented in a way that would not --

20 MR. STONE: Right. To review the --

21 CHAIR HOLTZMAN: -- create these --

22 MR. STONE: -- regulatory

1 implementation guidelines that require non-
2 referral to be forwarded.

3 CHAIR HOLTZMAN: Judge Jones?

4 JUDGE JONES: I guess, what would -- I
5 think I'm catching on to your suggestion, I'm a
6 little slow this morning, I'm sorry.

7 (Laughter.)

8 JUDGE JONES: I really am. What would
9 be a different way -- I just see this as a very
10 specific way that they're governing certain
11 actions and causing reviews at different levels.
12 What would the alternative be or what alternative
13 way would they look at --

14 VADM TRACEY: I believe that --

15 JUDGE JONES: -- how the systems --

16 VADM TRACEY: -- the Department could
17 have implemented this guidance in a way that
18 accounted for the fact that, by its nature, it is
19 exerting undue influence on the commanding
20 officer or convening authority.

21 JUDGE JONES: So, in other words, you
22 would still -- you wouldn't have the specifics

1 that occur here? In other words --

2 VADM TRACEY: I wouldn't be limited to
3 only cases that didn't get referred to court-
4 martial. I'd look --

5 JUDGE JONES: I see, so --

6 VADM TRACEY: -- at a broader --

7 JUDGE JONES: -- you might recommend
8 that --

9 VADM TRACEY: -- category, so I --

10 JUDGE JONES: -- they review everything
11 at a certain level?

12 VADM TRACEY: In the worst case.

13 (Laughter.)

14 JUDGE JONES: But that, in other words
15 --

16 VADM TRACEY: It's not uncommon for the
17 Department to focus attention on decisions that
18 are of high interest at a particular point in
19 time, where they do, in some ways, moderate the
20 authority that's actually been delegated to the
21 individual decision-maker.

22 It's not uncommon for us to do that,

1 when we are trying to fix something. And so, to
2 have engaged in a way that made this less about
3 only not, the evilness of not referring case to
4 court-martial, is what the Congress is --

5 JUDGE JONES: Well, if you had
6 substituted something that was a more general
7 review of the referral decisions, as opposed to
8 only reviewing the non-referrals --

9 VADM TRACEY: Exactly.

10 JUDGE JONES: -- is that --

11 VADM TRACEY: Yes. Because you would,
12 with all the changes that have been made, you
13 would expect that the Department, even without
14 FACAs, is engaged in a review of, how is this
15 working? So that the Department, by itself,
16 could be going to the Hill to say, these changes
17 are having negative effects beyond what you had
18 expected to fix, and so forth.

19 JUDGE JONES: So, would this -- how do
20 you think we can approach this, to sort of say,
21 Congress, take a look at this, as opposed to,
22 repeal it, and consider an alternative, more

1 general review of referrals?

2 VADM TRACEY: Maybe something like
3 that, I think.

4 CHAIR HOLTZMAN: But not only Congress,
5 you'd want the Department of Defense --

6 JUDGE JONES: Well, we would --

7 CHAIR HOLTZMAN: -- the Secretary of
8 Defense.

9 JUDGE JONES: -- start with the
10 Secretary of Defense, yes.

11 VADM TRACEY: But you might need the
12 Congress to --

13 JUDGE JONES: Well, we need them
14 desperately --

15 VADM TRACEY: -- head nod that it's --

16 JUDGE JONES: -- to think about --

17 VADM TRACEY: -- okay for you to --

18 JUDGE JONES: Yes.

19 VADM TRACEY: -- go think about this.

20 I mean, because --

21 JUDGE JONES: Yes.

22 VADM TRACEY: -- it was such a pointed

1 --

2 CHAIR HOLTZMAN: Right.

3 JUDGE JONES: And this wouldn't be the
4 first time they've been -- they've seen this
5 recommendation, so -- it's not working, so --

6 CHAIR HOLTZMAN: They know your views,
7 Barbara --

8 JUDGE JONES: Yes, I think they --

9 CHAIR HOLTZMAN: -- I think, very well.

10 JUDGE JONES: -- do. All right. I
11 think that's a good approach. I mean, it serves
12 the purpose of identifying the problem, but
13 offers an alternative.

14 CHAIR HOLTZMAN: Right, because chances
15 are, by the way, just as a practical matter,
16 Congress is not going to repeal this.

17 MR. STONE: That's right. So, one of
18 the questions that I want to know is, don't you
19 think we could simply recommend that the
20 Secretary review his implementation guidelines to
21 include referral as well as the statutory
22 required non-referral decisions about, blah,

1 blah, blah, blah, blah? In other words, can't we
2 make a nice recommendation that broadens it and
3 that he could do in his discretion without
4 Congress at all?

5 VADM TRACEY: I'm with you.

6 MR. STONE: Got to count on you --

7 VADM TRACEY: Even just to --

8 MR. STONE: -- for the language.

9 VADM TRACEY: -- look at the --
10 recommend that the Secretary look at the
11 perception, look at ways to address the
12 perception of pressure on convening authorities
13 that is generated by the implementation of those
14 NDAA --

15 JUDGE JONES: Right.

16 VADM TRACEY: -- changes.

17 JUDGE JONES: Right.

18 VADM TRACEY: Find ways to mitigate
19 those.

20 JUDGE JONES: Yes, I think we have to
21 play with it, but I would think that's a good
22 idea.

1 CHAIR HOLTZMAN: So, but is that -- so,
2 then you would, what, junk, sorry, not -- we
3 would just delete or not recommend anything to
4 Congress? I mean, what would we -- if we were
5 going to recommend to the Secretary of Defense
6 that he examine how to implement that
7 recommendation without creating this perception
8 of undue influence, what are we going to do about
9 the Congress? Are we going to just not address
10 anything to them or what do you want to do about
11 that?

12 JUDGE JONES: Well, I mean, maybe we
13 can make the same recommendation to both of them.
14 Congress can think up its own way that it wants
15 to make this less of a problem, in terms of the
16 perception of pressure.

17 So, we ask them to -- we present the
18 problem, we say, this is the problem this is
19 causing, and recommend that Congress consider an
20 alternative way of reviewing referrals, and we
21 could be more pointed or more specific.

22 And also ask the Secretary of Defense

1 to recognize this problem and recommend that the
2 Secretary of Defense may initiate a new procedure
3 for how to review referrals. I mean, we can -- I
4 think we make the same recommendation to both. I
5 mean, hopefully the Congress would wait for the
6 Secretary of Defense, but they might not. Or
7 they may do nothing.

8 CHAIR HOLTZMAN: They listen to us so
9 much --

10 (Laughter.)

11 CHAIR HOLTZMAN: Just joking. Anyway,
12 Mr. Taylor, you've been -- do you have something
13 to say about this?

14 PROF. TAYLOR: Well, I thought that
15 when this was passed in the NDAA FY14, the
16 original provision requiring the -- this was the
17 original referral provision, that this was very
18 unusual for Congress to be that specific about
19 how they wished to see these kinds of cases --

20 CHAIR HOLTZMAN: Right.

21 PROF. TAYLOR: -- handled. And then,
22 I thought it was even more interesting that the

1 following year, they added to another category,
2 that is the chief prosecutor of the Service could
3 request --

4 JUDGE JONES: Yes.

5 CHAIR HOLTZMAN: Right.

6 PROF. TAYLOR: -- such a review. So,
7 the extent to which they have been involved in
8 the details of how this is implemented is, from
9 my experience, somewhat unusual, instead of
10 leaving this to the Services. And I'm sure it
11 was done with the best of intentions, that is to
12 shine a light on the problem --

13 CHAIR HOLTZMAN: Correct.

14 PROF. TAYLOR: -- and be sure that
15 nothing got swept under the rug, as we have
16 discussed in previous sessions.

17 So, I do think that for us to simply
18 recommend that they repeal, as opposed to
19 something that's somewhere in-between, because we
20 know that their intentions were good, but we
21 think that one of the problems here has turned
22 out to be, either unlawful command influence,

1 which we have seen, because people either don't
2 want to make the decision or they think they're
3 going to make the decision a certain way, we've
4 seen some cases about that in the media recently.

5 So, I like Admiral Tracey's approach
6 of trying to not go quite so far as to recommend
7 repeal, because there might be something else
8 they can do. A more typical way in the
9 Department, that Admiral Tracey would know about
10 is, that if there has been a problem with the
11 disposition of a certain kind of case, a superior
12 convening authority simply withholds disposition
13 authority from subordinates.

14 I mean, that is a typical way of
15 addressing problems you're trying to shine a
16 light on. And then, once there's been some
17 restoration of balance, maybe you'll say, okay,
18 you can handle these cases now, because now you
19 see how I think these cases should be handled.

20 So, I don't know whether the Congress
21 considered that, which would be a less dramatic
22 remedy in some ways. And yet, in other ways, it

1 would be more dramatic, because it would move the
2 decision farther away from the person who
3 actually has responsibility for maintaining good
4 order and discipline.

5 CHAIR HOLTZMAN: But Congress did that
6 by raising the level of convening authority.

7 PROF. TAYLOR: Exactly.

8 CHAIR HOLTZMAN: So, they've already
9 done that.

10 PROF. TAYLOR: Right.

11 CHAIR HOLTZMAN: But I think -- my own
12 view is that I think it's -- I like Admiral
13 Tracey's approach here, because it draws
14 attention both to the Congress and the Secretary
15 of Defense that this very -- this was a well-
16 intentioned effort to try to make sure that the
17 problem wasn't ignored and that stereotypes in
18 the past didn't harm victims of sexual assault,
19 that that's had some serious consequences.

20 And so, both Congress and the
21 Secretary of Defense should consider measures
22 that, on the one hand, advance the idea of not

1 ignoring these cases and treating these cases
2 with the utmost seriousness, and at the same
3 time, making sure that you don't have undue
4 command influence. So, I have no problem with,
5 if the staff can figure out how to say that, I
6 think that's a good alternative, Admiral.

7 JUDGE JONES: Yes, I --

8 PROF. TAYLOR: I agree.

9 JUDGE JONES: -- I'm for it.

10 CHAIR HOLTZMAN: Mr. Stone?

11 MR. STONE: I'm just waiting to hear
12 the language, that's all.

13 CHAIR HOLTZMAN: Okay.

14 (Laughter.)

15 CHAIR HOLTZMAN: All right. I --

16 MR. STONE: You guys know about that
17 problem better than I do.

18 CHAIR HOLTZMAN: Yes.

19 MR. STONE: I would be inclined not to
20 recommend anything to Congress, because, like you
21 said, the likelihood it gets done is small. I'd
22 much prefer to recommend something to a body we

1 think could do something quickly, which would be
2 the Secretary or the next committee, without
3 expecting the stalemate in Congress is going to
4 change because of our recommendation and then,
5 it's something that never got done at all.

6 But I'll defer to you four as to
7 whether you think you really want to invoke that
8 process and not just work right -- do a
9 workaround.

10 CHAIR HOLTZMAN: I think it's okay to
11 let Congress know that there's this issue. I
12 think that that's really important, because I
13 don't think that -- I mean, I think they acted
14 with the best of intentions here and I think
15 they're not necessarily aware of the
16 consequences.

17 So, I think it's important to spell
18 that out to them and to suggest that they
19 consider approaches to minimizing the unintended
20 adverse consequences of this.

21 JUDGE JONES: And I think to some -- it
22 also, I mean --

1 CHAIR HOLTZMAN: I don't have a problem
2 with that.

3 JUDGE JONES: Yes. We've discovered
4 this is a problem and sending it over to Congress
5 in writing validates what other people have been
6 arguing is a problem --

7 CHAIR HOLTZMAN: Right.

8 JUDGE JONES: -- validated from us.
9 So, I think it --

10 CHAIR HOLTZMAN: Okay.

11 JUDGE JONES: -- should go to Congress.

12 MS. SAUNDERS: So, this afternoon,
13 while you're going through some of your other
14 reports, I could try to put some language
15 together --

16 CHAIR HOLTZMAN: Yes, that would be
17 great.

18 MS. SAUNDERS: -- and come back a
19 little bit more towards the end of the day.

20 CHAIR HOLTZMAN: Okay, great.

21 JUDGE JONES: Great.

22 MS. SAUNDERS: No pressure.

1 CHAIR HOLTZMAN: Okay, so --

2 (Laughter.)

3 CHAIR HOLTZMAN: So, there's consensus
4 that this is the approach we'd like to take, but
5 we need the language, okay.

6 JUDGE JONES: Great idea.

7 CHAIR HOLTZMAN: Okay, thank you. So,
8 we're up to Recommendation 6?

9 MS. SAUNDERS: Okay. Recommendation 6
10 reads: the JPP Subcommittee recommends that the
11 DAC-IPAD continue to gather data and other
12 evidence on disposition decisions and conviction
13 rates of sexual assault courts-martial to
14 supplement information provided to the JPP
15 Subcommittee during military installation site
16 visits and to determine future recommendations
17 for improvements to the military justice system.

18 CHAIR HOLTZMAN: Admiral, do you have
19 your --

20 VADM TRACEY: Same thing.

21 CHAIR HOLTZMAN: -- standard change?

22 MS. SAUNDERS: Same thing?

1 CHAIR HOLTZMAN: All right.

2 MS. SAUNDERS: Okay.

3 CHAIR HOLTZMAN: Any objection to --

4 JUDGE JONES: No.

5 CHAIR HOLTZMAN: -- the Admiral's
6 language? Okay. Without objection, it is agreed
7 to. You agreed to her --

8 MR. STONE: Yes, to hers, yes, sure.

9 CHAIR HOLTZMAN: Yes, right. Okay.
10 Any other discussion on this recommendation?

11 PROF. TAYLOR: I would just add one
12 comment. When you start writing the executive
13 summary, and this is a more general comment, I
14 noticed on this page, under the sub-bullet, you
15 use a word like, a very high acquittal rate.

16 MS. SAUNDERS: Okay.

17 PROF. TAYLOR: So, I would be very
18 careful about using a word like that, that --

19 MS. SAUNDERS: Okay.

20 PROF. TAYLOR: -- doesn't establish a
21 norm. And while I'm talking about it, on the
22 previous page, on Page 8, you listed under the

1 next to last bullet, site visit coordination from
2 counsel, and on the third bullet, there's a
3 perception counsel would rather refer cases, and
4 obviously counsel don't refer cases, commanders
5 do refer cases.

6 So, sort of double-check in your
7 executive summary that you don't just lift
8 everything you have in these bullets, as opposed
9 to giving them another scrub.

10 MS. SAUNDERS: Absolutely.

11 PROF. TAYLOR: Does that make sense?

12 MS. SAUNDERS: No, absolutely, thank
13 you for catching that, sir.

14 PROF. TAYLOR: Thank you.

15 CHAIR HOLTZMAN: Okay. Any other
16 comment on Recommendation 6?

17 MR. STONE: Yes. Starting on --

18 CHAIR HOLTZMAN: Okay, Mr. Stone?

19 MR. STONE: -- Line 3, after the word
20 -- my preference would be to go from, conviction
21 rates of sexual assault courts-martial, to,
22 determine future recommendations for improvements

1 in the military justice system.

2 I don't think we should be referring
3 our information from the JPP Subcommittee, which
4 was not the Committee's, on the military
5 installation site visits, primarily because we
6 obtained anecdotal, non-public information and it
7 does not deal with disposition decisions and
8 conviction rates. It's not data on that, it's
9 opinion evidence.

10 So, my preference is to just strike
11 that and just skip from, courts-martial, to,
12 determine future recommendations for improvements
13 to the military justice system. I don't think it
14 detracts from the rest of the recommendation.

15 In the event you feel strongly about
16 it, then I would have to look at the words and
17 see if I could come up with better language
18 there. So, I guess my first question is, I would
19 just drop from the word, to, on Line 3 to the
20 word, to, on Line 4.

21 JUDGE JONES: I'm sorry, could you just
22 tell me exactly what you want to drop? Maybe I'm

1 looking at a different --

2 MR. STONE: Yes. Where it says, to
3 supplement information provided to the JPP
4 Subcommittee during military installation site
5 visits. They didn't get information, they got
6 subjective opinions, which was non-
7 scientifically, anecdotally, collected. And so,
8 we're mixing what we ask for on Line 2, that they
9 gather data and other evidence on decisions and
10 conviction rates, with anecdotal concerns.

11 And I don't really think that we want
12 to mix those two, I think that confuses the
13 issue. If they choose to do that, that's up to
14 them, but the stuff we're asking for on Line 2
15 doesn't supplement what is on Line 3, it's
16 totally different kinds of information.

17 JUDGE JONES: Well, I mean, the
18 information can inform the data or the data can
19 inform the -- can have an impact on the
20 information. I guess I don't -- this is, I
21 believe, just a suggestion, that they should look
22 at the background of what we did get in the site

1 visits and make whatever analyses they want.

2 But I think it was just meant to
3 include sort of the background of why we were
4 looking at all the data. I mean, there's --

5 MR. STONE: I mean, I --

6 JUDGE JONES: -- lots of kinds of
7 information --

8 MR. STONE: -- read those summaries --

9 JUDGE JONES: -- data and --

10 MR. STONE: -- we got ten summaries,
11 which are now on the record, site visits A to J,
12 I don't think they provide any kind of data.

13 They provide some anecdotal concerns,
14 which is useful to note, but I don't know how
15 passing that along is as important, for example,
16 as passing along a lot of the statistical stuff
17 that we gathered and we would like to see
18 continue to be gathered. I think those are
19 apples and oranges. So, that's why I prefer not
20 to add oranges to the apples.

21 JUDGE JONES: I don't think it -- I
22 think it's fine, but I don't feel strongly, I

1 guess.

2 CHAIR HOLTZMAN: Well, I think it's --
3 I think, Mr. Stone, with all due respect, I
4 disagree emphatically with that statement,
5 because I think the statistics that we have on
6 acquittals, on whatever, they are very hard to
7 interpret and hard to draw conclusions from.

8 I think the, what you call anecdotal
9 data or anecdotal information is vitally
10 important to understanding what people see as
11 problems. Now, I completely agree with your
12 conclusion that this -- we interviewed, I don't
13 know how many people did we interview, 240
14 people?

15 MS. SAUNDERS: Two hundred and eighty.

16 CHAIR HOLTZMAN: I mean, how many
17 people are in the military?

18 MR. STONE: One point three million.

19 CHAIR HOLTZMAN: Yes, it could be a
20 statistically valid number. I mean, not
21 statistically in the sense that it was randomly
22 picked, but the number 240 is not necessarily

1 bad. I mean, they do national polling, 700
2 people, to test what 200 million voters think.
3 So, I mean, I don't think the number is way off
4 base.

5 And I think that the information that
6 was obtained is very important, even though it's
7 not reduced to numbers. And I think it can
8 inform -- it certainly informed my understanding
9 about the process and I hope it helps others, the
10 Secretary of Defense and members of Congress,
11 understand what the perceptions are, if not what
12 the reality is, in the prosecution of these cases
13 and the defense of these cases.

14 So, I don't -- just as I'm not ready
15 to rank harms, I'm not ready to rank this kind of
16 information against statistics. So, I think that
17 it should stay in here and I think people should
18 look at that, those interviews.

19 And maybe they'll think they're
20 worthless and maybe they'll think it's helpful,
21 but I wouldn't just discard it because it's not a
22 statistically valid sample, it's not presented as

1 a statistically valid sample. But it's a lot of
2 people saying a lot of the same things, so I
3 think that that's important to hear.

4 MS. SAUNDERS: Meghan was reminding me
5 that Dr. Spohn had informed the Panel that
6 qualitative research, such as interviews and
7 surveys, can supplement and inform quantitative
8 data. So, that was her opinion on that.

9 CHAIR HOLTZMAN: And it's my opinion
10 too. So, we have a suggestion by Mr. Stone
11 before us to strike all the words starting with,
12 to supplement -- wait, we're -- Mr. Stone, could
13 you --

14 MR. STONE: Yes, starting with, to
15 supplement, and ending, and, on the next line.

16 CHAIR HOLTZMAN: And ending with, and.
17 Okay. All in favor, say aye.

18 MR. STONE: Aye.

19 CHAIR HOLTZMAN: Opposed?

20 (Chorus of no.)

21 MR. STONE: Okay. And my --

22 CHAIR HOLTZMAN: The no's have it.

1 MR. STONE: My alternative suggestion
2 then --

3 CHAIR HOLTZMAN: Yes, Mr. Stone?

4 MR. STONE: -- if you leave it in is
5 that we replace the word, information, with, the
6 anecdotal concerns provided. And I use anecdotal
7 advisedly because I note that on the Chair's
8 changes to the other recommendation, when we get
9 to it later this afternoon, she said, she
10 specifically said, the JPP recognizes the
11 Subcommittee's report and recommendations are
12 based on specific anecdotes.

13 So, I'm not pulling that word out of
14 the air, it's a word that you've recommended we
15 put in the other place, and I think we have to at
16 least show we're up-front when we recommend
17 something and we know that, even if this was
18 qualitative data, it wasn't part of a
19 statistically-designed survey.

20 And, frankly, when this was proposed
21 to us in a non-public setting, we were told, and
22 I'll state this for the record, that this was

1 going to be an issue spotting project, that we
2 were looking to spot issues that we may have
3 overlooked. We weren't looking to rank them, as
4 you said, we were just spotting them.

5 And I think from that perspective, it
6 was helpful. But I think also that's the same
7 thing as I said before, the staff could have
8 spotted issues for us and that also -- and they
9 have over time spotted issues and that's helpful
10 too.

11 So, to the extent that they represent
12 the anecdotal concerns provided to the JPP, I
13 think that gives people the right message when
14 they take the data, because they won't have us to
15 ask about how this was gathered and what it might
16 mean and who gathered it and who summarized it,
17 because all of that has been sanitized. So,
18 therefore, I would just change, information, to,
19 the anecdotal concerns.

20 CHAIR HOLTZMAN: Judge Jones?

21 MR. STONE: That's the --

22 JUDGE JONES: I would leave it the way

1 it is. It's all information. I think it's
2 pretty clear from a number of the reports the
3 process that was used, so I don't think anyone is
4 going to be under any of the assumptions that
5 when we talk about information, we're talking
6 about analytical data. We talked about
7 interviews and reports from 240 people. Those
8 are anecdotes, I suppose, but I think,
9 supplemental information, is fine.

10 CHAIR HOLTZMAN: Okay. All those in
11 favor of Mr. Stone's recommended change, which is
12 to take the word, information, and to replace it
13 with -- Mr. Stone, help me out.

14 JUDGE JONES: Anecdotal concerns.

15 MR. STONE: The anecdotal concerns.

16 CHAIR HOLTZMAN: -- anecdotal concerns,
17 say aye.

18 MR. STONE: Aye.

19 CHAIR HOLTZMAN: Opposed?

20 (Chorus of no.)

21 CHAIR HOLTZMAN: The no's have it.

22 MR. STONE: Okay.

1 CHAIR HOLTZMAN: Okay. Now, we're on
2 to Recommendation 6.

3 MS. SAUNDERS: Ma'am, you need to vote
4 on Recommendation 6 as a whole.

5 CHAIR HOLTZMAN: That's what it is.

6 MS. SAUNDERS: Okay.

7 CHAIR HOLTZMAN: Okay.

8 MS. SAUNDERS: Great.

9 CHAIR HOLTZMAN: So, all in favor of
10 Recommendation 6, say aye.

11 (Chorus of aye.)

12 CHAIR HOLTZMAN: Opposed?

13 MR. STONE: Abstain.

14 CHAIR HOLTZMAN: Okay. Recommendation
15 6 is carried. Well, I want to ask the members of
16 the Panel. It's 12:00 now, should we break for
17 lunch or should we keep going?

18 JUDGE JONES: We can keep going as far
19 as I'm concerned.

20 CHAIR HOLTZMAN: Keep going? Okay.
21 Recommendation 7?

22 MS. SAUNDERS: Recommendation 7 --

1 CHAIR HOLTZMAN: Let's see how far we
2 get.

3 MS. SAUNDERS: -- reads: the JPP
4 Subcommittee recommends that the Secretary of
5 Defense ensure that SVCs and VLCs receive the
6 necessary training on the importance of allowing
7 full access by prosecutors to sexual assault
8 victims prior to courts-martial.

9 Such training will ensure that SVCs
10 and VLCs are considering the value of a
11 meaningful victim-prosecutor relationship in the
12 advice they provide their victim clients and
13 assist prosecutors in sufficiently developing the
14 rapport with the victim needed to fully prepare
15 for trial.

16 CHAIR HOLTZMAN: Okay. Is there any
17 discussion of this recommendation? Mr. Stone, do
18 you have -- oh, Mr. Taylor?

19 PROF. TAYLOR: Excuse me, go ahead.
20 No, I was just concerned, I'm concerned with the
21 word, full access, because it seems to me that
22 some word like, reasonable access, would provide

1 the same kind of opportunity, but, full, to me,
2 implies unfettered. So, I intend this as a
3 friendly amendment.

4 JUDGE JONES: I agree with that

5 CHAIR HOLTZMAN: Any opposition to --
6 so, what would you rather have? Reasonable?

7 JUDGE JONES: Reasonable.

8 PROF. TAYLOR: Reasonable is my
9 suggestion.

10 CHAIR HOLTZMAN: Okay. Any opposition
11 to the recommendation by Mr. --

12 JUDGE JONES: No.

13 CHAIR HOLTZMAN: -- Taylor?

14 VADM TRACEY: No.

15 CHAIR HOLTZMAN: Okay. So, that's
16 carried. Mr. Stone?

17 MR. STONE: On the next line, after the
18 word, well, after, reasonable access by
19 prosecution to sexual assault victims, we need to
20 insert five words that say, who agree to that
21 access prior to courts-martial.

22 Any witness has the right not to be

1 interviewed if they don't want to. They may
2 suffer the consequence if the prosecutor doesn't
3 think he has enough evidence to go forward, but
4 that's their choice. And, in fact, we give that
5 to everybody who files a restricted report.

6 And I'm a little bit worried that if
7 we don't put that in there, there's an
8 implication that if the prosecutor is prosecuting
9 one case that's unrestricted and there's another
10 sexual assault victim that's related to it, I
11 don't know, it was a party and there's two or
12 three victims and the other one files a
13 restricted report, that somehow we're suggesting
14 he can get reasonable access to the other person,
15 too.

16 In addition to which, Article 6b of
17 the Uniform Code of Military Justice guarantees
18 victims their right to talk to counsel and their
19 right to privacy and if, after talking to counsel
20 in privacy, they don't want to agree to be
21 interviewed, just like any witness anywhere, they
22 have the right to say no.

1 So, I would just say, to sexual
2 assault victims who agree to that access, in that
3 sentence. And before we go on, I think probably
4 we should deal with that.

5 JUDGE JONES: I think all this says is
6 that in the training, they're going to be asked
7 to or trained to consider the value of that. So,
8 I don't -- what were the words you wanted to add?
9 I think everybody knows that the victim can
10 decide she doesn't want to talk to the prosecutor
11 at all.

12 This is just a recommendation that
13 they be trained to consider at least that there
14 are pluses to the value of a meaningful victim-
15 prosecutor relationship, which is something
16 presumably they would advise them of.

17 CHAIR HOLTZMAN: Plus, I think the
18 recommendation is circular, because you're saying
19 that the training would only go to people who
20 already agree to have -- to be interviewed by the
21 prosecutor. Well, what's the point of that?

22 What you're trying to do is to get

1 people to consider whether it's desirable and
2 they may in the end decide they don't want to,
3 but you would defeat the very purpose of having
4 the SVCs or the VLCs consider this if you -- by
5 the amendment. That's my view. Any other
6 comment? Okay. Those in favor -- Mr. Stone,
7 could you state your -- I don't want to misstate
8 it.

9 MR. STONE: Yes.

10 CHAIR HOLTZMAN: Could you state your
11 --

12 MR. STONE: I think even the training
13 should make it clear, it's reasonable access by
14 prosecutors to sexual assault victims who agree
15 to that access prior to courts-martial. That's -
16 -

17 CHAIR HOLTZMAN: Okay. Those --

18 MR. STONE: -- highlighting.

19 CHAIR HOLTZMAN: Okay. Those in favor
20 of Mr. Stone's recommendation, say aye.

21 MR. STONE: Aye.

22 CHAIR HOLTZMAN: Those opposed?

1 (Chorus of no.)

2 MR. STONE: All right. My second --

3 CHAIR HOLTZMAN: The no's carry. Go
4 ahead.

5 MR. STONE: My second comment is that
6 I think that the second sentence in there is
7 insulting and I think it's also misleading. I
8 don't think it's necessary to say, will ensure --
9 of considering the value of a meaningful -- I'm
10 sure that they consider, every lawyer considers
11 the value of whether -- of who his client should
12 talk to. So, I think that is, frankly, I don't
13 know if it's meant to be demeaning, but it comes
14 across that way to me.

15 And the second thing is, this language
16 about sufficiently developing the rapport with
17 the victim, I questioned this at the hearing that
18 we had on the members of the Subcommittee, but I
19 see it's still here.

20 I think it violates Article 6b to
21 suggest that prosecutors have a right to some
22 rapport with victims. That is not their client.

1 They have a right to be provided with the
2 information they need to fully prepare for trial,
3 not to have some relationship with the victim.

4 If that was appropriate, and that's
5 what we used to have, then we wouldn't have had
6 to have legislation to provide for a victim's
7 counsel, because in the past, there was no
8 victim's counsel, there were prosecutors, but
9 somehow that was not what the victims wanted.

10 And I think talking about rapport,
11 either from the investigators or prosecutors,
12 when you have VLCs and SVCs and special people
13 designed to do that job, implies that you're
14 trying to get inside that relationship, which is
15 inappropriate under Article 6b. So, I would
16 change the sentence to simply say, such training
17 will ensure that prosecutors are provided the
18 information they need to fully prepare for trial.

19 JUDGE JONES: Well, they may not be
20 able to do that either. I mean, you're going to
21 tell a VLC that they have to make sure that they
22 do that?

1 MR. STONE: No. No, that the training
2 is to show -- you want to train the SVCs to
3 understand that prosecutors may need the
4 information that they need to proceed to trial.
5 That's what you're training them on.

6 You're trying to -- you're not telling
7 them, oh, and somebody has to develop rapport
8 with your client, you're saying, you want to
9 remind them specifically that if they cooperate
10 fully or reasonably -- and that's what we said
11 rapport was, access, when I questioned the
12 witness at the last hearing, I said, what do you
13 mean by rapport, and they said, access. Well,
14 you've got that in the first sentence, when you
15 talk about reasonable access.

16 So, without insulting anybody or
17 characterizing a relationship that I don't think
18 any longer is appropriate, we're just training
19 the prosecutors -- actually, I'm sorry, we're
20 training the SVCs and the VLCs that they should
21 ensure prosecutors get the information they need.

22 Now, it may be, it doesn't have to

1 take an in-person interview, it may be that
2 they'll do it by a Skype call. It may be they'll
3 say, oh, this case ought to go on stipulation,
4 and they'll be happy to provide a stipulation.

5 It may be they'll say, there was
6 another witness he'd like you to talk to first,
7 he or she, the victim is totally traumatized, but
8 by the way, they told me -- they gave me -- they
9 wanted me to tell you there was another person at
10 the party who say this whole thing go down.

11 That's the question, that they want
12 them to get sufficient access through counsel to
13 provide the information they need. And so,
14 that's why I edited it down to take out the
15 objectionable language.

16 JUDGE JONES: I don't know, I have to
17 think about that.

18 MR. STONE: You want to think about it
19 over lunch? We could do that too.

20 JUDGE JONES: Sure.

21 CHAIR HOLTZMAN: I just want to make
22 one point, Mr. Stone, in response to something

1 you said. I don't think that this is humiliating
2 or demeaning to SVCs and VLCs. Some of them are
3 not really experienced and that's the purpose of
4 the training is to substitute for the lack of
5 experience. And so, I don't think that this is
6 intended in any way, shape, or form --

7 MR. STONE: Okay.

8 CHAIR HOLTZMAN: -- to be critical of
9 them. And I think -

10 MR. STONE: Well, you --

11 CHAIR HOLTZMAN: -- that your inference
12 about that is not accurate. And I think, also,
13 that it's more than just access that we're
14 talking about here. I mean, if the SVC or the
15 VLC is -- sometimes it is not approaching this
16 with a -- I mean, it's approaching it with a very
17 hostile or an attitude that doesn't recognize
18 that there's an importance for the victim too,
19 because a conviction is, I think, is something
20 that the victim would want.

21 I understand that there's a tension
22 here. Obviously, the SVC and the VLC is going to

1 want to protect certain issues on the part of the
2 victim, and that's very important.

3 But sometimes, if they're not properly
4 trained or they're not properly experienced, they
5 might deny access when the access won't harm the
6 victim's interest, whether it's phone or whether
7 something else, and yet, it will help advance the
8 victim's ultimate interest in a conviction here.

9 So, it seems to me that -- I don't
10 have any objection to this, I don't see that this
11 is demeaning to SVCs or VLCs, I don't think it
12 assumes that there's some kind of magic
13 relationship between a prosecutor and a victim, I
14 just think it recognizes that there needs to be,
15 to the maximum extent possible in the
16 circumstance where there may be legitimate,
17 totally legitimate reasons to curtail the
18 victim's contact with the prosecutor.

19 But to have SVCs and VLCs recognize
20 that it's also in the victim's interest to see
21 what can be done to make sure there's a
22 conviction in the case, and that sometimes

1 requires a kind of access that they might not
2 have wanted to have, but maybe they'll realize
3 it's also important. I'm not saying that it's
4 going to be a magic be-all and end-all, but I
5 don't see your problem with it --

6 MR. STONE: Okay.

7 CHAIR HOLTZMAN: -- Mr. Stone, I would
8 say.

9 MR. STONE: I think your statement that
10 the prosecutor's needs ought to be considered are
11 considered by me saying, the prosecutors are
12 provided the information they need to fully
13 prepare for trial. Okay.

14 I don't think there is any longer in
15 the military a meaningful victim-prosecutor
16 relationship that is promoted. There is a
17 meaningful victim's counsel relationship that is
18 promoted --

19 CHAIR HOLTZMAN: Oh, I don't --

20 MR. STONE: -- just like there is for
21 any victim. And a victim can walk away from a
22 trial any time they wish, especially if they

1 think that what the prosecutor needs to elicit is
2 going to so psychologically damage them, they
3 don't want to go through this again, it's
4 embarrassing, their life -- some of them want to
5 just stay in their unit.

6 I mean, that's why the suggestion in
7 here cuts against restricted reporting. It's
8 none of the prosecutor's business whether the
9 victim wants to go forward, it's the victim's
10 business and the victim's counsel has a legal
11 obligation all the time to discuss those things.

12 They don't agree or deny access
13 without talking to their client and explaining it
14 in great detail, because they know it's not their
15 decision, it's the victim's decision. And so,
16 this idea, which I see expressed here, the
17 language, sufficiently developing the rapport,
18 frankly I think is nonsense --

19 JUDGE JONES: I have an idea.

20 MR. STONE: -- and I strongly oppose
21 it. So, I don't --

22 JUDGE JONES: I have an idea.

1 MR. STONE: -- know what else to say.

2 I was --

3 JUDGE JONES: I have an idea.

4 MR. STONE: -- trying to go around it

5 --

6 JUDGE JONES: Okay.

7 MR. STONE: -- and get to the same

8 place.

9 JUDGE JONES: I don't like the idea of
10 rapport either, but I would also say that we are
11 dealing with two different roles. The prosecutor
12 has their role. There never used to be a counsel
13 for the victim, I think it's great there is one
14 now, and obviously it goes without saying that
15 that lawyer, the VLC or whichever Service you're
16 in, has the responsibility of advising and then,
17 counseling.

18 And all we're saying here is we want
19 to train them on considering, we're not even
20 saying you have to do anything, and obviously
21 they know they have to follow their client's
22 wishes, we're just saying that they consider the

1 value of a meaningful victim-prosecutor
2 relationship.

3 There has to be some sort of
4 relationship between the victim and the
5 prosecutor. The victim is the main witness.
6 There used to be a much more all-encompassing
7 relationship before the victim had their own
8 lawyer.

9 But I see that as an additional lawyer
10 in the picture, not the removal of the necessary
11 relationship between any lawyer and any witness
12 that they're going to be preparing and putting on
13 the stand. And then, I might say, to get rid of
14 this rapport stuff, it sounds like if we want to
15 -- and by the way, you have to like the
16 prosecutor too --

17 (Laughter.)

18 JUDGE JONES: I don't think we meant to
19 say that. I think we should say, consider the
20 value of a meaningful victim-prosecutor
21 relationship in the advice that they provide
22 their victim client.

1 And then I would say, with the goal of
2 assisting prosecutors in sufficiently developing
3 the record needed to fully prepare for trial. It
4 seems to me that that hooks it up with the whole
5 point.

6 And every step along the way, it goes
7 without saying, if they decide they don't want to
8 have any relationship, they can, but we still
9 want their lawyer, the victim's legal counsel, to
10 be considering the fact that there can be a
11 meaningful relationship and that's probably a
12 good thing.

13 They can decide whatever -- the
14 individual client can decide whatever they want
15 to do. I think that will help you a little bit,
16 if we get rid of rapport. I don't know whether
17 that --

18 MR. STONE: I want to get rid of the
19 word meaningful too. Will you strike that word?
20 Then I think your language gets closer to what I
21 have in mind, because I don't think it has to be
22 meaningful. They don't represent each other.

1 They have no lawyer-client relationship.

2 JUDGE JONES: We're not saying that,
3 we're saying victim-prosecutor relationship.

4 MR. STONE: I know. There is no formal
5 victim -- it's an informal relationship --

6 JUDGE JONES: Right.

7 MR. STONE: -- that's why I think the
8 word meaningful is misleading there.

9 JUDGE JONES: Okay. What kind of
10 relationship do you want to call it?

11 PROF. TAYLOR: How about productive?

12 CHAIR HOLTZMAN: Or effective working

13 --

14 JUDGE JONES: And that goes back --

15 CHAIR HOLTZMAN: -- relationship or
16 something --

17 JUDGE JONES: -- to the prosecutorial

18 --

19 CHAIR HOLTZMAN: Yes.

20 JUDGE JONES: -- goal, which the victim
21 may or may not embrace in whole or in part.

22 Okay.

1 MR. STONE: I need somebody to read
2 back the language you're suggesting --

3 JUDGE JONES: What was your last --

4 MR. STONE: -- for that whole sentence.

5 JUDGE JONES: -- word, Mr. Taylor?

6 PROF. TAYLOR: Productive.

7 JUDGE JONES: Okay. So, such training
8 will ensure that SVCs and VLCs consider the value
9 of a productive -- and we still haven't resolved
10 victim-prosecutor relationship. We could say
11 relationship between the victim and the
12 prosecutor, if you want to do that. And that
13 takes away from the formality of it. All right.
14 In the --

15 MR. STONE: Okay. I thought Ms.
16 Holtzman said effective rather than productive,
17 is that what you said?

18 CHAIR HOLTZMAN: Mr. Taylor's language
19 is fine.

20 JUDGE JONES: I'm sorry, Liz, I didn't
21 hear you.

22 CHAIR HOLTZMAN: Well, that's all

1 right.

2 JUDGE JONES: In the advice they
3 provide their victim client, with the goal of
4 assisting prosecutors in sufficiently developing
5 the record needed to fully prepare for trial. I
6 mean, that's not the only thing the prosecutor
7 needs to do, so maybe that's a little narrowing -
8 -

9 CHAIR HOLTZMAN: Yes.

10 JUDGE JONES: -- but generally
11 speaking, is that better?

12 MR. STONE: Yes. Again, I would like
13 the word effective instead of productive, because
14 I don't know what exactly that means.

15 PROF. TAYLOR: Effective was fine.

16 MR. STONE: In other words, you want to
17 have --

18 JUDGE JONES: Effective's fine.

19 MR. STONE: -- an effective
20 relationship.

21 PROF. TAYLOR: Sure.

22 MR. STONE: Then we may be in

1 accordance.

2 JUDGE JONES: Okay. So, we'll make it
3 effective.

4 CHAIR HOLTZMAN: And you're going to
5 try to broaden --

6 JUDGE JONES: And I need to --

7 CHAIR HOLTZMAN: -- the last word.

8 Yes.

9 JUDGE JONES: Yes. Or we could
10 probably just say, to fully prepare for trial.

11 PROF. TAYLOR: I think that would be
12 better, because --

13 JUDGE JONES: We don't need to talk
14 about --

15 PROF. TAYLOR: -- you're not really
16 developing --

17 CHAIR HOLTZMAN: Right.

18 JUDGE JONES: Right.

19 PROF. TAYLOR: -- a record at this
20 point, this is all pre-record.

21 JUDGE JONES: Right.

22 PROF. TAYLOR: Right?

1 JUDGE JONES: I was borrowing from,
2 developing rapport, so --

3 PROF. TAYLOR: Right.

4 (Laughter.)

5 JUDGE JONES: Okay.

6 CHAIR HOLTZMAN: Okay. Do we have the
7 language now in front of us?

8 MS. SAUNDERS: So, is that, such
9 training will ensure that SVCs and VLCs are
10 considering the value of an effective victim-
11 prosecutor relationship with the goal of
12 assisting --

13 CHAIR HOLTZMAN: No, in the advice --

14 MS. SAUNDERS: Oh, I'm sorry.

15 CHAIR HOLTZMAN: -- they provide.

16 MS. SAUNDERS: In the advice they
17 provide --

18 MS. FRIED: No, I think it's the value
19 of a relationship between a victim and
20 prosecutor.

21 JUDGE JONES: Yes, we got rid of
22 calling it a victim-prosecutor --

1 CHAIR HOLTZMAN: Okay, right.

2 JUDGE JONES: -- relationship. So, in
3 the --

4 CHAIR HOLTZMAN: Okay. Of an effective
5 relationship between --

6 MR. STONE: Between --

7 JUDGE JONES: Right.

8 CHAIR HOLTZMAN: -- the prosecutor and
9 the victim --

10 MR. STONE: And the victim.

11 JUDGE JONES: And the victim.

12 CHAIR HOLTZMAN: -- in the advice they

13 --

14 MR. STONE: With the goal of --

15 CHAIR HOLTZMAN: -- in the advice they
16 provide their victim clients --

17 JUDGE JONES: Right.

18 CHAIR HOLTZMAN: -- with the goal of --

19 JUDGE JONES: With the goal of --

20 MS. FRIED: Preparing for trial.

21 JUDGE JONES: -- fully preparing for
22 trial.

1 CHAIR HOLTZMAN: -- assisting
2 prosecutors, yes, in fully preparing for trial.
3 Okay.

4 VADM TRACEY: In fully preparing for
5 trial.

6 CHAIR HOLTZMAN: Okay. All in favor of
7 the Recommendation 7 as amended, say aye.

8 (Chorus of aye.)

9 CHAIR HOLTZMAN: Opposed?

10 (No audible response.)

11 CHAIR HOLTZMAN: Ayes have it and
12 Recommendation 7 as amended is agreed to. And
13 should we try Recommendation 8? Should we keep
14 going? On a roll, okay.

15 JUDGE JONES: Keep going.

16 CHAIR HOLTZMAN: All right.

17 MS. SAUNDERS: Recommendation 8 reads:
18 The JPP Subcommittee recommends that the
19 Department of Defense Sexual Assault Prevention
20 and Response Office ensure that sexual assault
21 training conducted by the Military Services
22 provide accurate information to military members

1 regarding a person's ability to consent to sexual
2 contact after consuming alcohol and the legal
3 definition of impairment in this context and that
4 training be timed and conducted so as to avoid
5 training fatigue.

6 The JPP Subcommittee further
7 recommends that the DAC-IPAD monitor whether
8 misperceptions regarding alcohol consumption and
9 consent continue to affect court-martial panel
10 members.

11 CHAIR HOLTZMAN: Admiral Tracey, do
12 you have your --

13 VADM TRACEY: Same.

14 CHAIR HOLTZMAN: -- same proposal for
15 the last paragraph? Any objection to that?

16 JUDGE JONES: No.

17 CHAIR HOLTZMAN: Hearing none, that's
18 adopted.

19 Okay, any other comment with regard to
20 Recommendation 8?

21 MR. STONE: Only that this is one more
22 where we didn't hear the Services come in and

1 tell us if they have or they are about to change
2 their training material. And as I looked at the
3 site visits, there were comments of both ways,
4 including people who said no. I don't think that
5 is even in the report that some people said no, I
6 don't think alcohol, the training I got was
7 misleading and others said they thought it was
8 misleading. And some said I don't think that has
9 affected the outcome of trials and some said they
10 did. And the same thing about training fatigue.

11 I think there was some comments on
12 both sides of this issue. And since we did not
13 get the chance, since we ran out of time to have
14 each Service come here and tell us not only their
15 views on this comment but whether they were
16 already doing it; whether they already have it in
17 draft form. I feel, again, unprepared to
18 recommend that somebody else do it when I don't
19 have a basis to know whether it is being done, or
20 it's objectionable, or it's fine. If they are
21 already doing it, I wouldn't even have to
22 recommend it.

1 So given that we didn't, as the JPP,
2 and I don't think anything in the Subcommittee,
3 either, updated what's going on, just like they
4 did with some other things like with
5 investigators, oh, there's a new thing now that
6 the DoD regulation that they can do this and they
7 can do that.

8 In the absence of having testimony
9 before us from Military Services, I can't take a
10 position on this. I don't oppose the idea but I
11 can't -- I don't think there's a basis to --

12 JUDGE JONES: I think what we heard
13 and what we actually probably could say we know
14 between the RSP and today and this Committee is
15 that if you ask anyone who is a trainer, they
16 will say we are not training them that way, and I
17 don't discredit that statement, but we still
18 hear, as recently as these site visits, that
19 there is misunderstanding about it.

20 And so again, all we are doing is
21 recommending that they take a look at this to see
22 if maybe something further can be done to make

1 the training more understandable to everybody.
2 It's not that everyone doesn't understand it but
3 it's a concern that it is a recurring
4 misunderstanding that still exists. At least
5 that is the way I would explain it.

6 CHAIR HOLTZMAN: Okay.

7 MR. STONE: Would you change any of
8 the language to say that?

9 VADM TRACEY: We could certainly say
10 that in the explanatory content that comes below
11 the recommendation in the report, right, tie
12 those observations together.

13 JUDGE JONES: Sure, I could see that.

14 CHAIR HOLTZMAN: Well, with that
15 suggestion, Mr. Stone, is that satisfactory to
16 you?

17 MR. STONE: As in terms of a personal
18 preference, it satisfies me and I'm happy to hear
19 it. But does it give me any more basis to vote
20 for or against this recommendation? No, we ran
21 out of time. It's an issue that was spotted.
22 It's a useful issue that was spotted but it's not

1 enough for me to want to -- I didn't give
2 Military Services a chance to even talk about it
3 to me. So, I don't think it's a formal
4 recommendation. I could like it as a bullet
5 somewhere under one or the others.

6 JUDGE JONES: It's really just
7 recommending another look at a continuing issue
8 that's been very well-identified. So, anyway,
9 that's my two cents.

10 CHAIR HOLTZMAN: Okay, let's go to a
11 vote.

12 Those in favor -- well, I don't want
13 to cut off any -- any further discussion on
14 Recommendation 8? If not, let's vote.

15 Those in favor of Recommendation 8,
16 say aye.

17 (Chorus of aye.)

18 CHAIR HOLTZMAN: Opposed?

19 MR. STONE: Abstain.

20 CHAIR HOLTZMAN: Recommendation 8 is
21 carried, adopted.

22 We are up to Recommendation 9.

1 MS. SAUNDERS: Recommendation 9 reads:
2 The JPP Subcommittee recommends that the
3 Secretary of Defense review the policy on
4 expedited transfer of sexual assault victims and
5 consider whether it should be changed to state
6 that when possible, sexual assault victims should
7 be transferred to another unit on the same
8 installation or to a nearby installation. This
9 change will help ensure that prosecutors have
10 access to victims in preparing for
11 courts-martial, will satisfy the need to separate
12 the victim from the accused, and will maintain
13 the victim's access to support systems while
14 combating the perception that the ability to ask
15 for these transfers has encouraged fraudulent
16 claims of sexual assault. Commanders and SVCs
17 and VLCs should all receive training on how
18 relocating victims from less desirable to more
19 desirable locations can foster the perception
20 among military members that the expedited
21 transfer system is being abused and in how such
22 transfers can be used by defense counsel to cast

1 doubt on the victim's credibility, possibly
2 leading to more acquittals at courts-martial.

3 The JPP Subcommittee further
4 recommends that the DAC-IPAD review data on
5 expedited transfers to determine the locations
6 from which and to which victims are requesting
7 expedited transfers and to review their stated
8 reasons.

9 CHAIR HOLTZMAN: Okay, any discussion
10 on this recommendation?

11 VADM TRACEY: I have a problem with
12 the notion that just assigning a sailor from one
13 unit to another on the same installation does
14 anything to protect them from the accused or the
15 accused's compatriots. I mean you socialize
16 together. You use the same clubs. You use the
17 same facilities. So I'm not sure how the
18 Subcommittee thought this recommendation was
19 going to be effective.

20 Your daily work life might be
21 protected but the other 16 hours a day, seven
22 days a week are not. So, I wasn't sure why we

1 thought this was a reasonable recommendation.

2 JUDGE JONES: My recollection is that
3 or it was my understanding from what I heard and
4 read that there were some installations that were
5 so large, you could be segregated even socially.

6 I don't know. You would know better
7 than me. That is what my understanding was.

8 VADM TRACEY: No, not likely.

9 CHAIR HOLTZMAN: What about the term
10 -- I mean I will give you an example but what the
11 term it's not just are in the same installation
12 or a nearby installation. Does that solve the
13 problem, Admiral?

14 VADM TRACEY: It certainly is more
15 reasonable, there would have to be more effort
16 running into each other but nearby installations
17 in today's day and age often share the same
18 recreational facilities. If they are that
19 nearby, they share the same recreational
20 facilities.

21 I mean if what we're suggesting is
22 that we want someone to look at how this policy

1 has been implemented so that it can be done in a
2 way that minimizes the disruption to the ability
3 to pursue the case while still taking care of the
4 victim's interest, I think that's reasonable.

5 But we are explicitly suggesting they look at
6 just moving the person on the same installation
7 and that doesn't seem to me to make any sense.

8 CHAIR HOLTZMAN: Well, let me just
9 give you one example that I ran across actually
10 in Korea, where this apparently was a problem,
11 and where the commander said that he was now
12 going to start reviewing whether he could, in
13 fact, transfer people either to the same or
14 nearby installation because of the problem of
15 perception.

16 VADM TRACEY: And I'm sure that it is
17 --

18 CHAIR HOLTZMAN: And I'm not sure that
19 he could do it but that is what he said he was
20 planning to do. This was not something he had
21 already done.

22 VADM TRACEY: Which is fine.

1 CHAIR HOLTZMAN: Yes.

2 VADM TRACEY: I don't object to that.
3 But I do object to the Committee suggesting that
4 that's a solution to this problem to just
5 reassign a person.

6 If you are in Korea, you may have no
7 choice but to look at reassigning the person to
8 another installation or risk that they leave the
9 geographical area and you can't pursue the case
10 because of how remote Korea is. I understand
11 that and there may be reasons why, in that case,
12 there should be an exceptional look at this.

13 But the issues, I think, that you were
14 trying to address are that when you move the
15 victim it becomes hard for everybody to work the
16 case. I'm sure there is a general rumor mill
17 that victims are using this as an excuse to get
18 to a better duty station. And I am sure there
19 are some victims who are using this as a way to
20 get to a preferred duty station.

21 CHAIR HOLTZMAN: So what kind of
22 language would you suggest?

1 VADM TRACEY: You specifically suggest
2 that -- so I think you want the Department to
3 look at the ways in which the expedited transfer
4 opportunity is implemented is such to ensure the
5 smoothest ability to try the case, while looking
6 after the victim's interests. And I would
7 eliminate the discussion of the fraudulent use of
8 the relocation. You could certainly make that an
9 item to be followed up. If there is evidence to
10 that effect, then that should be addressed but I
11 think that has little to do with the actual
12 policy issue I think that was trying to be
13 addressed here.

14 CHAIR HOLTZMAN: I'm not sure,
15 Admiral, about that. I think that was the
16 trigger. I think that was more the trigger that
17 we heard. But I only went to four sites or four
18 or five installations.

19 MS. SAUNDERS: I think one of the
20 concerns I think that the Subcommittee considered
21 on the fraudulent aspect of that was more about
22 the ways that that can be used on cross-

1 examination in trial and how it could negatively
2 affect the case.

3 MR. STONE: And it's naive to think
4 that the prosecutors and the victims don't know
5 that any victim's counsel is going to say to his
6 client, you are aware they are going to cross-
7 examine you on this. You realize they are going
8 to try to argue that you did this only for that.

9 But we also heard testimony as a JPP
10 in the past that the most important thing to
11 victims was their transfer. They didn't even
12 care afterwards about the prosecution. They just
13 wanted to be free of having to bump into that
14 person.

15 And since we didn't take testimony
16 from the various Services, I'm going to feel free
17 to tell you about my experience as counsel to the
18 Witness Security Program, where witnesses also
19 wanted to be sure somebody didn't bump into them
20 later because they would have been bumped off if
21 they bumped into them later. And we never
22 considered it safe, just as a sort of general

1 rule, to think that we could hide somebody in the
2 same community if it was smaller than two million
3 people -- and you don't have any military bases
4 of the size of two million -- because in a
5 smaller arrangement than that, as was mentioned
6 here, you bump into somebody in the street, you
7 bump into them in the supermarket, you bump into
8 them in the health club, you bump into them in
9 the movie theater and then the person winds up
10 dead.

11 And we weren't happy about two million
12 as a number but we realized, at times, there
13 might be other considerations like if they are in
14 a foreign country and they only speak a certain
15 language that you know you are trying to focus on
16 how big a community do you need so that somebody
17 can feel safe.

18 And I would point out that safety here
19 is an issue because Article 6b(a)(1) of Uniform
20 Code of Military Justice says a victim has the
21 right to be protected from the accused. So, this
22 is implementing something that is in the UCMJ.

1 And I totally agree with that and the
2 fact that, sure, some people might abuse the
3 system and some commanders might decide to do
4 more or less but they are the individual, the
5 commanding officer, who decides on the expedited
6 transfer. So, if they think it's not warranted
7 in a case, that's their choice to make.

8 And if defense counsel want to use
9 that later as a benefit, of course they are going
10 to use it at trial, just like every person in the
11 witness security program when they testified at
12 trial was impeached on the ground well, the
13 government moved you, and they did this for you,
14 and they did that, didn't they? And they argued
15 to the jury later you know they probably did this
16 -- you shouldn't believe them; they did this just
17 to get the benefit. But that goes along with the
18 program. You accept that there's going to be
19 certain things like that.

20 So, I totally agree with what was
21 stated by Admiral Tracey and I even liked her
22 formulation of it, having added that, of course,

1 we did not hear any testimony from victims. And
2 the Subcommittee admitted last time, and you can
3 see in their report, they didn't even interview
4 any victims.

5 So, without any input from victims, I
6 don't know how you could have a sufficient basis
7 to even consider this. And I certainly think you
8 would be trying to take away the most important,
9 in the eyes of many victims, not the Service, may
10 be the most important thing in the whole change
11 of all the regulations and Statutes; that is, to
12 allow them to start their career and life over in
13 a place where that assault doesn't follow them.

14 Oh, and I have one more thing that I
15 want to point out. I think there is an enormous
16 misconception, again, from my experience, and I
17 am going to say this because there was no expert
18 testimony. There's an enormous misconception
19 that people in this country have thinking that
20 relocation is a benefit, even to a place with a
21 better climate. That is, frankly, bunk. There
22 is no person that I was involved with that I ever

1 relocated a long distance who was happy. They
2 left behind their church. They left behind their
3 friends. If they had kids in school, they left
4 behind their schools, their social organizations.
5 They didn't like that because they knew there
6 were bad consequences if they went back, they
7 might bump into that person, whatever.

8 But only in the movies do they make in
9 My Blue Heaven it's a great thing that these guys
10 are relocated somewhere else. It's not. And as
11 a fact I will tell you that the vast majority in
12 witness relocation programs around the world,
13 including Italy because they have a big program,
14 drop out after five years because they hate that
15 move to a place that they hadn't had in mind when
16 they signed up for this deal. It is an
17 involuntary move and sometimes it includes moving
18 their spouse, which means the spouse has to quit
19 their job and try and find a new one.

20 It's not a benefit. It may look that
21 way to the public, to the people who make movies,
22 maybe people who go to movies. But being

1 involuntarily told to move, and especially long
2 distances, is not anything that the numbers show
3 out that people are thrilled about.

4 CHAIR HOLTZMAN: Well, nobody here is
5 being involuntarily told to move. I think that
6 is one issue that is a big difference. And
7 secondly, when you are talking about the witness
8 protection program, these are people who are
9 living in a community, generally they have lived
10 there all their lives. We are talking about
11 people in the military who are on a temporary
12 assignment. So I think it is apples and oranges,
13 to use your words.

14 But I think about the point about this
15 and I think Admiral Tracey moved some good points
16 but I think it's not sufficient, in my judgment.
17 Everybody understands, at least I do, that
18 expedited transfers are vital. Okay? Vital.
19 They were vital when I was a prosecutor. They
20 are vital in the military. Nobody is questioning
21 that. This is one of the circumstances in which
22 we had issue spotting. Nobody here had heard

1 that there was any issue with regard to expedited
2 transfers. We went out to the field. And guess
3 what? Low, and behold, people said there is a
4 problem with expedited transfers because it
5 raises problems in terms of the prosecution of
6 the case and it raises problems in terms of
7 possible acquittals because of the charges of
8 potential fraud.

9 Okay. So, here we have a program that
10 has a completely laudatory objective to separate
11 the victim from the perpetrator and allow the
12 victim to live out his or her life in an
13 environment free from that harm. Okay, that's it
14 very important. I'm not arguing against it. I'm
15 just trying -- and Admiral Tracey had good
16 language. I talked about making sure that the
17 Secretary of Defense review how the expedited
18 transfer program is working so that we can
19 minimize any of the harms that come from it, the
20 unintended consequences. I have no problem with
21 rephrasing it that way. I would just say that
22 one of the unintended consequences are these

1 allegations of fraud and that that has to be
2 looked at, too, as part of how we minimize the
3 harms coming from this. That's all I'm saying.

4 JUDGE JONES: So I -- oh, go ahead,
5 Admiral. This is yours.

6 VADM TRACEY: My suggestion: The JPP
7 recommends that the Secretary of Defense review
8 the policy on expedited transfer of sexual
9 assault victims and consider whether it should be
10 changed. Delete from "to state" through to "this
11 change will."

12 So it then will say: whether it should
13 be changed to help ensure that prosecutors have
14 access to victims in preparing for
15 courts-martial, will satisfy the need to separate
16 the victim from the accused, and will maintain
17 the victim's access to support systems, period.

18 Delete "while combating the
19 perception" up through "claims of sexual
20 assault." Then: Commanders and VLCs should all
21 receive training on how relocating victims from
22 less desirable -- I'm sorry.

1 Make a separate sentence then on
2 additional, we should look at evidence that the
3 perception exists that the ability to ask for
4 these transfers has encouraged fraudulent claims
5 of sexual assault.

6 CHAIR HOLTZMAN: Don't you want to say
7 something about minimizing that perception?
8 Wouldn't that be a good thing, too? No?

9 VADM TRACEY: So, keep it where it is
10 and say "while minimizing?"

11 CHAIR HOLTZMAN: Yes.

12 VADM TRACEY: Good, okay. I'm happy
13 with that.

14 MR. STONE: While minimizing what?

15 CHAIR HOLTZMAN: The perception.

16 VADM TRACEY: Any perception that the
17 ability to ask for these transfers has encouraged
18 fraudulent claims of sexual assault, period.

19 And then I'm good with it. So I think
20 the change that I'm suggesting only takes out the
21 specific recommendation that we look to
22 transferring people on the same installation as

1 the best possible solution.

2 PROF. TAYLOR: I have a slightly
3 different idea, if I may, Admiral Tracey. And
4 this may be consistent with yours or may be
5 slightly a different twist.

6 It would be something like, the
7 Subcommittee recommends that the Secretary of
8 Defense review the policy on expedited transfer
9 of sexual assault victims and consider whether it
10 should be modified to determine whether there are
11 circumstances where sexual assault victims might
12 be transferred to another unit on the same
13 installation or to a nearby installation, without
14 sacrificing any interests of the victim.

15 Because that would keep the focus on
16 the victim, it seems to me, but it would also
17 introduce a balancing test.

18 I sort of like the fact that --

19 VADM TRACEY: I'm not unhappy with
20 that but I think that if the policy, as attended
21 today, doesn't address how is the prosecutor
22 going to have access to this victim, that needs

1 to be corrected.

2 PROF. TAYLOR: No, that was just my
3 first sentence.

4 I was happy with what you said
5 thereafter but it seems to me that it might be
6 fair to introduce something like a balancing test
7 that creates the presumption that the interests
8 of the victim are paramount on this question
9 because of the points that Mr. Stone raised about
10 the bumping into people.

11 And I think the culture for the Navy
12 might be a little different from the Army, for
13 example, because we do have very large
14 installations, you know 50,000 people where it is
15 much less likely, if you are transferring a
16 person from one corner to another, there are
17 different clubs that support different
18 activities. Unlike some of the other Service
19 installations, it might be somewhat more
20 contained.

21 So, I think it could be possible in
22 circumstances like that to have someone

1 transferred and the victim was saying that's
2 okay. I don't know.

3 VADM TRACEY: I like that. Consider
4 whether circumstances under which it could be and
5 is satisfactory at all times. That works for me.

6 JUDGE JONES: And I like a balancing
7 test. It has to be consistent with the needs of
8 the victim.

9 PROF. TAYLOR: Yes.

10 CHAIR HOLTZMAN: All right but are we
11 going to mention this issue of fraudulent
12 transfers or that's just out?

13 JUDGE JONES: I think you added that,
14 too.

15 PROF. TAYLOR: Well, to me, that is
16 more of an explanatory note about things to
17 consider and not maybe the rationale itself. I
18 thought, in my mind, at least, this last sentence
19 in the first paragraph sort of overstated the
20 problem of foster the perception among military
21 members that the expedited transfer is being
22 abused.

1 I know that's a perception but I just
2 don't know if when you add that to "transfers can
3 be used by defense counsel to cast doubt," to me,
4 that's a little bit too much in the weeds for a
5 recommendation, as opposed to some further
6 explanatory note that I would soften a little bit
7 probably, instead of making it quite so in your
8 face.

9 And again, I'm perfectly willing to
10 ask the Staff to see if they can't do that and
11 then we can use our normal ways of communicating
12 with the Staff Director to try to come up with
13 the final language.

14 CHAIR HOLTZMAN: If that's okay, why
15 don't we ask the Staff to try to draft up some
16 language? First, we have an earlier
17 recommendation and we have this one. Maybe we
18 can do it before the end of the day today. If
19 not, Maria, can we do that on the phone or we're
20 not allowed to do that on the phone?

21 MS. FRIED: As long as it's not a
22 substantive change.

1 CHAIR HOLTZMAN: Well it probably is
2 going to be a substantive change.

3 MS. FRIED: We could do it on the
4 phone if we open some lines to the public and
5 notice it.

6 CHAIR HOLTZMAN: Oh, okay.

7 MS. SAUNDERS: Is that a possibility
8 that we could do that, though?

9 MS. FRIED: You could have a public
10 meeting.

11 MS. SAUNDERS: Have a public meeting
12 on the phone.

13 MS. FRIED: As long as lines are
14 available to the public and you go through the
15 notice process.

16 CHAIR HOLTZMAN: Okay.

17 MR. STONE: I have one more comment
18 about the bullets in the underlying report. The
19 first bullet says: Counsel reported that once
20 victims receive expedited transfer to other
21 locations, they are less likely to cooperate with
22 the prosecution.

1 You can even write defense counsel or
2 some counsel but that's a questionable thing,
3 given that today, they can Skype with lawyers.
4 They have conference calls. If they want to
5 cooperate, they cooperate and I don't think one
6 is a "but for" for the other.

7 The second thing comes out of the
8 report and on the prior version, it was on page
9 26, talking about this. I don't know what page
10 it is on now but it is in "see expedited transfer
11 sections." There is a sentence that says: The
12 victims often are able to select the location to
13 which they will transfer.

14 I think that sentence is absolutely
15 wrong. The commanding officer decides where they
16 are going to transfer. Sometimes they have no
17 choice in the matter. It's take it or leave it.
18 Sometimes they may be given one or two locations
19 but they have to figure out where does money,
20 where is the slot that they qualified to work in.
21 I mean this is a very complex thing and I think
22 the idea, the suggestion that the victims can

1 select the location to make it sound like they
2 are in control of this process is very
3 misleading. And I don't want us to leave that
4 uncorrected. So I think a bullet has to say
5 commanding officers already determined this
6 process and our recommendation talks about thing
7 they may consider. Something like that.

8 JUDGE JONES: No, I understand your
9 point. I mean, obviously, a victim can suggest
10 but can't order their own transfer to a specific
11 location. So, we should fix that.

12 MS. SAUNDERS: I could put in a bullet
13 following this recommendation. I could put
14 language to that effect.

15 MR. STONE: Yes, it has to be
16 addressed in the report.

17 CHAIR HOLTZMAN: Well but, of course,
18 you have a bullet here that says some counsel and
19 commanders felt that expedited transfers are
20 abused and perceive their commanders are afraid
21 to say no to victims for fear it will be seen as
22 retaliation.

1 MR. STONE: Well I don't think we ever
2 heard testimony on that either. That's another
3 one of these things that we should have called
4 for people to testify about.

5 We heard early on --

6 CHAIR HOLTZMAN: Why do we need
7 testimony, Mr. Stone? I don't understand. We
8 have --

9 MR. STONE: Because we're the JPP
10 Panel that conducts proceedings in public.

11 CHAIR HOLTZMAN: But we can accept the
12 report. I think you're in error here. We can
13 accept the report of the Subcommittee without
14 hearing independent testimony on that. I think
15 that that's clear.

16 MR. STONE: I believe that when it
17 affects the Military Services that the overall
18 idea behind FACA is that we give the people at
19 issue, in this case each Military Service, just
20 like we did on every other issue, a chance to
21 come in here and we convened panels that were
22 all-defense counsel panels or defense counsel,

1 and prosecution, and SJAs from each Service and
2 they got to give us their views. It wasn't
3 anonymous. They were happy to do it. These are
4 not issues that, for some reason, they wouldn't
5 comment on.

6 Inadvertently, many have commented on
7 these issues before and we have heard conflicting
8 views, which didn't cause us to issue a
9 recommendation. So, to do it now, based on a
10 nonscientific sample, hearing the same thing,
11 doesn't seem to me to be what FACA is expecting
12 us to do.

13 If we had panels called and we had
14 time for it, that would be a different story. We
15 don't.

16 CHAIR HOLTZMAN: Yes, but I just want
17 to say one thing. I just want to say one thing.
18 Just because people come here and testify doesn't
19 mean that their testimony is any more accurate,
20 any more an accurate description of what's
21 happened than what the Subcommittee heard.

22 I think if you feel that you need to

1 have that testimony, that's fine but there's no
2 legal requirement that we hold independent
3 hearings and independently verify all the
4 statements that were or weren't made in that
5 report. That's the only point I'm making.

6 MS. FRIED: You are correct, Ms.
7 Holtzman. And Mr. Stone, and the FACA attorney,
8 and myself had a conversation about the role and
9 function of subcommittees. And I understand Mr.
10 Stone has his own views but we're comfortable
11 that we're operating consistent with the
12 requirements of FACA and the law.

13 MR. STONE: Right. And I just want to
14 say that in my decades of experience as a lawyer,
15 when somebody is willing to make a statement in
16 front of the public and be questioned on it, I
17 find that to be more convincing and credible to
18 me than when people are in a closed setting, it's
19 not public, I can't question them about it, and I
20 have no idea whether they are talking from their
21 own experience or somebody else's experience.

22 So, in terms of me being able to rely

1 on it and do what I think I should be doing under
2 FACA, which is give the public and the agencies a
3 chance to hear and evaluate something, a
4 statement made in public, I find it more
5 credible. That's all I meant.

6 As Admiral Tracey mentioned before,
7 sure, there are rumors of lots of things but I
8 can't tell from summaries of interviews whether
9 people's information was secondhand from somebody
10 else or firsthand by them. And I didn't get a
11 chance to ask that question either. So, that's
12 where it comes from.

13 CHAIR HOLTZMAN: I just want to
14 support the -- I just don't like the attack on
15 the integrity of the subcommittee report. I
16 think the fact the report does not purport to be
17 anything more than it is. But he statements that
18 are contained in the recommendations that were
19 made in the report, even though these come from
20 nonpublic hearings, the fact of the matter is
21 that these are statements that were repeated at
22 site visit, after site visit, after site visit.

1 These are not statements that were made just by
2 defense counsel, or just by trial counsel, or
3 just by this counsel, or just by that counsel.

4 So, I'm not saying that they are
5 necessarily scientifically valid but I do think
6 that the Subcommittee felt, and we have very
7 distinguished members on the Subcommittee, I'm
8 not including myself on that but the other
9 members of the Subcommittee, and they felt that
10 the reports that they heard were important. And
11 I think the fact is that JPP thinks that they are
12 important, too, because we have already adopted I
13 don't know four or five recommendations.

14 So I just don't think that the attacks
15 on the Subcommittee process or the Subcommittee
16 report, itself, are really -- I don't agree with
17 them.

18 MR. STONE: Okay, for the record, I'm
19 not attacking the Subcommittee or the
20 Subcommittee process. I'm saying that the Panel
21 ran out of time to take all the issues that they
22 spotted and handle them in a way that I could

1 feel comfortable making a recommendation, based
2 on the case law that I've read, based on the
3 regulations.

4 Legally, we may be able to do that but
5 I'm not comfortable. I don't do it in my legal
6 practice. I don't do it in my life. And I have
7 a lot of qualms about doing it as an appointed
8 JPP Member of the Secretary of Defense.

9 CHAIR HOLTZMAN: Okay. I think we
10 will take a half-hour break for lunch and then
11 come back and we've got a long agenda to do this
12 afternoon. Let's see if we can get through it.

13 Thank you very much, Panel Members.

14 (Whereupon, the above-entitled matter
15 went off the record at 12:48 p.m. and resumed at
16 1:27 p.m.)

17 CHAIR HOLTZMAN: Now with all the
18 spiritual sustenance provided by Dr. Janice, we
19 are ready to go full speed head.

20 MS. PETERS: All right, good afternoon
21 Members of the Panel.

22 MR. STONE: Wait one second. Before

1 you jump to that, I just have one wrap-up comment
2 from the last morning session.

3 CHAIR HOLTZMAN: Yes, sure.

4 MR. STONE: And I guess it relates to
5 formality, as much as anything else.

6 I would like to suggest that the title
7 of that report should not be Barriers to the Fair
8 Administration of Justice because there are a lot
9 of things that we have changed and that we might
10 have a title that is more neutral that shows a
11 little more balance, like Additional Concerns
12 about the Administration of Justice.

13 Because they say what they say but I
14 don't like the title seeming to characterize
15 what's in there before you look at it.

16 CHAIR HOLTZMAN: Well, I think that's
17 a fair comment but do you want to give us a
18 chance to think about another title?

19 MR. STONE: Sure. I just wanted to
20 throw that out there.

21 CHAIR HOLTZMAN: Is that a substance
22 issue or is that a procedural issue that we could

1 --

2 MS. FRIED: I think it's a substance
3 issue but we could --

4 CHAIR HOLTZMAN: All right, we'll see
5 if we can address that before the end of the day.
6 Maybe we can wait until July.

7 Okay, so now we are up to judicial --
8 oh, Ms. Peters.

9 MS. PETERS: Yes, ma'am. In your red
10 folders there is a revised executive summary and
11 recommendations and findings pertaining to the
12 Sex Assault Investigations Report that we have
13 discussed at previous meetings. The copy
14 provided in you folder has on the front of it The
15 Report on Sexual Assault Investigations in the
16 Military. This is only about five or six pages
17 long.

18 This version is being provided to you
19 to obtain the Panel's final approval of the
20 language of the Executive Summary and of the
21 recommendations. Now, these recommendations were
22 voted on previously by the Panel. There have

1 been changes since the last meeting because since
2 May 19th -- during the May 19th meeting I think
3 the Panel gave the Staff some directive to make
4 some changes to the Executive Summary and maybe
5 two minor edits to the recommendation.

6 The Staff went back and incorporated
7 those edits and those changes into the version
8 you have in front of you. In addition, we
9 received additional comments and edits from Ms.
10 Holtzman and Mr. Stone, which we have
11 incorporated as well into this version.

12 So what's before you reflects
13 everything discussed in the May 19 meeting, plus
14 additional panel member feedback that has been
15 provided to the Staff since the May 19th meeting
16 and today.

17 What I can do, ma'am, subject to your
18 or for your decision is I guess we could approach
19 this in one of two ways. We could discuss
20 proposed edits to the recommendations first or go
21 over proposed changes to the language of the
22 Executive Summary but there are two separate

1 items.

2 CHAIR HOLTZMAN: Well, what do you
3 recommend? I was actually reading while you were
4 talking. So, I missed what you said.

5 MS. PETERS: Sure. So, I could refer
6 to the recommendations first. They often will
7 affect then the language of the rest of it.

8 CHAIR HOLTZMAN: Okay, so let's do the
9 recommendations first. That sounds good.

10 MS. FRIED: If I may just interject.

11 CHAIR HOLTZMAN: Yes.

12 MS. FRIED: We call this an executive
13 summary but I don't think we should call it
14 anything except the JPP Report because it's
15 different from what the JPP Subcommittee report
16 is. So you are not really just having a separate
17 executive summary.

18 CHAIR HOLTZMAN: I see. Oh, okay,
19 that's a good point.

20 MS. FRIED: So I don't think you need
21 that. So I would just delete the term executive
22 summary.

1 MR. STONE: Because this is our
2 report.

3 MS. FRIED: Correct.

4 MS. PETERS: Okay, thank you. Noted.
5 The first item then for the --

6 CHAIR HOLTZMAN: Oh, let me just ask
7 a question, then. Shouldn't it indicate -- it
8 says Report on Sexual Assault Investigations in
9 the Military, including the report of --

10 MS. FRIED: You can just say it's an
11 addendum.

12 CHAIR HOLTZMAN: But somehow it has to
13 relate or indicate that we are dealing with a
14 Subcommittee report. It doesn't say that on the
15 outside, did it?

16 MS. FRIED: In here, we talk about how
17 you came up with your information. But because
18 you are not adopting the Subcommittee report as a
19 whole, you're modifying it --

20 CHAIR HOLTZMAN: Oh, I see. Okay,
21 fine. Got it. All right.

22 MS. FRIED: You reference it in here.

1 CHAIR HOLTZMAN: Even I can learn.

2 Okay.

3 Now, we're up to -- so you would
4 suggest we do the recommendations first, Meghan?

5 MS. PETERS: Yes, ma'am.

6 CHAIR HOLTZMAN: Okay, so what page is
7 that?

8 MS. PETERS: That is page 4 to this
9 document.

10 CHAIR HOLTZMAN: Okay.

11 MS. PETERS: I'm sorry. I'm going to
12 revise that. No, it is page 4.

13 CHAIR HOLTZMAN: Right.

14 MS. PETERS: We've just changed the
15 numbers to reflect the current order of reports.

16 CHAIR HOLTZMAN: Okay.

17 MS. PETERS: And again, these
18 recommendations have previously been voted on and
19 adopted by the Panel. Subsequent to that, we
20 have received some suggested changes. Those are,
21 first for Mr. Stone, in the body of
22 recommendation, what is now Recommendation 47,

1 that it stated that the JPP suggests that the
2 advisory committee that follows the JPP, the DAC-
3 IPAD, monitor the effects of the DoD policy.

4 And this is changing -- it previously
5 said simply that the DAC-IPAD should monitor the
6 effects of DoD policy. And what I think has been
7 inserted is that we should suggest that the DAC-
8 IPAD monitor the effects of DoD policy. And
9 that's the essence of the recommended change to
10 this recommendation.

11 CHAIR HOLTZMAN: Judge Jones?

12 JUDGE JONES: I'm trying to read it
13 without the changes. I'm sorry.

14 CHAIR HOLTZMAN: Okay, sorry.

15 MS. PETERS: Would you like me to read
16 the recommendation as revised?

17 (Simultaneous speaking.)

18 JUDGE JONES: -- it's revised, right?

19 MS. FRIED: I could interject again.

20 I guess this document has the proposed edits from
21 Mr. Stone, correct?

22 MR. STONE: Right.

1 MS. FRIED: That's what the red and
2 the --

3 MS. PETERS: Yes.

4 MS. FRIED: Okay. If and until they
5 are adopted, I guess if what you were going to
6 say is you were adopting the Investigations
7 Report as a whole, it's okay to have the
8 Executive Summary.

9 MR. STONE: It's what?

10 MS. FRIED: It's okay to have the
11 Executive Summary.

12 CHAIR HOLTZMAN: If what?

13 MS. FRIED: If you weren't going to
14 make any changes. I thought these were your
15 Panel changes. I'm sorry.

16 CHAIR HOLTZMAN: Oh.

17 MS. FRIED: So we could revisit after
18 we have this discussion.

19 CHAIR HOLTZMAN: Okay.

20 MS. FRIED: I'm sorry.

21 CHAIR HOLTZMAN: Okay.

22 MS. PETERS: Okay, I have highlighted

1 where the changes are but would you like me to
2 read aloud the original recommendation?

3 CHAIR HOLTZMAN: Yes.

4 MS. PETERS: Okay.

5 CHAIR HOLTZMAN: Well, why isn't it
6 just the pink, the stuff that's in pink?

7 JUDGE JONES: I think everything is
8 the same except that there is additional
9 language. Is that right?

10 MS. PETERS: I think it's just says
11 the JPP suggests that.

12 JUDGE JONES: Okay.

13 CHAIR HOLTZMAN: And the word monitor,
14 I see, is also added. Am I wrong?

15 MS. PETERS: You know it's highlighted
16 but the word monitor is in the same place in the
17 original recommendation. So that could be an
18 error. It might have been deleted and then re-
19 added and we highlighted out of caution but it is
20 in the original recommendation in the same form,
21 "monitor the effects of the DoD policy" is the
22 same in both.

1 JUDGE JONES: I don't know that we
2 need that we suggest it. We already call it a
3 recommendation and we say in order to do this,
4 they should monitor. Small thing.

5 CHAIR HOLTZMAN: Okay.

6 JUDGE JONES: I don't know if anybody
7 feels strongly about it.

8 CHAIR HOLTZMAN: All right, let's just
9 vote on that, unless somebody else has a burning
10 desire to talk. Okay.

11 MR. STONE: I think I would like to
12 say something before you vote.

13 CHAIR HOLTZMAN: Okay.

14 MR. STONE: I mean, to be honest, this
15 whole document you are looking at and everything
16 in pink is because I pointed out at our last
17 public meeting that I wasn't ready to vote on
18 this report because I had some concerns about
19 whether we were directing the next panel, based
20 on information which, again, I haven't heard
21 publicly, that I didn't mind the ideas behind it
22 but I didn't feel I had a basis. But I was

1 perfectly happy to suggest to them that these are
2 topics that we got out of our listening sessions
3 that we felt, if we had had more time, we would
4 have looked at. And in their discretion, we are
5 suggesting that they look at it.

6 I thought it was -- it struck me as a
7 little bit too much to make, again, a formal
8 recommendation about things that I hadn't exactly
9 heard about here. So, therefore, I just added
10 the word suggest. I didn't think it took away
11 from the substance of the recommendation.

12 And you will see in each of these,
13 with me just hedging a few words so it doesn't
14 look like I have a record upon which I am making
15 this recommendation. And that is true for every
16 one of these, except what is now 49 and 50, that
17 is just an editorial stylistic change on all but
18 49 and 50, where I wanted to add some data in
19 order to be able to go along with the
20 recommendation. I didn't change the substance of
21 the recommendation very much but I either changed
22 a bullet or -- I guess I just changed some

1 bullets and a few words here and there. I was
2 trying to stick with what I thought was the
3 thrust of everybody's views but, at the same
4 time, pointing out what would allow me to feel
5 comfortable going along with it.

6 So really, 47 and 48 there is
7 virtually nothing of substance changed here
8 except suggests that.

9 CHAIR HOLTZMAN: Okay so why don't we
10 take the three of them together?

11 We have a recommendation in
12 Recommendation 47, 48, and 49 --

13 MR. STONE: Well, and 51.

14 CHAIR HOLTZMAN: I'm sorry -- and 51.

15 MR. STONE: Yes.

16 CHAIR HOLTZMAN: Mr. Stone wants to
17 add the term the JPP suggests that, in essence.
18 And Barbara?

19 JUDGE JONES: I think recommendation
20 means we are suggesting it.

21 CHAIR HOLTZMAN: Okay. Any other
22 comment? Okay.

1 Those in favor of Mr. Stone's
2 recommendation/suggestion say aye.

3 MR. STONE: Aye.

4 CHAIR HOLTZMAN: Those opposed?

5 (Chorus of no.)

6 CHAIR HOLTZMAN: Okay, the no's have
7 it. It's not accepted.

8 Mr. Stone, what's your next item?

9 MR. STONE: That takes us to
10 Recommendation 49. And when I get to 49, the
11 last two bullets actually relate to the last
12 topic we just spoke about in the recommendation
13 --

14 CHAIR HOLTZMAN: Is that on page 6?

15 MR. STONE: I'm on page 6 at the top.

16 CHAIR HOLTZMAN: The top of 6. Okay,
17 great.

18 MR. STONE: Yes, we have to be careful
19 about suggesting that SVCs and VLCs don't have a
20 legal obligation to their clients and we have to
21 be more careful in the way we make a
22 recommendation. So, therefore, I added some

1 language to make it clear that they have a legal
2 obligation to their client and that those topics
3 may want additional training, which we just spoke
4 about in the other recommendation. But I think
5 it has to be made clear, especially if this
6 relates to investigators because they are not
7 lawyers and they do not often understand that
8 lawyers have an obligation to their client before
9 they have it to an investigator.

10 So, therefore, I wrote since some
11 SVCs/VLCs who attend investigative interviews,
12 consistent with their legal obligation to their
13 client, may limit the scope of questioning. I
14 don't want to cast doubt on what they are doing
15 when what they're doing is legitimate. It's
16 just, as a policy matter, we think it may cause a
17 problem with what the investigators would like.

18 CHAIR HOLTZMAN: Mr. Stone, would you
19 have an objection to an amendment to that --

20 MR. STONE: No. No, that would be
21 perfectly fine.

22 CHAIR HOLTZMAN: -- which would say

1 since some SVCs/VLCs who attend investigative
2 interviews consistent with their view of their
3 legal obligations to their client? Because in
4 fact, their legal obligation may not require them
5 to do X, Y, Z but they think they are required.

6 Then I would have no objection. I
7 can't speak for anybody else.

8 VADM TRACEY: Is this a sentence? I
9 get lost here.

10 CHAIR HOLTZMAN: Do we have a
11 grammatical problem now? Oh, my goodness.

12 JUDGE JONES: Are you in the box on
13 49?

14 MR. STONE: No, we're at the very top
15 --

16 CHAIR HOLTZMAN: No, at the top of
17 page 6.

18 VADM TRACEY: Since some SVCs/VLCs who
19 attend investigative interviews consistent with
20 their perceived did we say --

21 MR. STONE: No, with their view.

22 VADM TRACEY: -- their view of their

1 legal obligations to their clients, comma, may
2 limit the scope of questioning and sometimes
3 inject to investigators requests for any follow-
4 up interviews with the victim. And investigators
5 lose rapport-building opportunities and possibly
6 important details about the reported offense --
7 then what?

8 CHAIR HOLTZMAN: Yes, right. Was
9 something taken out of this? Meghan, do you have
10 the original language?

11 MS. PETERS: I do. And it was a two-
12 line note that said SVCs/VLCs who attended
13 investigative interviews limit the scope of
14 questioning and sometimes object to
15 investigators' requests for any follow-up
16 interviews with the victim.

17 MR. STONE: Oh, that's good because
18 that gets rid of then investigators lose rapport-
19 building opportunities. And there I go again
20 with rapport-building opportunities who has no
21 privilege.

22 VADM TRACEY: But I still -- even if

1 that is the case, there is still this clause
2 hanging out at the end: whether those topics
3 warrant additional SVC.

4 CHAIR HOLTZMAN: Where did that come
5 from?

6 MR. STONE: I don't know. Oh, maybe
7 -- okay so I guess that's in red. I must have
8 added that.

9 CHAIR HOLTZMAN: What is the original
10 language? If everyone is happy with the original
11 language, we could just go with that.

12 MS. PETERS: SVCs/VLCs who attend
13 investigative interviews limit the scope of
14 questioning and sometimes object to
15 investigators' requests for any follow-up
16 interviews with the victim.

17 VADM TRACEY: So Mr. Stone wanted to
18 add the consistent with --

19 (Simultaneous speaking.)

20 MR. STONE: No, no, I'm just making
21 more trouble in a confusing sentence.

22 VADM TRACEY: All right.

1 CHAIR HOLTZMAN: Okay, fine.

2 MR. STONE: And I can accept Ms.

3 Holtzman's insertion of view of their.

4 CHAIR HOLTZMAN: Well, we don't have
5 consistent with their obligations. So, that's
6 out of it.

7 MR. STONE: No, no, that's still in I
8 think.

9 VADM TRACEY: No.

10 CHAIR HOLTZMAN: No.

11 JUDGE JONES: No, it's out.

12 MR. STONE: Okay, well, that's what
13 I'm proposing: consistent with their view of
14 their legal obligation to their client may limit
15 the scope of questioning. Because I don't want
16 anybody to think we think they're doing something
17 wrong when they limit the scope of questioning.

18 CHAIR HOLTZMAN: I have no problem
19 with that but let's vote on it.

20 VADM TRACEY: I'm sorry.

21 CHAIR HOLTZMAN: Go ahead.

22 VADM TRACEY: There's still a last

1 sentence hanging out. What is the whole
2 recommendation?

3 CHAIR HOLTZMAN: Go ahead, read it
4 again, please, Meghan.

5 MR. STONE: Since some SVCs slash --

6 CHAIR HOLTZMAN: No, not it doesn't
7 start with that. No, go ahead, Meghan, read it.

8 MS. PETERS: "SVCs/VLCs who attend
9 investigative interviews" with the proposed that
10 it's "consistent with their view of their legal
11 obligation to their clients may limit the scope
12 of questioning and sometimes object to
13 investigators' requests for any follow-up
14 interviews with the victim," period.

15 MR. STONE: Then I want to get the
16 word some before that because it was definitely
17 not universal, from the interviews with SVCs and
18 the VLCs. It should say some SVCs/VLCs. I mean
19 if that is an observation, it's an observation
20 but it's some.

21 CHAIR HOLTZMAN: All right.

22 Okay, those in favor of Mr. Stone's

1 recommendation -- do we have his recommendation
2 in mind?

3 In favor of Mr. Stone's
4 recommendation, say aye.

5 (Chorus of aye.)

6 CHAIR HOLTZMAN: Those opposed?

7 (No audible response.)

8 CHAIR HOLTZMAN: The ayes have it.
9 That recommendation is agreed to.

10 Okay, what's next?

11 MR. STONE: And then I crossed out the
12 next, the last bullet under that because I didn't
13 think that added anything. And I thought that it
14 was inexplicable the way it stood, as a result of
15 the barriers to the thorough questioning by
16 MCIOs, since details about an incident are coming
17 together all the time.

18 CHAIR HOLTZMAN: It's not grammatical.

19 MR. STONE: Am I missing something
20 there?

21 CHAIR HOLTZMAN: Yes, what is the
22 original language?

1 MS. PETERS: I think a portion of that
2 sentence was transposed and tagged onto that
3 bullet above, which created the confusion.

4 CHAIR HOLTZMAN: Okay.

5 MS. PETERS: The original bullet reads
6 as follows: As a result of the barriers to
7 thorough questioning by MCIOs, the investigators
8 lose rapport-building opportunities, as well as
9 important details about the reported offense,
10 since details about an incident are commonly
11 gathered over time after a traumatic event, such
12 as sexual assault.

13 CHAIR HOLTZMAN: Okay.

14 MR. STONE: My suggestion was to take
15 out the remainder of that because we at least
16 have some of this for object to follow-up
17 interviews above and the rest of it is may. It's
18 speculative and I don't think it is necessary.

19 CHAIR HOLTZMAN: Okay, so you want to
20 strike the bullet.

21 MR. STONE: Just strike that bullet.

22 CHAIR HOLTZMAN: Okay, those in favor

1 of striking the bullet say aye.

2 (Chorus of aye.)

3 CHAIR HOLTZMAN: Those opposed?

4 (Chorus of no.)

5 CHAIR HOLTZMAN: Barbara have you
6 voted?

7 JUDGE JONES: No, I haven't.

8 CHAIR HOLTZMAN: We have a tie vote
9 here.

10 JUDGE JONES: I know. This is really
11 my moment.

12 CHAIR HOLTZMAN: Right, live it up.

13 JUDGE JONES: And I'm voting whether
14 to strike or not?

15 CHAIR HOLTZMAN: Yes.

16 JUDGE JONES: No.

17 CHAIR HOLTZMAN: Okay, the no's have
18 it.

19 Mr. Stone, next.

20 MR. STONE: Okay, now we have --

21 CHAIR HOLTZMAN: Did we do 50? Is
22 this part of what we already did?

1 MR. STONE: No.

2 CHAIR HOLTZMAN: Okay, Recommendation
3 50.

4 MR. STONE: No, we haven't touched
5 this.

6 CHAIR HOLTZMAN: Okay.

7 MR. STONE: In addition to the
8 suggest, which is separate and apart from the
9 substantive issue --

10 CHAIR HOLTZMAN: Right.

11 MR. STONE: -- I added the last, two,
12 three, four, five words at the bottom of the
13 recommendation talking about trying to get
14 cellular phones and it makes it clear we're not
15 just recommending something willy-nilly. It says
16 which can lawfully be ameliorated. And then I
17 wanted to clarify in the first bullet, which is
18 -- and in the second one actually, the difference
19 between somebody voluntarily turning over their
20 cell phone or not voluntarily turning it over.

21 And I thought I needed to point out
22 that the Supreme Court unanimously held in 2014

1 that the information on a cell phone is immune
2 from search. A warrant is generally required
3 before such a search, even when a cell phone is
4 seized incident to arrest. Our cases have
5 historically recognized that the warrant
6 requirement is an important working part of our
7 machinery of government, not merely an
8 inconvenience to be somehow weighed against the
9 claims of police efficiency.

10 All that language is from the Supreme
11 Court case. It's recent. It talked about
12 whether you can just grab a cell phone, even
13 incident to arrest, which we don't have it from a
14 defendant, and they said no.

15 So, that's why in the second bullet I
16 wrote, "When a victim voluntarily declines to
17 turn over relevant evidence such as . . . and a
18 warrant for the cell phone is not obtained," that
19 that would be the right way to get it, there are
20 military warrants, investigators and prosecutors
21 make decisions by investigating charging without
22 possessing all available evidence.

1 That's the point. They may decide
2 we're not going to get a warrant or we can't get
3 a warrant, it wasn't turned over. They are going
4 to make a decision without possessing all of the
5 available evidence and that's why in the main
6 recommendation was suggesting that they look at
7 this in ways that can lawfully be ameliorated.
8 That's the point.

9 JUDGE JONES: So is the first one in
10 the box you want to add which can lawfully be
11 ameliorated?

12 MR. STONE: Yes, in other words,
13 consistent with the Supreme Court Riley v.
14 California. Maybe they can come up with
15 something consistent with that. That's fine.
16 But I don't want to suggest that we're ignorant
17 of what the constitutional Fourth Amendment rule
18 is as decided recently by a unanimous Supreme
19 Court, which is odd in itself in the last couple
20 of years, having to do with cell phones.

21 CHAIR HOLTZMAN: Now before you get to
22 that, why is there a striking through the word

1 remove? Is that an accident, or do we take that
2 seriously, or what does that mean?

3 MS. PETERS: That's an edit from Mr.
4 Stone.

5 MR. STONE: In the second bullet?

6 CHAIR HOLTZMAN: In the first bullet.

7 MS. PETERS: In the recommendation we
8 are talking about.

9 MR. STONE: Because the original
10 recommendation said JPP recommends that the blah,
11 blah, blah consider removing. And what I'm
12 saying is monitor if there are impediments, which
13 can lawfully be ameliorated.

14 CHAIR HOLTZMAN: But we rejected.

15 MR. STONE: So I have the ameliorated
16 instead of remove.

17 CHAIR HOLTZMAN: Okay. But the
18 suggested part we have already voted on.

19 MR. STONE: Yes. No, I know. You
20 want to get rid of that. I got that.

21 CHAIR HOLTZMAN: Okay, now, Barbara,
22 do you want to respond to lawfully being

1 ameliorated?

2 JUDGE JONES: Yes. Again, I don't
3 think we need it.

4 I think what we were talking about
5 here is we are asking them to -- well, I don't
6 know. Maybe it's not well-stated. I don't think
7 anybody has any misunderstanding about them
8 looking to go beyond developed Fourth Amendment
9 law. I just think we're asking them to figure
10 out other ways to address the victims' concerns.

11 And I remember one of the things we
12 talked about was really just sort of the kinds of
13 explanations a victim may need to understand the
14 importance of this evidence getting to the
15 prosecutor quickly to develop leads or, at some
16 time, appropriately to figure out what the
17 defense may be in the case and also to be able to
18 explain that they are able to search without
19 necessarily going beyond the subject matter that
20 is involved in the case.

21 Those were the kinds of things that we
22 talked about in the Subcommittee that are

1 possible remedies. And maybe what they all are
2 is they and a number of other suggestions that
3 can be used to explain to victims that this can
4 be done very carefully and with the least
5 invasion of the victim's privacy in terms of
6 other events and other things.

7 So I don't know that we need to say
8 that -- I don't think we really have to tell
9 anybody that of course we don't mean we're going
10 to do unlawful things. So, I just wouldn't put
11 it in.

12 CHAIR HOLTZMAN: All right, are we
13 ready to vote?

14 MR. STONE: I guess I should just
15 respond to that. That, unfortunately, is not how
16 I read this recommendation. The word that was
17 there originally was remove impediments. And if
18 you're talking about training SVCs to talk to
19 their clients, you can't be talking about
20 training victims because you have no idea who
21 they are going to be. But the words remove
22 impediments --

1 JUDGE JONES: Can I just -- I've got
2 remove in or remove out. Is remove in or out?

3 MS. PETERS: There are three
4 substantive changes to the recommendation, as we
5 received them from Mr. Stone.

6 JUDGE JONES: Okay.

7 MS. PETERS: If I could just highlight
8 them in order and discuss this in the order you
9 want to take them in, where the pink highlight
10 says the JPP suggests that the DAC-IPAD monitor
11 something, that is a substantive change.
12 Recommendation 46, as voted on last time, said
13 the Secretary of Defense remove impediments to
14 MCIOs obtaining tangible evidence. And there was
15 no mention of a DAC-IPAD. So I just want to
16 highlight that that is the first change in this
17 recommendation.

18 The second change is that remove
19 impediments. It was the Secretary of Defense
20 remove impediments to access to tangible
21 evidence. Remove impediments has been changed to
22 monitor if there are impediments to MCIOs

1 obtaining tangible evidence.

2 JUDGE JONES: Well I remember an issue
3 that is more to the point here than the ones I
4 listed and it is perceived difficulties in
5 obtaining search warrants as an impediment. That
6 was also discussed. That came up in a variety of
7 the site visits.

8 So I guess if we are not going to
9 assume that we have any proof of any of these
10 things, it can be are impediments. And I'm
11 against which can lawfully be ameliorated. I
12 haven't changed my opinion on that.

13 MS. PETERS: And that is the third
14 edit --

15 JUDGE JONES: Okay.

16 MS. PETERS: -- adding to the end of
17 the recommendation, which can lawfully be
18 ameliorated. That is the third substantive edit
19 to this recommendation.

20 CHAIR HOLTZMAN: Okay, so if I
21 understand it, we have three things that we are
22 being asked to vote on. Number one, to replace

1 the recommendation to the Secretary of Defense,
2 to the recommendation to the DAC, whatever you
3 call it, the IPAD.

4 The second is the suggestion that
5 instead of removing impediments, to monitor
6 whether if there are impediments. I'm not going
7 into the grammar here or the style.

8 And the third is the language which
9 can lawfully be ameliorated.

10 Okay, let's vote on this. I think we
11 can take them as a whole, unless there is
12 objection to that.

13 So those in favor of Mr. Stone's
14 suggested changes, three suggested changes to
15 Recommendation -- I don't know if it's 46 or 50
16 but as appearing on page 6, say aye.

17 MR. STONE: In favor? Aye.

18 CHAIR HOLTZMAN: In favor, aye.

19 Opposed?

20 (Chorus of no.)

21 CHAIR HOLTZMAN: The no's have it.

22 The recommendation is not carried.

1 Mr. Stone, we have your next
2 recommendation which on the bullet point number
3 1, which I think you already explained.

4 Ms. Peters, is that simply to add this
5 language about the Supreme Court decision?

6 MS. PETERS: It is that plus there is
7 a minor technical edit to that first line.
8 Instead of asserting that MCIO investigators have
9 difficulties obtaining evidence, it has been
10 changed to MCIO investigators report having
11 difficulties voluntarily obtaining evidence.

12 So it would be for the MCIO
13 investigators report having difficulties and
14 voluntarily obtaining evidence, as opposed to
15 just has difficulties obtaining evidence.

16 CHAIR HOLTZMAN: Okay. So, we have
17 two changes in the bullet point. One is changing
18 the first line, basically, to adding the word
19 voluntarily and changing it so that MCIO
20 investigators report having difficulties.

21 And then the second one is to
22 basically include the language about the Supreme

1 Court decision, plus some other material above
2 it.

3 Barbara, do you want to respond to
4 that?

5 JUDGE JONES: I don't think we need
6 the Supreme Court language in there. And I think
7 I liked it the first time around. I can read it
8 again, Mr. Taylor. This one?

9 PROF. TAYLOR: This one. Do you want
10 me to read it for you?

11 JUDGE JONES: No, I can see it.

12 MR. STONE: I'd like to just say that
13 nowhere in the report is it clear in the
14 Subcommittee's report that there is Supreme Court
15 law, which is something that has to be looked at.
16 And the report, when read on its face, is
17 contrary to the last line of the bullet as it now
18 reads. It talks how the MCIOs found it an
19 inconvenience to be weighed against the claims of
20 police efficiency, which is perfectly acceptable
21 for MCIOs. They are not lawyers but I think
22 that, given our responsibility to be clear, we

1 just need to say we're cognizant of that, even
2 though the MCIOs in their non-public, non-
3 attributional comments, would have liked police
4 efficiency.

5 If they had shown up in front of us
6 here, I am certain I would have raised this and
7 maybe they would have said oh, yes, of course,
8 absolutely. But it didn't come up. It is not in
9 the Subcommittee report and it implies that
10 police efficiency is the end all and be all. And
11 I just want it to be clear that there is a
12 balance there and that we understand the balance.

13 JUDGE JONES: I don't think it's
14 necessary.

15 CHAIR HOLTZMAN: Since this is all in
16 one bullet, I, personally, don't see that there's
17 an objection to Mr. Stone's change in the first
18 sentence, which instead of MCIO investigators
19 report have difficulties obtaining evidence. I
20 don't mind saying they report having
21 difficulties.

22 JUDGE JONES: No, I don't mind that

1 either.

2 CHAIR HOLTZMAN: And I don't mind the
3 word voluntarily obtaining evidence.

4 VADM TRACEY: I think that is contrary
5 to what Judge Jones said. I thought that she
6 said that they reported actually having
7 difficulty getting warrants, as well as obtaining
8 voluntarily.

9 JUDGE JONES: That was one of many
10 follow-ups, yes.

11 CHAIR HOLTZMAN: Oh, okay. So then --

12 MR. STONE: That's treated in the
13 second bullet.

14 MS. PETERS: I think those are two --
15 both problems in their own right I think from the
16 Subcommittee's --

17 CHAIR HOLTZMAN: Right, so I think the
18 voluntarily part, I think that is okay. I don't
19 think I have any problem with that first
20 sentence, to changes in the first sentence.

21 But I agree with Judge Jones about the
22 Supreme Court case and the balance of the

1 material.

2 Do you have a view about the -- okay,
3 let's --

4 JUDGE JONES: Well, I still don't
5 think we need to say voluntarily but maybe I am
6 missing something.

7 CHAIR HOLTZMAN: Okay, well if you
8 don't --

9 JUDGE JONES: No, I think the MCIO
10 Investigators report having difficulties is fine
11 with me. I agree with you as you agree with me,
12 we don't need the Supreme Court in there and I
13 just don't think we need voluntarily either.

14 CHAIR HOLTZMAN: Okay, so let's first
15 -- so let's separate it out into three points.

16 Number one, I am going to do your
17 proposal on sentence number one without the word
18 voluntarily and then I will ask for the
19 voluntarily. Okay?

20 So, those in favor of Mr. Stone's
21 suggestion that we change sentence one to say
22 MCIO investigators report having difficulties,

1 those in favor say aye.

2 (Chorus of aye.)

3 CHAIR HOLTZMAN: Opposed?

4 (No audible response.)

5 CHAIR HOLTZMAN: The ayes have it.

6 Question: Do we want to add the word
7 voluntarily after the word difficulties?

8 Those in favor say aye.

9 MR. STONE: Aye.

10 CHAIR HOLTZMAN: Those opposed?

11 (Chorus of no.)

12 CHAIR HOLTZMAN: The no's have it.

13 Then the balance of Mr. Stone's
14 proposal on bullet number one, those in favor say
15 aye.

16 MR. STONE: Aye.

17 CHAIR HOLTZMAN: Those opposed?

18 (Chorus of no.)

19 CHAIR HOLTZMAN: The no's have it.

20 Okay, bullet two --

21 MS. PETERS: Ma'am, may I clarify for
22 the Staff's reference on bullet one?

1 CHAIR HOLTZMAN: Yes.

2 MS. PETERS: You have discussed the
3 balance of the pink is all about the Supreme
4 Court case, except for --

5 (Simultaneous speaking.)

6 CHAIR HOLTZMAN: Yes, right, I said
7 that when I described it. I said the rest of the
8 --

9 MS. PETERS: The balance of it.

10 CHAIR HOLTZMAN: -- balance of his
11 proposal.

12 MS. PETERS: Okay, then, understood.
13 So, that applies to everything else.

14 CHAIR HOLTZMAN: Yes.

15 MS. PETERS: Okay, yes, ma'am.

16 VADM TRACEY: So I'm sorry, now it
17 says, let's see, allows clients not to --

18 CHAIR HOLTZMAN: It will revert to
19 whatever the original language was. I don't know
20 that we had the original.

21 MR. STONE: It implies that the SVCs
22 and the VLCs are doing something wrong when it

1 says openly acknowledged they advised clients not
2 to turn over the cell phones.

3 And I don't think we should be
4 implying they are doing something wrong when they
5 are doing something constitutional.

6 CHAIR HOLTZMAN: Or they think it's
7 constitutional.

8 JUDGE JONES: I didn't know you were
9 challenging -- that's not in pink here. It looks
10 unchallenged.

11 CHAIR HOLTZMAN: Well, what he's got
12 there is the voluntarily part.

13 JUDGE JONES: Right, we voted on that.

14 CHAIR HOLTZMAN: And then he's got
15 diary and -- well, we have voluntarily twice in
16 that bullet. There is a second time voluntarily
17 and then there is diary and privileged materials.

18 Then he says, therefore, the use of
19 both voluntary productions and the use of
20 military search warrants with cell phones should
21 be monitored. And then there's the Supreme Court
22 reference.

1 Do you want to revisit that issue?

2 JUDGE JONES: Aren't we back in the
3 first bullet now about openly acknowledged?

4 CHAIR HOLTZMAN: Can you read sentence
5 number two of what the original language was,
6 please?

7 MS. PETERS: The second sentence of
8 the original first bullet reads: Some SVCs/VLCs
9 openly acknowledged that they advised clients not
10 to turn over their cell phones to investigators,
11 even when it is likely to contain potential
12 evidence.

13 CHAIR HOLTZMAN: Even when "it," when
14 we have cell phones in the plural?

15 MS. PETERS: That's how it reads right
16 now, ma'am.

17 CHAIR HOLTZMAN: Yes, there is a
18 grammatical problem there. Really we don't need
19 a -- that's not a substantive issue, is it?

20 MS. FRIED: No.

21 JUDGE JONES: So, I understand your
22 point, Mr. Stone, to the extent that openly

1 acknowledged. The openly part makes it sounds
2 like they're doing something wrong. So I would
3 get rid of openly. And it can be as simple as
4 "have acknowledged" or "some SVCs report that."

5 CHAIR HOLTZMAN: Yes, that's better
6 report instead of acknowledge because it doesn't
7 suggest something wrong. Right.

8 JUDGE JONES: Right.

9 So, anyway, I would go along with
10 getting rid of it and suggest SVCs/VLCs report
11 that they advise clients, et cetera. I would
12 agree to that. That would be my suggestion.

13 CHAIR HOLTZMAN: And what about the
14 term voluntarily there? Because this is not
15 necessarily in response to a subpoena. That
16 could suggest that they are advising them not to
17 turn over cell phones to investigators. Is that
18 necessary?

19 JUDGE JONES: I think it's unnecessary
20 for the same reason we didn't need it the first
21 time.

22 CHAIR HOLTZMAN: Okay.

1 All right. So, we just voted on that,
2 right?

3 MS. PETERS: Yes, ma'am.

4 CHAIR HOLTZMAN: Okay.

5 MR. STONE: We just changed some
6 language, though. And in light of that language,
7 some SVCs/VLCs report --

8 CHAIR HOLTZMAN: Right.

9 MR. STONE: -- that, and if you put in
10 a comma, consistent with governing law, comma,
11 they advise clients not to blah, blah, blah. I
12 don't want them being criticized or looking like
13 they are being criticized unfairly when they are
14 acting consistent with governing law. It may not
15 be the best thing for the investigators but it's
16 consistent with governing law the way they're
17 acting.

18 JUDGE JONES: But I don't think now
19 that we've taken out what I agree with you was
20 language that was inappropriate, a little over
21 the top on this issue, that that's what we're
22 saying.

1 MR. STONE: But it says it in the
2 Subcommittee report to which we refer to. That's
3 the point. We have a Subcommittee report that
4 backs this up and that report is much more
5 critical without ever recognizing because it's
6 coming from comments by MCIOs who are not
7 typically lawyers, that they are frustrated, and
8 they are angry, and everything else that they are
9 not getting the cell phones and they want them.
10 And frankly, I don't think they've had the legal
11 training to understand that what they should be
12 doing is rushing right out to the warrant
13 procedure and at least trying to get a warrant
14 right away, which they would probably get pretty
15 quickly. Mr. Taylor made that point a couple of
16 days ago.

17 JUDGE JONES: Well, look, I think the
18 report is recording their statement but this
19 recommendation is not that. And I don't think we
20 need to go any farther than what we've done here.

21 CHAIR HOLTZMAN: Okay, so let's vote
22 on the proposed change that Judge Jones has made,

1 which would be in the sentence to strike openly
2 acknowledge and replace it with report or
3 reported. Which word?

4 JUDGE JONES: Reported I suppose.

5 CHAIR HOLTZMAN: Okay.

6 JUDGE JONES: I don't think it
7 matters.

8 CHAIR HOLTZMAN: All right, those in
9 favor, say aye.

10 (Chorus of aye.)

11 CHAIR HOLTZMAN: Opposed?

12 (No audible response.)

13 CHAIR HOLTZMAN: That's carried.

14 Can we also make the change about "it"
15 to "they", or turn over -- so that we make the
16 grammatical change?

17 MS. PETERS: Yes, ma'am.

18 MR. STONE: Now, I would like just
19 like a vote on whether you want to say consistent
20 with governing law.

21 CHAIR HOLTZMAN: Okay.

22 MR. STONE: That would be the phrase

1 after reported that they, comma, consistent with
2 governing law.

3 JUDGE JONES: I mean my view about
4 that is, in any case, it should be their view of
5 governing law because I don't know that --

6 MR. STONE: Okay, could be consistent
7 with their view. That's okay.

8 CHAIR HOLTZMAN: But I don't know if
9 it's necessary.

10 JUDGE JONES: I mean that's the kind
11 of phrase that you either do it everywhere or you
12 don't do it anywhere, it seems to me.

13 MR. STONE: Well, I think if you are
14 criticizing the lawyers anywhere, you have to
15 throw that in.

16 JUDGE JONES: Well I've tried to take
17 the wording out that would criticize them. This
18 is just a fact now that they do this, which I
19 think takes care of it.

20 CHAIR HOLTZMAN: Okay, let's vote.

21 Those in favor of Mr. Stone's
22 suggestion to use language -- would you state it

1 again, Mr. Stone?

2 MR. STONE: Consistent with governing
3 law.

4 CHAIR HOLTZMAN: Okay -- say aye.

5 MR. STONE: Aye.

6 CHAIR HOLTZMAN: Those opposed?

7 (Chorus of no.)

8 CHAIR HOLTZMAN: The no's have it.

9 Mr. Stone, we're up to bullet three or
10 two.

11 VADM TRACEY: I'm sorry, we took out
12 the sentence: Therefore, the use of both
13 voluntary productions and the use of military
14 search warrants for cell phones should be
15 monitored. Did we not agree that both things
16 need to be monitored?

17 CHAIR HOLTZMAN: Isn't that already --
18 do we have that in our original language?

19 MS. PETERS: No, ma'am. It's not in
20 the original language. This is added. This is
21 all part of the new and proposed language from
22 Mr. Stone, beginning with I mean everything above

1 but --

2 MR. STONE: That was my new language.

3 MS. PETERS: -- therefore. The entire
4 section that begins with therefore, everything
5 below it highlighted in pink is all brand new to
6 the report.

7 MR. STONE: Would you like to suggests
8 we vote on just that sentence? Therefore, the
9 use of both voluntary productions and the use of
10 military search warrants for cell phones should
11 be monitored. I'm fine with that. I second the
12 idea we vote on it.

13 CHAIR HOLTZMAN: Barbara, do you have
14 --

15 JUDGE JONES: Yes, I think these are
16 sort of statements of fact to support the
17 recommendation. Right? And now this one
18 incorporate a recommendation that things were not
19 really, I don't think, honing in on the use of
20 voluntary productions and the use of military
21 search warrants should be monitored.

22 I mean that is a recommendation

1 somewhere else but I'm not sure why it fits here.
2 It's not the recommendation.

3 CHAIR HOLTZMAN: Right. Maybe that
4 language could be added to Recommendation I don't
5 know what the number is 46 or 50 right above it.

6 MR. STONE: It's 50. It's 50 now.

7 CHAIR HOLTZMAN: Okay, so maybe
8 something instead therefore and maybe just simply
9 the use of both voluntary productions -- I don't
10 know if that is the correct language -- and the
11 use of military search warrants for cell phones
12 should be monitored. I don't know how to
13 incorporate that.

14 I have no problem with --

15 JUDGE JONES: Yes, I don't think we
16 thought about monitoring those things. This was
17 to --

18 MR. STONE: If you make it a whole new
19 sentence, you could put it as the last sentence
20 of the current recommendation.

21 PROF. TAYLOR: So could I just make
22 one observation about this?

1 CHAIR HOLTZMAN: Yes, go ahead.

2 PROF. TAYLOR: I don't know how you do
3 that. I mean I don't know how you would do that
4 unless you sent something out to every MCIO
5 saying that every time you faced an issue
6 involving the need for this kind of evidence that
7 somehow you would file a flash report or keep up
8 with it. It seems to me like this has some
9 really practical difficulties in implementation.

10 MR. STONE: Well, we might have them
11 just have a place on their normal reporting as to
12 cell phone voluntarily -- cell phone was
13 requested, voluntarily turned over, search
14 warrant requested, search warrant obtained, or
15 search warrant not obtained. I mean we just add
16 that to whatever they're doing on their reporting
17 forms. Because according to the Subcommittee
18 report, this is in a majority of cases.

19 CHAIR HOLTZMAN: Well, maybe this is
20 covered already under the recommendation that
21 this be monitored to remove impediments. I mean
22 as part of the monitoring you could assess how

1 the system is working now.

2 JUDGE JONES: Yes, I mean that would
3 have to be -- the guts of this is simply to say
4 we're trying to remove impediments and point up
5 the issue on that sometimes it's difficult
6 because victims don't understand or we don't have
7 the technology to be able to persuade them.
8 Those impediments, it seems to me, are very
9 different than, and that recommendation is very
10 different than launching a monitoring system for
11 all search warrants and, I guess, voluntary
12 productions.

13 MR. STONE: Could you tell me,
14 practically, what you mean by that when you say
15 victims don't understand? We haven't recommended
16 training for victims and we have recommended
17 training for their counsel. So, I'm not sure
18 what the impediment is, just simply that they
19 don't wish to turn it over?

20 JUDGE JONES: No, and I may have
21 misspoke. It is the notion that they -- look,
22 these are all of the same ilk and the VLC, just

1 to have an appreciation for what the value of
2 these things are. And we've captured that.

3 Look, I totally understand a victim
4 has a right to make a decision. I just want the
5 victim adequately advised by a trained VLC.
6 That's the point of all of these.

7 MR. STONE: But this one is in an
8 investigation one. Then you want more training
9 of the SVCs and VLCs instead of remove
10 impediments.

11 That's why I said before if you want
12 to turn this into a training recommendation, that
13 might be a good way to do it.

14 CHAIR HOLTZMAN: Meghan, could you
15 please read the original language of sentence
16 number in the recommendation so that we
17 understand what was of asked of the Secretary of
18 Defense to do?

19 MS. PETERS: Yes, ma'am. And we're
20 obtaining copies of the original language because
21 it is --

22 CHAIR HOLTZMAN: Well anyway, just

1 read it to us now, if you don't mind, please.

2 MS. PETERS: Okay. The first --

3 CHAIR HOLTZMAN: Yes, Recommendation
4 50.

5 MS. PETERS: The original
6 recommendation, ma'am?

7 CHAIR HOLTZMAN: The original.

8 MS. PETERS: The Secretary of Defense
9 remove impediments to MCIOs obtaining tangible
10 evidence from a sexual assault victim,
11 particularly information contained on cellular
12 phones or other digital devices, and develop
13 appropriate remedies that address victims'
14 legitimate concerns about turning over this
15 evidence to assure that sexual assault
16 investigations are complete and thorough.

17 CHAIR HOLTZMAN: All right. What
18 about, Mr. Stone, if we did this: instead of
19 just saying remove impediments, assess and remove
20 impediments? Wouldn't that get to the issue
21 you're talking about, which is to review
22 voluntary and involuntary production?

1 MR. STONE: No, because I still don't
2 know what the impediments are. This, by the way,
3 was the thing that kept me from being able to
4 join in this whole recommendation last meeting.

5 CHAIR HOLTZMAN: Yes, it is an
6 impediment. They refuse to turn -- right.

7 MR. STONE: I'm fine if you can come
8 up with language about training the SVCs about
9 possible impediments to blah, blah, blah.

10 VADM TRACEY: So I thought that what
11 the Subcommittee found was several dimensions
12 around this. One, that the view was that SVCs
13 didn't always recognize how important it was to
14 the investigation to get data off of these
15 devices. And so they advised their clients in a
16 way that impeded the ability to win the case.

17 Second, that the MCIOs either didn't
18 ask for or reported difficulty in obtaining
19 warrants. So, they couldn't force the production
20 of these devices.

21 I think, third, that it wasn't clear
22 that the Government made use of certain

1 techniques and technologies there are today that
2 would allow the extract of relevant information
3 while protecting the privacy of the victim.

4 So, I think there is actually sort of
5 three sets of things that were uncovered in these
6 conversations with MCIOs that merit being
7 addressed.

8 MR. STONE: And if you are going to --

9 JUDGE JONES: And those all constitute
10 impediments. So whatever those impediments are,
11 is there a way for them to be remediated by the
12 DoD?

13 MR. STONE: If you name those three
14 things in the recommendation, I think probably I
15 can go along with it.

16 VADM TRACEY: I think that's what the
17 sub-bullets are attempting to do.

18 CHAIR HOLTZMAN: Correct.

19 MR. STONE: Well, I want them in the
20 recommendation because, as I read it and then
21 look back, it suggests something entirely
22 different to me. So if that is what they're

1 looking at, training for SVCs, actually training
2 for MCIOs so they understand what they need to do
3 in these circumstances, and further exploration
4 of possible new technologies. I'm fine with
5 those three things.

6 I don't call those impediments. It's
7 a training requirement. It's a new technology
8 requirement.

9 JUDGE JONES: Well, I just don't think
10 it all makes sense.

11 MR. STONE: So maybe it's just the
12 awkward language in the recommendation that
13 causes me so much trouble and I don't know if
14 somebody here or wants to get back to us with
15 another formulation, or let me take a stab. Or I
16 would love to have you, Admiral, take a stab
17 because you just articulated it pretty well, or
18 somebody else.

19 I don't have to be the one to name
20 those three things but I'm not troubled with
21 those three things.

22 JUDGE JONES: All I can say is I think

1 it's in the bullets and it's modifying the
2 recommendation.

3 VADM TRACEY: That's what I think as
4 well, that the recommendation says what I think
5 what we want it to say. We found categories of
6 potential impediments in our conversations in the
7 Subcommittee. There may be others and those may
8 be one-offs that came up in those conversations.
9 And the monitoring of the data by whoever in DoD
10 might suggest that there are other problems or
11 these are not real problems or that training is
12 the right remedy or that we actually have to make
13 some policy changes.

14 And I thought that the bullets were
15 attempting to explain kind of what the foundation
16 of our concerns were.

17 MR. STONE: I guess then the other
18 option I will ask is that since I don't think
19 those bullets get us there, maybe somebody just
20 wants to clarify the bullets to say each of those
21 three things. And if they said that, I would be
22 fine with it.

1 I just think this thing is so obscure
2 you don't know if it is telling MCIOs to be
3 cowboys. That's what I think it's suggesting but
4 it's not what's intended.

5 CHAIR HOLTZMAN: Do you want to try
6 your hand at doing some bullets?

7 MR. STONE: I'd be happy to do that
8 then circulate them through the Captain.

9 MS. FRIED: I think that couldn't be
10 today, though. That's how --

11 CHAIR HOLTZMAN: How we got here.

12 MS. FRIED: Yes.

13 MR. STONE: Well, no, no, no. I
14 rewrote the recommendations is how we got here.
15 Now, I'm just rewriting three bullets and we all
16 agree on where it's going.

17 CHAIR HOLTZMAN: Well, I don't know.
18 Those bullets, some of that material is in the
19 bullets now.

20 MR. STONE: I just want to make it a
21 little explicit.

22 MS. FRIED: And again, Mr. Stone can

1 write separately. The purpose of this was to
2 provide the opportunity for the Panel, because
3 you guys already deliberated on this at the last
4 meeting, the benefit of Mr. Stone's input so you
5 all could consider it, make changes consistent
6 with what he's recommending, discuss it, modify
7 it, or what have you. And you can certainly can
8 have him come back with additional comments but
9 you may have to have another deliberation
10 session.

11 CHAIR HOLTZMAN: Well, we may have to
12 do that. We already have two recommendations.
13 So, he can come forward with new bullet points.
14 They can be circulated and we can respond to
15 them. And if we like them, we like them; if we
16 don't, we don't.

17 MR. STONE: Right. It's an easy vote
18 next time; they like the bullets or they don't
19 like the bullets.

20 CHAIR HOLTZMAN: And the bullets would
21 be really basically to elaborate the points that
22 --

1 MR. STONE: Exactly. Right, I will
2 suggest the bullets and, at the same time, ask
3 them to be circulated. And if I think other
4 panel members, since we're not voting, could
5 circulate alternative bullets based on mine, so
6 we come in here with maybe not just my version
7 but one or two versions and we simply take a
8 quick vote.

9 CHAIR HOLTZMAN: I have no objection
10 to that. Or we can do it on the phone if we get
11 a public phone meeting.

12 MR. STONE: Right.

13 CHAIR HOLTZMAN: Okay. Now, going to
14 the -- does that remove the proposals you made to
15 the other bullet points, Mr. Stone, or do we have
16 to go through those as well?

17 MR. STONE: No, I think we took care
18 of the other bullet points because we decided --

19 CHAIR HOLTZMAN: Well, you took
20 something out over here. Are you still proposing
21 that? Are you still proposing the changes in the
22 last three bullet points? We haven't reviewed

1 those yet. I just want to make sure.

2 MR. STONE: Yes, I'm going to propose
3 to rewrite all the bullets because I pointed out
4 that the fourth bullet, nobody talked of it. So,
5 it's a little hard to talk about what it is the
6 victims care about in this thing.

7 CHAIR HOLTZMAN: Okay, do you want to
8 just suggest that now?

9 MR. STONE: But I'm going to try and
10 get to Admiral Tracey's three things. I'm going
11 to focus on one, two, three.

12 CHAIR HOLTZMAN: All right.

13 VADM TRACEY: But again, with respect
14 to the third bullet, you can certainly admit that
15 some sources interviewed suggested that victims'
16 concerns about providing their cell phones were
17 attributable to the financial loss. That's a
18 fact.

19 MR. STONE: Okay. Okay, I'll find a
20 way to say that.

21 CHAIR HOLTZMAN: So maybe the change
22 that we're proposing is that victims reported or

1 it was reported that victims have concerns, some
2 victims, maybe not many but some victims, have
3 concerns about whatever.

4 MR. STONE: Right.

5 CHAIR HOLTZMAN: We don't need to
6 eliminate the whole thing because --

7 MR. STONE: Okay, that's legitimate.
8 That's what I'm trying to do, get --

9 CHAIR HOLTZMAN: Okay.

10 MR. STONE: That's what I tried to say
11 at the outset --

12 CHAIR HOLTZMAN: Okay.

13 MR. STONE: -- that I didn't disagree
14 with the thrust of these. I was just trying to
15 get wording that worked.

16 CHAIR HOLTZMAN: Okay, thanks, Mr.
17 Stone. So if you would please provide that, that
18 would be great.

19 MR. STONE: Okay.

20 CHAIR HOLTZMAN: Now what are we up to
21 now, page 7?

22 MR. STONE: Well, we didn't do the --

1 yes. Yes.

2 CHAIR HOLTZMAN: Okay.

3 MR. STONE: Page 7 and this one is
4 sort of like the others. Oh, it says monitor
5 because that is their job to monitor. So, I
6 thought monitor --

7 CHAIR HOLTZMAN: What is the original
8 language that this replaces?

9 MS. PETERS: The original language of
10 this recommendation is: The Secretary of Defense
11 review the resources, staffing, procedures, and
12 policies at forensic laboratories within the
13 Department of Defense to ensure expeditious
14 testing of evidence by forensic laboratories.

15 CHAIR HOLTZMAN: Okay. So, you still
16 want this changed, Mr. Stone? We can --

17 MR. STONE: Well I thought that before
18 we recommended to him that he review it, that we
19 at least ask the next panel to look at it because
20 we didn't really get to look at it. We heard
21 they are all behind but maybe the next panel will
22 say last week he doubled their funding and they

1 can catch up. So, I just wanted to be -- I
2 didn't want to overload his plate on something.
3 Again, I didn't ask how are you doing. Maybe
4 they contracted with the FBI who is going to pick
5 up all their overload. I just didn't know.

6 CHAIR HOLTZMAN: But I think,
7 according to Admiral Tracey's earlier point and,
8 Admiral, forgive me for putting words in your
9 mouth, I don't dare to do that but I do think
10 that the Admiral's point was to leave this to the
11 Secretary of Defense to handle how he, now he,
12 wants to wants to handle it, whether he wants it
13 personally contracted with the FBI or give it to
14 the DAC-IPAD or whatever. So that, I think, was
15 the method behind the madness of this
16 recommendation.

17 But if you want to have a vote on it,
18 we can.

19 MR. STONE: Well, the point of my vote
20 was I don't know the current and immediate future
21 status. I only know what they tell me about the
22 past.

1 CHAIR HOLTZMAN: Okay, fine.

2 MR. STONE: So, therefore, I would
3 have them monitor it. If nobody else thinks
4 that's a problem, you'll out vote me.

5 CHAIR HOLTZMAN: Okay, fine.

6 MR. STONE: I would just like to know
7 what the status is before I tell somebody to
8 change something.

9 CHAIR HOLTZMAN: Okay, so
10 recommendation 51 on page 7, Mr. Stone's
11 suggested change is in pink. Those in favor say
12 aye.

13 MR. STONE: Aye.

14 CHAIR HOLTZMAN: Those opposed?

15 (Chorus of no.)

16 CHAIR HOLTZMAN: The no's have it.

17 Okay, so we are basically finished.

18 Do we have to do another vote on this?

19 MR. STONE: We didn't do page 2. I
20 put the big block in page 2, which I think is the
21 only probably it relates to why I said suggested
22 and not recommended. And if you like, I can read

1 it but it's the big block on page 2.

2 CHAIR HOLTZMAN: All right, give us a
3 chance to read it.

4 MR. STONE: Okay.

5 CHAIR HOLTZMAN: And that's the only
6 other thing we have to do? Do we have to vote on
7 this?

8 MS. FRIED: I think you need to go
9 over his edits, the next two -- I mean, assuming
10 you all accept the edits, there is no need to
11 vote but you still need to go back to them.

12 CHAIR HOLTZMAN: Okay. So, let's look
13 at page 2 and read it.

14 JUDGE JONES: I honestly don't think
15 we need to say this. Certainly, the follow-on
16 committee, as well as the Secretary of Defense,
17 when we ask him to review something, all we're
18 doing is from our Subcommittee's site visits,
19 identifying issues, giving them some color so
20 they can sense what some of the information is
21 out there, and suggesting, if you want to call it
22 that, the recommendation is that they review.

1 Almost every one of these is review.

2 If the Secretary of Defense does find
3 out, or the next Panel, in five minutes that the
4 DoD has just tripled the budget of the
5 laboratories, I would be surprised.

6 I think we are sending along a
7 recommendation to look at these. These may be
8 something you want to follow-up on. We're not
9 telling them to do anything. I just don't see
10 why we need all of this.

11 CHAIR HOLTZMAN: Mr. Stone, do you
12 want to respond?

13 MR. STONE: I actually think it speaks
14 for itself. I don't want to send something to
15 the Secretary. I think it looks premature, that
16 we didn't ask Services first to tell us what they
17 think about it here and, therefore, the most I'm
18 ready to do on all of these is recommend it to
19 the follow-on Committee and they can have
20 whatever hearings they want before they say yea
21 or nay. I think that just looks like we are rash
22 going to the Secretary about issues that some of

1 the Services may have made wonderful progress on.
2 And it is sort of like a criticism of them. And
3 I'm not ready to criticize them to the Secretary
4 when I haven't given them an option, as I said at
5 that other thing, to respond, have an official
6 representative respond. That's my view.

7 MS. FRIED: Mr. Stone, so for all
8 practical purposes, the JPP makes recommendations
9 to the Secretary of Defense and to Congress.

10 For all intents and purposes, this JPP
11 is charged with making recommendations to the
12 Secretary of Defense or Congress. You could say
13 the DAC-IPAD here but the effect would still be
14 the Secretary of Defense would consider it before
15 it goes to the DAC-IPAD or the DAC-IPAD, on its
16 own initiative could, assuming they had that
17 discretion, consider it. But getting stuck on
18 whether or not it goes to the DAC-IPAD or not I
19 think is kind of unnecessary because, ultimately,
20 your report is going to go to the Secretary of
21 Defense and Congress.

22 MR. STONE: Okay.

1 MS. FRIED: Right? So, I see where
2 you're trying to go with this but --

3 MR. STONE: Well, I'm trying not to
4 look like we made a recommendation before we had
5 a hearing to Congress or the Secretary. If you
6 want to say we are going to recommend it to them,
7 I still think somewhere we have to acknowledge,
8 in case we look really stupid, like you say that
9 they just quadrupled their budget, that because
10 of the lack of time, and I am willing to maybe
11 even put that in there, because of the lack of
12 time, we didn't get a chance to ask of them what
13 is your budget. Get a guy here. What is your
14 budget? What's your turnaround time? What's
15 your new budget? What do you expect your new
16 turnaround time is? Have you any new
17 arrangements to get rid of that?

18 I mean we didn't do it and I don't
19 want to criticize anybody or make a
20 recommendation when I don't know what they're
21 doing. That's all. So, I was trying to hedge
22 that so I could stay with your recommendations

1 without it looking like I could care less what
2 they are doing in the military services; I'm
3 going to recommend it anyway.

4 That's where I was coming from. Do
5 you think there is another way to hedge those
6 words? I could do it, too. But that was my
7 guess right there.

8 I mean we said, above, that the views,
9 as you can see, are not universally shared. It
10 had said do not necessarily reflect broad trends.
11 That's true, too. So that's why when I said
12 that, I said you know about whether or not these
13 concerns reflect broad trends.

14 And then I put the issues ought to be
15 followed up. I'm okay with that. I just don't
16 want us implying and, by the way, our duties
17 under Section 576, I looked it up and I think it
18 is (b) and (c), I have the subsections, say that
19 we are supposed to be making recommendations on
20 trends. That's why the language trends is in
21 here because it says we make recommendations on
22 trends, not that we found oh, there is little

1 concern that people have. So, I was trying to
2 stick with trends and say well, we don't have it
3 on trends. But, in addition, we still think,
4 based on everything we got, that this ought to be
5 what I have down here further followed up. And
6 then if they decide --

7 I don't want to crack the whip on
8 somebody and tell them you need to do this
9 because you didn't do that. And that's what it
10 looks like, otherwise. And I'm just not in a
11 position to feel comfortable doing that when I
12 have no evidence what their old budget was.

13 Like with other things, we got the old
14 statistics, the current statistics, projected
15 statistics, budget. I didn't see any of that and
16 so I don't know if this is a problem today. I
17 think the issue is interesting.

18 You know this relates particularly to
19 the forensic stuff. The issues are interesting
20 but I want to know it's a problem today before I
21 tell somebody you have got to work on it.

22 CHAIR HOLTZMAN: Okay, ready to vote.

1 The vote is on the pink material, the dark pink
2 material on page 2. Does that include all the
3 material?

4 MR. STONE: And all the struck stuff
5 right underneath because that is what it
6 replaced.

7 CHAIR HOLTZMAN: And all the struck
8 stuff and all the additional.

9 MR. STONE: Yes.

10 CHAIR HOLTZMAN: All the dark pink
11 materials on page 2 and 3.

12 MR. STONE: Yes.

13 CHAIR HOLTZMAN: Those in favor of Mr.
14 Stone's recommendations, with regard to the
15 materials on page 2 and 3 that I described,
16 namely adding the dark pink and striking the
17 materials that are stricken, say aye.

18 MR. STONE: Aye.

19 CHAIR HOLTZMAN: Those opposed?

20 (Chorus of no.)

21 CHAIR HOLTZMAN: The no's have it.

22 Are we finished now with Judicial

1 Proceedings, Sexual Report on Investigations or
2 do we have to vote on this pending the -- what do
3 we have to do now?

4 MR. STONE: I think we have to wait
5 until I do the bullets.

6 MS. FRIED: No, I think Mr. Stone was
7 going to suggest language for the bullets.

8 MR. STONE: Right. And I don't want
9 somebody printing it up before we have done that
10 because it is a waste of time.

11 CHAIR HOLTZMAN: Can we approve this,
12 subject to the bullets?

13 MS. FRIED: Yes.

14 CHAIR HOLTZMAN: Okay, so let's just
15 vote now to adopt this report, subject to a
16 discussion and vote on Mr. Stone's proposed
17 bullets for Recommendation 50, say aye.

18 (Chorus of aye.)

19 CHAIR HOLTZMAN: Opposed?

20 MR. STONE: I have to abstain until I
21 have the bullets accepted in some form or not
22 accepted.

1 CHAIR HOLTZMAN: Okay, is that
2 sufficient?

3 MS. FRIED: That's fine.

4 CHAIR HOLTZMAN: Okay. So are we done
5 now with this subject?

6 MS. PETERS: We have two
7 recommendations from Mr. Stone that are very
8 similar. I just want to make sure the Panel has
9 noted the recommendation on page 5. I think it
10 is the same. We have already addressed the word
11 suggests but recommendations now 48 and 49 --

12 MR. STONE: We covered those.

13 MS. PETERS: -- say the DAC-IPAD --
14 okay and monitor.

15 MR. STONE: They were not accepted.

16 MS. PETERS: Okay, I just want to make
17 sure that I'm tracking. Okay.

18 MR. STONE: And I would request that
19 you circulate at least a draft up to date, as
20 soon as you've got it so we can see where we are,
21 but for the bullets.

22 MS. PETERS: Yes, sir.

1 CHAIR HOLTZMAN: Okay so now, what's
2 our next item on the agenda?

3 CAPT TIDESWELL: Ma'am I would
4 recommend that we allow Ms. Saunders time. She's
5 had the time to go ahead and write those
6 recommendations so you can see the new language
7 for the report.

8 CHAIR HOLTZMAN: Oh, beautiful. Thank
9 you.

10 JUDGE JONES: Who is this Ms.
11 Saunders?

12 MS. SAUNDERS: If nothing else, there
13 will be a new slate on which to write.

14 CHAIR HOLTZMAN: How are we doing on
15 our time?

16 CAPT TIDESWELL: Yes, ma'am. There
17 are two reports left to discuss. One is called
18 the Final Report and then the second one would be
19 the Data Report for the FY15 statistics.

20 CHAIR HOLTZMAN: Which is the first
21 one?

22 CAPT TIDESWELL: It's the Final

1 Report.

2 CHAIR HOLTZMAN: Oh, the Final Report,
3 okay.

4 CAPT TIDESWELL: Yes, ma'am.

5 CHAIR HOLTZMAN: All right, let's see
6 how quickly we can do this.

7 MS. SAUNDERS: Would you like me to go
8 ahead and read Recommendation 5 or do you want to
9 --

10 CHAIR HOLTZMAN: Just give me a
11 second.

12 (Whereupon, the above-entitled matter
13 went off the record at 2:38 p.m. and resumed at
14 2:41 p.m.)

15 CHAIR HOLTZMAN: Are we still deep in
16 thought on Recommendation 5 and 9? Are we ready?

17 First of all let me say, now that
18 after four to five of these candies, thank you
19 very much Ms. Saunders for an amazing job in this
20 short period of time. I don't know if I can -- I
21 went through Recommendation 5 and I have some
22 suggestion that doesn't change the substance but

1 I think might change a problem here because you
2 can't have the Secretary of Defense revise a
3 statutory provision.

4 MS. SAUNDERS: I tried to say or
5 recommending revision --

6 CHAIR HOLTZMAN: Well, I know but I
7 did it in a different way.

8 MS. SAUNDERS: Okay.

9 CHAIR HOLTZMAN: So I added the words
10 -- by the way, after while well intentioned,
11 these provisions I put appear to have, instead of
12 have created.

13 And then instead of have had
14 consequent negative effects, I said and with the
15 consequent negative effects so the term appear to
16 have modifies the whole thing.

17 MR. STONE: And what is going to go
18 before negative consequences? And what?

19 CHAIR HOLTZMAN: With the negative
20 effects.

21 MR. STONE: Oh, okay.

22 CHAIR HOLTZMAN: So that it is all

1 modified by appear to have.

2 Okay and then in the last sentence,
3 what I did was -- I don't know whether this works
4 because it was pretty hasty -- the JPP recommends
5 that Congress and the Secretary of Defense review
6 and consider these provisions, maybe that's the
7 word or statutory provisions, and in the case of
8 Congress, consider revising these provisions and
9 in the case of the Secretary of Defense,
10 developing or develop -- I don't know the grammar
11 here -- procedures to reduce, if not eliminate
12 this perception of undue pressure so that we have
13 given them a different task. I don't know if
14 that actually works and I don't know if my
15 language actually works but that would be kind of
16 the suggestion I would make.

17 VADM TRACEY: I kind of like that,
18 then further stylistically, the body of the
19 recommendation should be that sentence. The
20 other two sentences belong in the discussion
21 underneath. That would be consistent then with
22 the style.

1 CHAIR HOLTZMAN: I didn't look at
2 that.

3 VADM TRACEY: Oh.

4 MR. STONE: And I was going to suggest
5 that if there is a perception, you can never
6 eliminate but you can mitigate. So I would have
7 said instead of eliminate to mitigate this
8 perception of undue pressure. If somebody
9 believes something, you can't get rid of it but
10 you can try and mitigate it.

11 CHAIR HOLTZMAN: That's fine.

12 JUDGE JONES: I don't know. If you
13 eliminate the procedure, then there can't be any
14 more effects from it.

15 CHAIR HOLTZMAN: Well, that's right,
16 developing procedures to reduce if not mitigate
17 the perception of undue pressure.

18 I mean so if you want to retype this
19 and we can just circulate it.

20 MS. SAUNDERS: Certainly.

21 CHAIR HOLTZMAN: What did you want to
22 do, Admiral? I'm not sure I understood.

1 VADM TRACEY: I think the blue box
2 should only contain the last sentence, as
3 revised. It's the recommendation.

4 CHAIR HOLTZMAN: Oh, I see.

5 VADM TRACEY: And the other is the
6 background.

7 CHAIR HOLTZMAN: Oh, okay .

8 VADM TRACEY: Why we're making that
9 recommendation.

10 CHAIR HOLTZMAN: Right.

11 MS. SAUNDERS: So just the JPP
12 recommends. And some of the other
13 recommendations have had other language in there
14 but, in this case, you want those to be bullets
15 underneath?

16 VADM TRACEY: I think so.

17 PROF. TAYLOR: I would agree with
18 that.

19 MR. STONE: Yes, me, too.

20 MS. SAUNDERS: Okay, great.

21 CHAIR HOLTZMAN: So, can I give this
22 to you --

1 MS. SAUNDERS: Certainly.

2 CHAIR HOLTZMAN: -- and you can try to
3 turn this into some kind of --

4 MR. STONE: And Maria, can we do this
5 if we do a phone thing, since we're talking form
6 now? Can we do a phone meeting?

7 CHAIR HOLTZMAN: Well we might get
8 this done because we're going to be here. I have
9 to leave at 4:00 but we might be able to make
10 that.

11 MR. STONE: Okay.

12 CHAIR HOLTZMAN: So, assuming we get
13 that back, people are kind of satisfied with that
14 or we are on the right track with that?

15 VADM TRACEY: Yes.

16 MR. STONE: Yes.

17 CHAIR HOLTZMAN: Okay. On
18 Recommendation 9, does somebody have some
19 suggestions? I have some thoughts about it.

20 MR. STONE: Yes, I have got a couple
21 of suggestions.

22 I thought we got rid of the language

1 one way or the other on to another unit on the
2 same installation or to a nearby installation.
3 So it just would say whether a sexual assault
4 victim could be transferred without sacrificing
5 the interests of the victim but I would have put
6 in Admiral Tracey's language that she used
7 before, the paramount interest of the victim to
8 make clear that that is the top interest.

9 That wouldn't mean that the commanding
10 officer couldn't use, in an unusual case, the
11 same installation or a nearby one but that we
12 were not recommending that. We were just leaving
13 that open.

14 And then at the very end, I ended it
15 -- this is the main paragraph, foster the
16 perception among military members that the
17 expedited transfer system is being abused,
18 period. And I left out the business about
19 casting doubt on the victim's credibility,
20 leading to more acquittals because, number one,
21 it's speculative and, number two, there's going
22 to be that casting doubt. No matter where they

1 are moved, they are going to say that.

2 So I just didn't think that added
3 anything to the recommendation.

4 CHAIR HOLTZMAN: I added some language
5 in the second part of this, where the commander's
6 sentence. I guess that's the second or the third
7 sentence there, where I said so commanders in
8 SVCs/VLCs should -- I think there is a word that
9 I took out -- should all -- I don't think we need
10 the word all -- should receive training in how
11 relocating victims from less desirable to more
12 desirable locations can foster the reported
13 perception among military members that the
14 expedited transfer system is being abused and how
15 to minimize the ability of such transfers to be
16 used by defense counsel to cast out on the
17 victim's credibility.

18 MR. STONE: You can't. That's
19 something that they are going to do no matter
20 what they've got.

21 CHAIR HOLTZMAN: Yes, I understand
22 that.

1 MR. STONE: If they get a \$10 gift,
2 they are going to be impeached with it.

3 CHAIR HOLTZMAN: I understand that.
4 But if we want them to be thinking about this as
5 a consequence, from my point of view, we have an
6 unintended consequence. How do we minimize the
7 harm of that consequence? That's all I'm talking
8 about.

9 You're saying there's nothing you can
10 do and, with all due respect, I'm not sure
11 there's nothing you can do about it.

12 And so to the extent you can do
13 something about it, they should be thinking about
14 it. That's just my view about it.

15 Anyway, Mr. Taylor or Barbara, Judge
16 Jones, do you have --

17 PROF. TAYLOR: I agree with what you
18 have formulated.

19 CHAIR HOLTZMAN: Okay but Mr. Stone,
20 let's start with his. He had some suggestions in
21 sentence number one. And Admiral, if you have
22 some changes --

1 So in sentence number one, Mr. Stone
2 wants to strike --

3 MR. STONE: To another unit on the
4 same installation or to a nearby installation.
5 Just omit it.

6 CHAIR HOLTZMAN: Yes, so it would just
7 be -- yes, to strike to another unit or to a
8 nearby unit. Anybody have any comment about
9 that?

10 JUDGE JONES: Admiral, I hate to throw
11 this to you but I thought you had a phrasing
12 there relating to that issue. Am I
13 misremembering?

14 VADM TRACEY: So it was my concern
15 that if you transfer them on the same unit, in
16 most cases, that is not going to achieve the
17 separation, the unmonitored separation that you
18 desire. Right?

19 CHAIR HOLTZMAN: Right.

20 VADM TRACEY: I think Mr. Taylor's
21 formulation, though, was close to this, if not
22 exactly this. And the difference between what

1 was originally proposed and his suggestion was
2 that we were originally saying that this should
3 be the preferred method and, in this case, what
4 he's saying is look at this as an option each
5 time. So, I'm okay with this, as it's
6 formulated, with the change to the second
7 sentence that I think makes clear what we're
8 actually trying to say.

9 CHAIR HOLTZMAN: But you're not for
10 striking that.

11 VADM TRACEY: No, I don't understand
12 what we are telling them if we strike it.

13 CHAIR HOLTZMAN: Okay. So you are in
14 favor of keeping the language to another unit or
15 a nearby.

16 VADM TRACEY: I think we can keep
17 this. What we're saying is every time that you
18 are going to do this, take a look at whether you
19 could achieve the objectives by transferring the
20 victim on the same installation.

21 CHAIR HOLTZMAN: Oh, okay, fine.

22 VADM TRACEY: And there are reasons to

1 do that.

2 PROF. TAYLOR: Yes, so that was my
3 point.

4 CHAIR HOLTZMAN: Okay, fine. So in
5 other words, you disagree with Mr. Stone about
6 that.

7 VADM TRACEY: Correct.

8 CHAIR HOLTZMAN: Okay.

9 MR. STONE: What about adding the
10 other word that I had in that same line four or
11 three words later, without sacrificing any
12 interests of the victim?

13 CHAIR HOLTZMAN: I was going to get to
14 that.

15 MR. STONE: Okay, paramount.

16 CHAIR HOLTZMAN: Let's do the first
17 two. Another unit on the same installation; are
18 you still in favor of your amendment, Mr. Stone?

19 MR. STONE: Yes.

20 CHAIR HOLTZMAN: Okay.

21 MR. STONE: I still would rather not
22 have that in there because I don't think it is --

1 I mean, it's the exception and not the rule.

2 CHAIR HOLTZMAN: So let's just take a
3 vote. Let's just take a vote on that.

4 So those in favor of Mr. Stone's
5 proposal to strike the words to another unit on
6 the same installation or to a nearby installation
7 say aye.

8 MR. STONE: Aye.

9 CHAIR HOLTZMAN: Those opposed?

10 (Chorus of no.)

11 CHAIR HOLTZMAN: The no's have it.

12 Second proposal by Mr. Stone: The
13 phrase without sacrificing the interest of the
14 victim; his suggestion is without sacrificing the
15 paramount interest of the victim.

16 Any concern with that? Anybody want
17 to speak to that?

18 I guess my concern would be you know
19 there still is the military and it still is a
20 question of whether there is a military interest
21 here. I don't know that we, again, need to rank
22 this. I think without sacrificing the interest

1 of the victim says it all to me. Then I'm
2 concerned about making that paramount in the
3 sense of maybe this person needs to be there
4 because he or she has some kind of wartime skill
5 that is vital on some kind of war-making
6 activity. I don't know.

7 PROF. TAYLOR: Well, since I suggested
8 that language, I would say that what I had in
9 mind is completely aligned with what the Chair
10 just said and that is that in each case will be a
11 balancing act that will have to be considered by
12 the commander to be sure that all of the
13 interests are taken into account but, clearly,
14 not to sacrifice any interest of the victim. And
15 I don't know --

16 CHAIR HOLTZMAN: What about the vital
17 interest of the victim as opposed to paramount.
18 Would that get closer to you or would that solve
19 your problem, Mr. Stone?

20 MR. STONE: Yes, I could live with
21 vital.

22 CHAIR HOLTZMAN: Okay. Anybody object

1 to that?

2 PROF. TAYLOR: Sure, I'm okay with
3 that.

4 CHAIR HOLTZMAN: All right.

5 JUDGE JONES: That's fine.

6 CHAIR HOLTZMAN: Then we are on point.
7 The second sentence we don't have any issues. Do
8 you have an issue?

9 VADM TRACEY: I have a recommended
10 change.

11 CHAIR HOLTZMAN: Okay, sure.

12 VADM TRACEY: The intent of such
13 change would be to strike a balance --

14 CHAIR HOLTZMAN: Oh, okay.

15 VADM TRACEY: -- between ensuring that
16 prosecutors have access to victims in preparing
17 for courts-martial and satisfying the need to
18 separate the victim from the accused and maintain
19 the victim's access to support systems.

20 CHAIR HOLTZMAN: Any objection to that
21 language?

22 JUDGE JONES: No, I think it's great.

1 CHAIR HOLTZMAN: Okay. Without
2 objection, that is agreed to.

3 And then the third sentence, if I can
4 reconstruct it, basically is commanders and
5 SVCs/VLCs should receive training in how
6 relocating victims from less desirable to more
7 desirable locations can foster the reported
8 perception among military members that the
9 expedited transfer system is being abused and in
10 how to minimize the ability of such transfers to
11 be used by defense counsel to cast doubt on the
12 victim's credibility, period.

13 MR. STONE: Period.

14 VADM TRACEY: Does this say the same
15 thing, maybe, a little bit simpler? Commanders
16 and SVCs should all receive training -- should
17 receive training and how relocating victims from
18 less desirable to more desirable locations can be
19 used by defense counsel to suggest abuse of the
20 system and to cast doubt on the victim's
21 credibility possibly leading to more acquittals
22 at courts-martial.

1 CHAIR HOLTZMAN: The only difference
2 is that I'm directing them to minimize the
3 ability of this to be used.

4 VADM TRACEY: Let's add a separate
5 sentence to do that so that we don't have a run-
6 on sentence.

7 CHAIR HOLTZMAN: Okay.

8 VADM TRACEY: We don't want to add a
9 run-on sentence.

10 CHAIR HOLTZMAN: That's fine or we
11 could just put something in about developing
12 methods to minimize this problem.

13 VADM TRACEY: The Chairman should help
14 commanders to develop methods to minimize --

15 CHAIR HOLTZMAN: Minimize this problem
16 or something or address this. Yes.

17 Okay, so can you give us a -- what do
18 we need, Maria, here? We agreed on the
19 substance.

20 MS. FRIED: I think if you agree on
21 the substance, it may time to read it back.

22 CHAIR HOLTZMAN: Okay, so are we

1 agreed on the substance now of this? We can
2 agree on the substance and, if we get a chance,
3 we will review it before we leave today or,
4 otherwise, it will be circulated for our
5 approval.

6 Okay, any disagreement with the
7 Recommendation 9 as changed/as amended?

8 JUDGE JONES: No.

9 CHAIR HOLTZMAN: Hearing no
10 disagreement, this is accepted. Wow, record
11 time, for what it's worth.

12 MS. SAUNDERS: Could we do that with
13 Recommendation 5 as well?

14 CHAIR HOLTZMAN: What is
15 Recommendation 5?

16 MR. STONE: I don't know. That was
17 the other one she was trying to work on.

18 CHAIR HOLTZMAN: No, I think we need
19 to do that.

20 MS. SAUNDERS: Okay.

21 MR. STONE: And we didn't come up with
22 a slightly different title, either, but we can do

1 that on the phone as well.

2 CHAIR HOLTZMAN: Yes, I hope so.

3 MR. STONE: That would give you some
4 chance to think about it.

5 CHAIR HOLTZMAN: So now we want to do
6 -- we are up to -- do we want to take a break,
7 five minutes?

8 PROF. TAYLOR: Yes, please.

9 CHAIR HOLTZMAN: All right, five-
10 minute break. Okay, seven-minute break.

11 (Whereupon, the above-entitled matter
12 went off the record at 2:55 p.m. and resumed at
13 3:04 p.m.)

14 CHAIR HOLTZMAN: I guess our next
15 issue is the -- and by the way, Panel Members,
16 thank you very much for your cooperation. We've
17 really made a lot of progress. And Staff, of
18 course, thank you for your extraordinary work.

19 Our next item on the agenda is the
20 data report. That's in our blue book.

21 MS. PETERS: Yes, ma'am. That is in
22 your kind of blue folders.

1 CHAIR HOLTZMAN: Yes.

2 MS. PETERS: And Stayce and I are your
3 data team today because Ms. Rozell has been here
4 since Day 1 of the court-martial project and we
5 are here to help answer any of the Panel Members'
6 questions.

7 This draft report is being provided to
8 you today in your second day-of folder first to
9 obtain the Panel's approval on the final wording
10 of the recommendations. You had previously voted
11 to adopt the three recommendations in this
12 report. They begin on page 3.

13 During the last meeting, we received
14 some suggested changes from the Panel. And so we
15 are providing you with the recommendations once
16 again in what the Staff proposes as its final
17 form because it reflects those changes and it
18 would need to just be finally approved by the
19 Panel today.

20 Secondly, we provided you with the
21 body of the data report, really just to
22 familiarize the panel members with the layout of

1 the report, the data that's in it. And then from
2 this point on, we will provide, of course, the
3 Panel with ample time to review the content of
4 the report and provide feedback to the Staff
5 after this meeting.

6 But to get a visual of what the report
7 looks like, I just provided you the whole thing
8 today, ma'am.

9 CHAIR HOLTZMAN: I guess I need
10 Maria's guidance, Ms. Fried's guidance.

11 So are we going to vote? I just
12 understand the procedure. We'll vote on the
13 three recommendations contained on pages 3 and 4.

14 MS. FRIED: Yes, ma'am.

15 CHAIR HOLTZMAN: And then once we
16 review that, we can review the substance of this
17 report and then vote on it on the phone?

18 MS. FRIED: Only in a public meeting.

19 CHAIR HOLTZMAN: In a public meeting.

20 MS. FRIED: Yes, ma'am.

21 CHAIR HOLTZMAN: So when were you
22 expecting us to vote on this report?

1 MS. PETERS: We thought that the Panel
2 would have usually a standard about two weeks to
3 review the report on your own, provide any
4 suggested changes to the Staff. The Staff will
5 consolidate those changes, circulate them back to
6 the panel and then we would convene in an
7 appropriate forum the opportunity for the panel
8 to vote on the final report.

9 CHAIR HOLTZMAN: Oh, okay, great. The
10 phone call meeting.

11 MS. PETERS: Yes, ma'am.

12 MS. FRIED: I would also add that the
13 comments that are circulated have to be discussed
14 on the phone call as well, not just consolidated
15 with a new recommendation.

16 So any input that the Panel gives back
17 to Meghan happens like on an individual basis and
18 then she would put them on the report and
19 attribute the comments to that member and then
20 that would be discussed in a public meeting.

21 CHAIR HOLTZMAN: Perfect. Okay.

22 CAPT TIDESWELL: And we still have one

1 meeting left, Ms. Holtzman.

2 CHAIR HOLTZMAN: Right. Okay, fine.

3 Okay, so I think what we'll do is we
4 will start with Recommendation 2, right?

5 MS. PETERS: Yes, ma'am, I can read
6 aloud Recommendation 52.

7 CHAIR HOLTZMAN: Good. I'm sorry, 52.

8 MS. PETERS: The Secretary of Defense
9 and the Military Services use a standardized
10 document-based collection model for collecting
11 and analyzing case adjudication data in order to
12 implement Article 140a, Uniform Code of Military
13 Justice case management data collection and
14 accessibility.

15 CHAIR HOLTZMAN: Is there any
16 discussion of this?

17 Could you please explain what a
18 document-based collection modeling is?

19 MS. PETERS: This is that they
20 actually, instead of taking summaries and notes
21 from the field from all the disparate commands in
22 the field, that when they build a system for

1 collecting Military Justice data, that they
2 actually lift it from documents, just as the U.S.
3 Sentencing Commission does as they advised the
4 JPP to do.

5 CHAIR HOLTZMAN: So is this a term of
6 art document-based collection model? I mean
7 statisticians understand what that means, as
8 opposed to --

9 MS. PETERS: We have been using that
10 phrasing in conversation with the Sentencing
11 Commission for the full term of the data project.
12 So, to that extent, I think it is a term of art.
13 It's not the only way to say it.

14 CHAIR HOLTZMAN: Oh, it's not? Okay.

15 MS. PETERS: I don't think it would
16 have a technical veneer that a statistician would
17 say must be used to refer to something specific.
18 I think it could be rephrased because it --

19 CHAIR HOLTZMAN: Well, is it going to
20 be defined somewhere here? I mean I think that
21 that is really important maybe under that
22 recommendation. I don't know whether anybody

1 else thinks it should be defined or described or
2 explained. But you know it's like -- it's the
3 very first term we use and I didn't know what it
4 meant. I mean I don't want to hold myself up as
5 an example but I just want to make sure that
6 people who read know what we're talking about
7 from the get go.

8 So, can we define that somewhere,
9 maybe a footnote or in a bullet?

10 MS. ROZELL: Maybe we can define what
11 specific documents.

12 MS. PETERS: Right.

13 CHAIR HOLTZMAN: Does anybody disagree
14 with me?

15 JUDGE JONES: No, I think that's
16 right.

17 CHAIR HOLTZMAN: Okay, so somewhere
18 put some explanation of this term.

19 MS. PETERS: Could we do that in the
20 bullet below it?

21 MR. STONE: Yes, do it in the first
22 bullet, just put another sentence in there.

1 CHAIR HOLTZMAN: Yes, document --
2 first bullet. Good. Document-based collection
3 model means X, Y, Z. And then you go document-
4 based means the best practice utilized and
5 recommended by the U.S. Sentencing Commission.
6 Great.

7 Okay, any other discussion on
8 Recommendation 52?

9 VADM TRACEY: Maybe -- I don't see
10 this addressed but I thought that we had
11 suggested that even though the NDAA requires the
12 establishment of the system within four years
13 that we should suggest that the services continue
14 to do this in a way that comports with how they
15 do work today in the intervening four years.
16 Wasn't this the area on which we made that
17 recommendation?

18 MR. STONE: In other words that they
19 hurry it up, that they don't have to wait four
20 years if they've got --

21 CAPT TIDESWELL: No, I was going to
22 say it probably will take four years to do a

1 standardized system but in the meantime that
2 every service continue to populate data for use
3 in these reviews. I thought that was -- wasn't
4 it about this, the gist of that?

5 VADM TRACEY: Didn't Mr. Taylor point
6 out that you shouldn't dictate a standardized way
7 to do it until you actually have the standardized
8 system, that every Service should be able to do
9 it within --

10 CAPT TIDESWELL: I think that context,
11 ma'am, was the Victims' Appellate Rights Report,
12 where they were talking about establishing a
13 system to notify the victims.

14 VADM TRACEY: Well, maybe you're
15 right.

16 CAPT TIDESWELL: Yes, ma'am, but that
17 doesn't mean you can't put it in here because
18 they are all so similarly situated that they have
19 to build a system.

20 VADM TRACEY: So that's a question.
21 Why don't we get through all three
22 recommendations? Maybe we can address whether we

1 have attacked that.

2 CHAIR HOLTZMAN: All right. So, if we
3 have no further discussion on Recommendation 52,
4 let's vote on it.

5 All in favor say aye.

6 (Chorus of aye.)

7 CHAIR HOLTZMAN: Opposed?

8 (No audible response.)

9 CHAIR HOLTZMAN: Hearing none, the
10 recommendation is adopted.

11 Recommendation 53, Meghan, would you
12 read that please?

13 MS. PETERS: Okay, the new Military
14 Justice Data Collection System required to be
15 developed pursuant to Article 140a Uniform Code
16 of Military Justice entitled Case Management and
17 Data Collection Accessibility should be designed
18 so as to become the exclusive source of sexual
19 assault case adjudication data for DoD's annual
20 report to Congress on the DoD's Sexual Assault
21 Prevention and Response Initiatives.

22 CHAIR HOLTZMAN: Any discussion of

1 this recommendation?

2 What does your second bullet mean,
3 military justice practitioners should be
4 responsible for the information collected? Does
5 that mean defense counsel, or trial counsel, or
6 victims' assistance person?

7 MS. PETERS: I think the essence of it
8 was that Article 140a being part of the Uniform
9 Code of Military Justice is going to be built,
10 and used, and implemented by military justice
11 practitioners who are the source of military
12 justice data, as opposed to the DoD SAPRO Sex
13 Assault Policy Office collecting reporting on the
14 legal status of cases. This would become --
15 Article 140a would become the system of record
16 for what happened in sex assaults in all cases
17 because it is coming from the legal community.
18 That's the source of the information so that is
19 who should be fulfilling the data collection --

20 CHAIR HOLTZMAN: So everybody has to
21 input data into the system? Doesn't that create
22 some problems? I mean --

1 MS. PETERS: I think that, as opposed
2 to dictating the number, I think the Staff's
3 intent was to convey the message that when you're
4 looking at UCMJ data, it should come from the
5 practitioners in the military justice system.

6 CHAIR HOLTZMAN: What does it mean
7 come from? Come from, that's the phrase that is
8 getting me. Come from meaning they input it or
9 come from means what?

10 MS. PETERS: Right, they input it.
11 They define it. I mean the military justice
12 community is going to build this database and
13 that is where you want to --

14 CHAIR HOLTZMAN: They are?

15 MS. PETERS: Well, they are going to
16 build the information for it. It's going to come
17 between them. The Secretary of Defense has to
18 prescribe it but it's informed by the military
19 justice practitioners in the Services.

20 But aside from the mechanics of 140a,
21 I think what this was intended to get at is that
22 right now Congress' information on sexual assault

1 comes from the DoD Sex Assault Policy Office.
2 And that's not where military justice
3 practitioners reside. So, the information is --
4 so there is a disconnect.

5 There are military justice
6 practitioners who are practicing or monitoring
7 their own systems and their own cases and then
8 they separately turn and do a hand off to DoD
9 SAPRO that has to then, they translate it, they
10 present it in their own way and send it to
11 Congress.

12 So, and they also are making these
13 non-legal practitioners and DoD SAPRO Officers
14 making the determination about what in the legal
15 system ultimately goes to Congress, how data is
16 categorized. Whereas, it would seem that Article
17 140a is something that is going to be built with
18 the military justice community in mind primarily.
19 So you would think that the information is going
20 to come in the form that is more reliable when
21 you are trying to understand the legal outcomes
22 of cases.

1 CHAIR HOLTZMAN: Well, it's one thing
2 to -- I mean I'm sorry to harp on this but I,
3 frankly, am not understanding what you're saying.
4 Because it is one thing to have a system that is
5 user friendly. I got that. And I understand
6 something that reflects information that -- well
7 and that's another way of saying that it will
8 contain information that is helpful to the people
9 who are actually using the system. But that
10 doesn't get to the point about who is responsible
11 for the information collected. That doesn't
12 necessarily seem to me to be the MCIOs or the
13 defense counsel. I mean they may input some
14 little information but I'm not following.

15 And to me there is what you just
16 called disconnect. I mean I don't know what
17 we're talking about here. Maybe it's my
18 deficiency.

19 MS. PETERS: Well, it may be mine in
20 trying to proceed too delicately.

21 If one were to agree with the premise
22 that some of the data in DoD SAPRO's reporting to

1 Congress is inaccurate and unreliable, in terms
2 of its legal adjudication data. Meaning, we
3 can't tell what is really going on with these
4 cases. The aggregation of this data is still not
5 clear in terms of what it means.

6 Rather than have DoD SAPRO tell us
7 what the data is and what it means, if there is a
8 system being built in existence that's being used
9 by the legal community at large across all the
10 services, let's use that system and that legal
11 community to give us legal information because
12 DoD SAPRO's data is inaccurate and unreliable for
13 Congress' purposes and even for the JPP's
14 purposes.

15 So, this finding is --

16 CHAIR HOLTZMAN: All right, well maybe
17 the language you are using here is not right in
18 terms of it is possible for the information. I
19 don't know that that is really what we're talking
20 about. That's what just struck me.

21 MS. PETERS: Yes, ma'am. But I would
22 add one point to that, is that when you, at one

1 of the meetings, discussed the JPP received its
2 information directly from the Military Services.
3 In fact, directly from the JAG Corps in each
4 Service.

5 The problems that that alleviated were
6 before when you look at SAPRO, you don't get the
7 FAP cases and you get double counting and
8 miscounting. You get all these cross-references
9 to different years. They are all thrown into one
10 year's report.

11 When you go to the Military Services,
12 you get all of the cases, all of the documents
13 all at once and it alleviates any problems that
14 were created by DoD SAPRO's methodology.

15 PROF. TAYLOR: I have a question, if
16 I could just follow-up on that. I share your
17 concern. I guess my question is how do we know
18 that there is any transparency in the system if
19 you have to go to each individual Service to get
20 answers to questions? It seems reasonable that
21 there would be some central point, if not DoD
22 SAPRO, somebody at the Defense Department level,

1 whether it is the General Counsel or someone
2 else, who is able to look across all the Services
3 with some transparency to see how they are doing
4 in various areas.

5 And I guess part of the problem now is
6 that each of the Service JAGs organizes
7 differently, correct?

8 MS. PETERS: Yes, sir.

9 PROF. TAYLOR: So depending upon the
10 service you go to, you get the data produced in
11 one way or another. So, how is that going to
12 work?

13 MS. PETERS: I think, again, I wasn't
14 suggesting -- I don't think the Staff was trying
15 to say that the method is to go to each of the
16 Services because 140a takes care of that problem.
17 140a is the standardization of one system across
18 all Services so DoD can look down at all the
19 Services in the same way, in a meaningful way.

20 It's just that using that system -- by
21 placing that system in a UCMJ Article, maybe
22 we're making an assumption there that military

1 justice practitioners are going to be completing
2 a system, be the machinery for that system.

3 CHAIR HOLTZMAN: I don't know what
4 that means.

5 MS. PETERS: They are going to support
6 accurate information from documents.

7 And so rather than whatever DoD SAPRO
8 is doing right now, which is for our purposes and
9 Congress' inaccurate and unreliable, if 140a has
10 the potential to provide a more accurate
11 solution, we want military justice case
12 information to come from the military justice
13 community.

14 140a then takes it a step further and
15 says it is going to be done writ large from all
16 the services at once.

17 CHAIR HOLTZMAN: Why does it have to
18 come from the military justice community? Maybe
19 they just scan documents and they read the
20 documents, the computer reads the documents and
21 spits out the information. Why does it have to
22 come from people?

1 I don't --

2 MS. PETERS: It doesn't ma'am. And I
3 wasn't --

4 CHAIR HOLTZMAN: But that's what this
5 says. That's the problem with this is that it
6 says that people are going to be responsible for
7 the information collected. That is the
8 difficulty here. And I don't know why that's a
9 good thing. It suggests to me a big burden on
10 people in the military justice system if they
11 have got to be responsible for the input of the
12 data. I don't know how the system is going to be
13 designed.

14 JUDGE JONES: So are we trying to say
15 that each of the Services should be responsible
16 for collecting and inputting the data into the
17 system, this 140a system?

18 VADM TRACEY: Or are we saying that
19 SAPRO should draw military justice information
20 it's going to analyze or submit to the Congress
21 from this Article 140 system?

22 MS. PETERS: I think that is one

1 plausible solution. If this system would seem to
2 produce, especially if it is document-based, more
3 accurate information, rather than what's being
4 produced by SAPRO now.

5 VADM TRACEY: And they should be
6 informed by how the military justice community
7 interprets that data.

8 MS. PETERS: Yes, ma'am.

9 VADM TRACEY: Aggregates and
10 interprets that data.

11 MS. PETERS: Yes.

12 VADM TRACEY: They shouldn't make up
13 their own way to aggregate and interpret the
14 data.

15 MS. PETERS: Yes, ma'am.

16 MS. ROZELL: One other thing is SAPRO
17 is more of a victim-based organization versus
18 military justice who is doing the adjudication of
19 the military justice offenders.

20 CHAIR HOLTZMAN: If you take revised
21 bullet point 2 --

22 JUDGE JONES: You know I hate to admit

1 my ignorance but what does 140a actually say?

2 MS. PETERS: It says that there will
3 be a case management system or I'm sorry that in
4 four years -- let me pull the exact language,
5 ma'am, that they are going to develop a system
6 across all of the Services. Let me just get the
7 exact language here.

8 CAPT TIDESWELL: Right now, each
9 Services does have a system and there is a point
10 of data entry, typically in the field of the
11 local, where the courts-martial are conducted. I
12 think 140a is going to sort of take an umbrella
13 approach, where all of the Services will now feed
14 into the same system.

15 JUDGE JONES: Which could add to
16 uniformity.

17 CAPT TIDESWELL: Yes, ma'am, a
18 standardized approach.

19 JUDGE JONES: But it is not just a
20 military justice subject matter. It's whatever
21 you would normally put in your database. Is that
22 right?

1 CAPT TIDESWELL: Well, I think it's
2 just from an adjudication perspective.

3 JUDGE JONES: Well, that's what I'm
4 trying to figure out. This is to get all four or
5 five Services reporting into through one system.

6 CAPT TIDESWELL: Yes, ma'am.

7 JUDGE JONES: But is it just the
8 criminal justice aspect?

9 MS. ROZELL: That's my understanding.

10 CAPT TIDESWELL: Yes, it's a case
11 management --

12 PROF. TAYLOR: Well, if that's the
13 case, so you won't be able to look at this data
14 base, as I understand it, and figure out those
15 that are handling it for the Family Advocacy
16 Program, right?

17 MS. PETERS: That's what SAPRO does.

18 PROF. TAYLOR: Unless they have also
19 made their way into the adjudication system
20 somehow or another.

21 MS. FRIED: So I don't think 140a is
22 specific to sexual assault.

1 MS. PETERS: No, it's not.

2 MS. FRIED: So they would have all
3 court-marital data on FAP cases or Article 15s as
4 well.

5 PROF. TAYLOR: Well all I'm saying is
6 that if it is not a case that makes its way into
7 the court-marital system but is handled through
8 the Family Advocacy Program through some other
9 means, it never touches this system. Is that
10 correct?

11 MS. FRIED: Yes, as long as it is
12 something that is not like an Article 15. If it
13 is a reprimand or something, it probably would
14 not get into 140a.

15 PROF. TAYLOR: So you could not look
16 at this database and figure out what the full
17 extent of sexual assault is in the military.
18 It's only those cases that make it into the
19 military justice system. Is that correct?

20 MS. ROZELL: So they could be reported
21 through SAPRO but if there is any administrative
22 or nonjudicial disciplinary action taken against

1 that person, then of course it would be within
2 140a.

3 JUDGE JONES: It would be in the
4 database.

5 MS. ROZELL: Yes, ma'am, but if they
6 went to FAP but nothing came of it and there was
7 no judicial proceedings or anything like that,
8 then of course it wouldn't be reported in 140a.

9 MS. PETERS: It has yet to be defined
10 what its purpose in serving as a case processing
11 and management system will be. Those parameters
12 will be defined. If they find it beneficial to
13 start with every substantiated report of every
14 crime, including every unrestricted report of
15 sexual assault, as some Service systems do
16 currently, then they can decide to do that. So
17 we don't know.

18 What we do know is legal adjudication
19 data will be in there and it will not matter who
20 provides victims' services because the JAG
21 community does not differentiate a case based on
22 who provides victim services. That is a creature

1 of DoD and that's why they don't have the full
2 picture of sex assaults right now.

3 CHAIR HOLTZMAN: All right, I'm going
4 to suggest that we take out the words responsible
5 for and just put involved in that bullet. And
6 then I think that more or less solves that part
7 of the problem, which is military practitioners
8 should be involved in the information collected
9 pursuant to Article 140, which would improve the
10 accuracy and level of detail currently contained
11 in DoD's reports. Is that okay?

12 I mean does that help or hinder? Is
13 this an impediment?

14 JUDGE JONES: I think we could still
15 say military justice practitioners, understanding
16 that it doesn't mean the defense lawyer or the
17 prosecutor.

18 CHAIR HOLTZMAN: Right but I don't
19 want to take out the words responsible for.

20 JUDGE JONES: Right.

21 CHAIR HOLTZMAN: That was my problem
22 because I don't know that they are going to be

1 responsible for the information collected. But I
2 have no problem with requiring them to be
3 involved so that we understand exactly how the
4 system should be designed. It should be user
5 friendly. It should get the statistics that the
6 military justice people want to see. So, to that
7 extent --

8 VADM TRACEY: It sounds to me what I
9 think the intent was.

10 CHAIR HOLTZMAN: It does?

11 VADM TRACEY: I think that what was
12 intended that rather than SAPRO creating the
13 military justice data that they create today,
14 that they would actually turn to this Article 140
15 -created system to obtain that data. Am I right?

16 MS. PETERS: Yes, ma'am.

17 VADM TRACEY: So a subset of the data
18 that they submit has to do with the judicial
19 disposition of cases. And we want them to come
20 to this source for that data going forward, not
21 whatever the sources that they use.

22 Is that correct?

1 MS. PETERS: Yes.

2 MS. ROZELL: And because 140a is not
3 limited to just sexual assault, even years from
4 now they can look at what are the trends of other
5 crimes that are being committed as well.

6 VADM TRACEY: So what if you turn the
7 second bullet around to say that DoD SAPRO will
8 rely on information collected pursuant to Article
9 140a? Or will obtain its information on --

10 PROF. TAYLOR: Well I guess the
11 question, Admiral Tracey, will be whether there
12 is anything that they are required to report to
13 Congress under the Sexual Assault Prevention and
14 Response Initiative that they could not get from
15 that database.

16 VADM TRACEY: I think there are many
17 things that have nothing to do with the
18 adjudication. But anything that they are going
19 to report with regard to adjudication will be
20 drawn from this system I think is what we were
21 trying to say.

22 PROF. TAYLOR: I see. Thank you.

1 VADM TRACEY: Is that right or not?

2 MS. PETERS: Yes, that's right because
3 Congress right now mandates that some sort of
4 analysis of adjudication data occur. And this --

5 VADM TRACEY: And you are also trying
6 to say that that will be done by people in the
7 legal --

8 MS. PETERS: Yes, ma'am.

9 MS. ROZELL: One of the issues that,
10 I guess, we found because we were comparing the
11 SAPRO data versus the actual court-marital
12 documents that we have in our data, that unless
13 you're not very familiar and educated on the
14 actual Statutes, then they can be very confusing
15 for the lay person to actually determine is this
16 an actual rape, or is it a sexual assault, or is
17 it a contact offense. So, I think the legal
18 community is more better honed to define those
19 statutes and those offenses are more precise.

20 CHAIR HOLTZMAN: So what is the
21 language that we are now focusing on?

22 MS. PETERS: Whether I think a second

1 sentence would be added to this bullet indicating
2 that DoD SAPRO will rely on the legal
3 adjudication information in the database to be
4 developed pursuant to Article 140a and providing
5 information to Congress.

6 CHAIR HOLTZMAN: And military
7 adjudication, what is that supposed -- will have
8 that information just about an arrest or if there
9 was no adjudication? Will there still be
10 information in the system?

11 MS. PETERS: SAPRO will still be
12 collecting. SAPRO will do what it does, which is
13 the broadest view of the system possible. From
14 the moment an unrestricted report is made, they
15 will collect information.

16 CHAIR HOLTZMAN: They are still going
17 to be doing data? Are we going to have two data
18 collection systems? No. No, don't tell me that.
19 Is that really what we're doing here? That's
20 incredible.

21 MS. PETERS: I think the intent of
22 Article 140a is just to give DoD a transparent

1 look at military justice across the Services.
2 Military justice involves legal action.

3 What SAPRO does is a bit of a creature
4 of the requirements from Congress. One way to do
5 this is that it could put the SAPRO -- SAPRO
6 could do what it does, manage cases, manage the
7 disposition of victims' cases but do less in
8 terms of legal adjudication.

9 CHAIR HOLTZMAN: Well, it's not
10 managing cases. It's recording cases. It's not
11 managing. It doesn't have a management function.

12 MS. PETERS: Yes, ma'am. So their
13 system is mainly a data aggregator right now.
14 What could happen is Article 140a could supplant
15 SAPRO's role in communicating the legal
16 disposition of sex assault cases to Congress. So
17 Congress could learn about legal outcomes from
18 the Article 140a database and SAPRO can turn to
19 all of the other data that it does around victim
20 reports and satisfaction surveys.

21 CHAIR HOLTZMAN: So 140a is only on
22 when you have an actual adjudication by a

1 military justice court. So, it's not going to
2 record arrests. It's not going to record any
3 other kinds of dispositions, disciplinary
4 dispositions by the convening authority or
5 anything like that?

6 I mean I'm totally flabbergasted. I
7 have to say that in this year, 2017, that the
8 military is going to create two separate systems
9 to record information on criminal activity sexual
10 assault? I don't know maybe I'm overreacting but
11 it seems to me insane.

12 MR. STONE: For what it's worth, if
13 they are using the Sentencing Commission model,
14 that model only looks at adjudicated cases. It
15 doesn't look at all the cases that were
16 dismissed. It doesn't look at deferred
17 prosecutions. None of that is in there. And I
18 guess if they are looking at that model, that's
19 why they're looking at adjudicated cases and then
20 everything else somewhere else.

21 CHAIR HOLTZMAN: But isn't there an
22 issue with regard to the accuracy of the

1 somewhere else?

2 MR. STONE: Well maybe you want to put
3 in the recommendation that we recommend that they
4 see if they can use common data collection and
5 analysis methods so that the two systems can be
6 viewed in pari materia, if necessary. I mean I
7 can see that.

8 I don't think we can make them get
9 into one system now but I think that we could
10 recommend that the two talk to each other. I
11 guess there is some language for that. It's not
12 talk to each other but it's --

13 CHAIR HOLTZMAN: This is absurd.

14 MS. PETERS: Ma'am, if there is any
15 way that the Panel would find it beneficial to
16 specify or be more specific as to the type of
17 data regarding sexual assault cases that they
18 would like to see, if you still feel that Article
19 140a is the purview, it is something you want to
20 address specifically as Recommendation 53 does,
21 if we could say when in the process you would
22 like Article 140a to start recording information,

1 I think the panel is all within its right to be
2 more specific in that regard.

3 CHAIR HOLTZMAN: Well, we haven't
4 really done any work on that so I don't know it's
5 going to be more specific.

6 MS. PETERS: And I think the Staff can
7 provide you with more information on when they
8 are going to say a case begins. Are they going
9 to open a line every time an investigation starts
10 into every felony and misdemeanor? I don't know.

11 CHAIR HOLTZMAN: I'm just thinking
12 about when I had to get clearance for this
13 position, the Defense Department asked me to
14 prove my citizenship and bring my passport. So I
15 said to them, why can't you look up my passport
16 by contacting the State Department? They said
17 our computers don't talk to each other.

18 MR. STONE: No, they're not allowed to
19 look at passport stuff. That's State Department
20 stuff by definition.

21 CHAIR HOLTZMAN: Yes, I understand
22 that but --

1 MR. STONE: But you were going to give
2 them permission?

3 CHAIR HOLTZMAN: Yes, there should be
4 an ability or call the Congress. I said you have
5 to be a U.S. citizen to be a member of Congress.
6 They can't talk to each other.

7 So all I am saying is that we are
8 moving into a period of time, we have already
9 moved into a period of time where people need to
10 -- where these computers need to be able to
11 communicate.

12 So we're building a whole new system.
13 Can it talk to the SAPRO system? I mean I don't
14 know. It just seems to me to be --

15 VADM TRACEY: I'm sorry. Isn't that
16 what Recommendation 53 says? The new Military
17 Justice Data Collection System required to be
18 developed should be designed so as to become the
19 exclusive source of sexual assault case
20 adjudication data for DoD's annual report to
21 Congress.

22 CHAIR HOLTZMAN: Case adjudication

1 data.

2 MR. STONE: Not case.

3 VADM TRACEY: Can you expand that --
4 is it our recommendation that that be expanded in
5 some way we can't define because we didn't do the
6 work but we suggest that rather than develop
7 potentially two conflicting systems that the
8 definition of the start of a case in this system
9 allow for a single database to be maintained? Is
10 that kind of what we're recommending?

11 CHAIR HOLTZMAN: Brilliant, Admiral.
12 You got my point.

13 MR. STONE: That's true.

14 MS. FRIED: You could say SAPRO could
15 leverage the system developed under 140a to meet
16 its reporting requirements with respect to
17 adjudication of cases.

18 CHAIR HOLTZMAN: Somehow they need to
19 be aware of each other and be able to
20 communicate.

21 MR. STONE: Have a supplemental
22 database on all other matters.

1 CHAIR HOLTZMAN: Whatever. Okay.

2 All right, so are we finished now with
3 Recommendation 53 --

4 MR. STONE: Unless you're going to
5 change the language of it.

6 CHAIR HOLTZMAN: -- with Admiral
7 Tracey's recommended change?

8 MS. PETERS: Ma'am, is that to the
9 wording of the recommendation, would you like
10 that as a finding below the recommendation
11 regarding --

12 MR. STONE: The wording, you have got
13 to go beyond case.

14 CHAIR HOLTZMAN: What do you think,
15 Admiral?

16 VADM TRACEY: I would recommend maybe
17 a separate recommendation or a sub-recommendation
18 that we are saying -- I think this is to your
19 concern -- to the extent possible, the Department
20 should avoid the creation of multiple data
21 sources --

22 MR. STONE: That do not communicate.

1 VADM TRACEY: -- that do not
2 communicate.

3 CHAIR HOLTZMAN: And maybe
4 specifically allude to the SAPRO system and the
5 system built under 140a.

6 MR. STONE: Yes, a good bullet on
7 that. We would anticipate or we would hope that
8 those two systems would be able to provide
9 overall statistics for adjudication.

10 JUDGE JONES: So we're for 140a and we
11 want it done so it standardizes wherever it
12 starts with cases the adjudication process but we
13 are making this additional recommendation.

14 CHAIR HOLTZMAN: Right. So, anybody
15 opposed to that recommendation? So it's 53, as
16 amended.

17 (No audible response.)

18 CHAIR HOLTZMAN: Okay and now we have
19 Recommendation 54. Meghan, would you read it,
20 please, for us?

21 MS. PETERS: The successor Federal
22 Advisory Committee of the JPP, the Defense

1 Advisory Committee on Investigation, Prosecution,
2 and Defense of Sexual Assault in the Armed Forces
3 should consider continuing to analyze adult
4 victim sexual assault court-martial data on an
5 annual basis as the JPP has done and should
6 consider analyzing the following patterns that
7 the JPP discovered in its analysis of Fiscal Year
8 2015 court-martial data: A) cases involving
9 military victims and that have less punitive
10 outcomes than cases involving civilian victims;
11 B) the conviction and acquittal rates for sexual
12 assault offenses vary significantly among the
13 Military Services; and C) if a Servicemember is
14 charged with a sexual assault offense, the
15 probability that he or she will be convicted of a
16 sexual assault offense is low.

17 CHAIR HOLTZMAN: Any discussion?

18 VADM TRACEY: One of the issues I had
19 with the way this statistical data was put
20 forward, we have a set of questions that were
21 raised in the discussion of a previous report as
22 to whether cases are being sent to trial that

1 shouldn't be sent to trial, that in fact there is
2 not enough reason for them to go to trial, and
3 then the trial is being lost. Well then, that
4 outcome is exactly what you want it to be if that
5 is the case.

6 This formulation of C suggests to the
7 reader who hasn't been in the room with us all
8 this time that we are saying that people who have
9 done bad things are getting away with those bad
10 things. And I think there's truth to both sides
11 of that. This is my problem with way that
12 statistical report was put forward.

13 CHAIR HOLTZMAN: So what's your
14 suggestion, Admiral? How do we fix that problem?

15 MR. STONE: I think we fix the problem
16 by I don't know if it is extending C or putting
17 in a D that says although the convictions in the
18 same cases for related non-sexual offense -- non-
19 sexual assault offenses raises the probability
20 considerably. Because what we found in those
21 cases are if you include both together,
22 everybody's numbers are that there is a 70

1 percent conviction rate. It's double the
2 conviction rate, the sexual assault offense when
3 you start including the non-sexual offenses. And
4 we have heard testimony and I have seen it also
5 in the stuff from the Subcommittee interviews
6 that a lot of times people who were sitting on
7 members committees seem to hesitate about putting
8 somebody on a sexual offense registry. So, the
9 result is they convict them of related non-sexual
10 assault.

11 And I just think that if you put that
12 in there, then we sort of balance this both ways.

13 VADM TRACEY: Say that again.

14 CHAIR HOLTZMAN: Okay, so I would
15 suggest, actually, putting it in C so that
16 someone doesn't misread C.

17 MR. STONE: Okay, yes.

18 CHAIR HOLTZMAN: And put a comma at
19 the end of low.

20 MR. STONE: Yes.

21 CHAIR HOLTZMAN: And it's although the
22 probability of a conviction of a non-sexual

1 offense is high.

2 MR. STONE: Of a related.

3 CHAIR HOLTZMAN: Okay, of a related.

4 MR. STONE: Yes. In other words, it
5 is in the same case. We're not saying that they
6 have prosecuted in severed case in a bank
7 robbery.

8 CHAIR HOLTZMAN: No, but we're talking
9 about that a Member is charged with a sexual
10 assault but the probability that he or she would
11 be convicted of a sexual assault offense is low,
12 although the probability that he or she will be
13 convicted of a non-sexual offense in that case --

14 MR. STONE: In that case --

15 CHAIR HOLTZMAN: -- is high.

16 MR. STONE: -- is high. Is much
17 higher.

18 PROF. TAYLOR: So if I could just add
19 one thing, if we are going to make that level of
20 detail apparent, shouldn't we also say is charged
21 with a sexual offense and pleads not guilty?
22 That's what we're talking about.

1 VADM TRACEY: Yes.

2 MR. STONE: Pleads not guilty.

3 CHAIR HOLTZMAN: Yes, okay.

4 MR. STONE: Okay.

5 CHAIR HOLTZMAN: That's fine.

6 JUDGE JONES: Pleading at trial or
7 after trial.

8 CHAIR HOLTZMAN: Yes.

9 MR. STONE: And I guess I would just
10 add for the record, because I would like it in
11 the transcript right now, since Admiral Tracey
12 and some of the members brought it up, that a
13 good deal of the Subcommittee report that we
14 currently have entitled Barriers to the Fair
15 Administration of Justice repeatedly discusses
16 that the conviction rate is low and that shows
17 all the problems. And it does not recognize or
18 take into account that in fact its own numbers
19 show that there is a 70 percent conviction rate
20 when you include the non-sexual assault
21 convictions in the same cases. And that
22 undercuts an enormous amount of the non-

1 scientific opinions that were solicited when one
2 views that critically. And that was a concern to
3 me but luckily, our version of the report and
4 recommendations does not, to the same extent,
5 rely on those allegations that there is too many
6 cases and the small rate of conviction which
7 shows there are too many bad things going on.
8 So, we now have to avoid taking that conclusion
9 directly into account.

10 CHAIR HOLTZMAN: Okay. I think we are
11 -- did we finish voting on our third
12 recommendation?

13 Okay, as amended, let's vote on the
14 third recommendation. Those in favor, say aye.

15 (Chorus of aye.)

16 CHAIR HOLTZMAN: Those opposed, no.

17 (No audible response.)

18 CHAIR HOLTZMAN: The ayes have it.
19 Recommendation 3 or whatever the number is there
20 is adopted.

21 We have just two more issues to
22 address now. I am going to leave at -- Judge

1 Jones?

2 JUDGE JONES: Five 'til 4:00.

3 CHAIR HOLTZMAN: One is a new title to
4 the Barriers Report. I just thought of it right
5 now but can we Report on Issues in the Fair
6 Administration of Justice or Concerns about the
7 Fair Report on Concerns related to the Fair
8 Administration of Military Justice?

9 MR. STONE: Concerns related -- I like
10 concerns. Can we strike fair and just the
11 administration of justice? I'm fine with just
12 saying that.

13 CHAIR HOLTZMAN: No, I don't like
14 that. I want fair in there. So, you can amend
15 my amendment.

16 MR. STONE: Well, that's what I
17 suggested before, earlier in the day, concerns
18 related to the administration of justice.

19 CHAIR HOLTZMAN: I know but I don't
20 like that.

21 MR. STONE: You don't like that.

22 CHAIR HOLTZMAN: I want the fair

1 administration of justice because I think that is
2 what the issue is. It's not just the
3 administration.

4 JUDGE JONES: Yes, I'm for keeping
5 fair in.

6 CHAIR HOLTZMAN: Okay, so shall we
7 vote on that or does someone else have an idea
8 about it?

9 MR. STONE: Vote on it.

10 CHAIR HOLTZMAN: Okay. So those in
11 favor of changing the title to Report on Concerns
12 About the Fair Administration of Military Justice
13 in Sexual Assault Cases, those in favor of that
14 say aye.

15 (Chorus of aye.)

16 CHAIR HOLTZMAN: Opposed?

17 MR. STONE: Aye.

18 CHAIR HOLTZMAN: Is the aye an
19 opposed?

20 MR. STONE: Yes.

21 CHAIR HOLTZMAN: All right. Now we
22 have I think one other person and we have to hear

1 from our public comment, which is Mr.
2 Christensen.

3 Sir, you have really got to keep your
4 comments short because, otherwise, you know this
5 is Cinderella time. The pumpkin is about to
6 arrive.

7 Thank you. We received your
8 testimony.

9 Col CHRISTENSEN: Yes.

10 CHAIR HOLTZMAN: So you should feel
11 free to just summarize it, if you can.

12 Col CHRISTENSEN: In fact, I was going
13 to let the Panel just read that separate. This
14 is just a couple of things I wanted to expand on.

15 CHAIR HOLTZMAN: Okay.

16 Col CHRISTENSEN: Expand on in a five-
17 minute time frame.

18 Well first I want to thank the Panel.
19 I know this is the second to the last meeting for
20 the service that you provided. I think anybody
21 who watches these, as I watch more than most,
22 that you are all very conscientious and I

1 appreciate that. And the American people
2 appreciate it.

3 I did want to pass on you said
4 something, Madam Chair, about Congress listening
5 to you or do they do or not. I can tell you from
6 the many times that I have met with congressional
7 staffers, congressional members, the committee
8 staff, they do listen and they are very concerned
9 about what you say. There are many conversations
10 that end with I want to hear what the JPP says.
11 So I think that says a lot to what you have done.

12 I hope it is for those have heard me
13 before that you understand that I care deeply
14 about the justice system as a whole. You know I
15 have been a defense counsel, a trial counsel, a
16 judge. I care that the process is fair for both
17 sides. That is why, as I know Mr. Taylor has
18 seen this, I don't know if the other members have
19 seen it, that we produced the Disparity Report
20 that came out last week on racial disparity in
21 military justice. That is not something that
22 would align directly to what we do as an

1 organization for the military sexual assault but
2 it does speak to the fairness of the system.

3 So, I hope that this Committee
4 understands when I testify I testify because I
5 think that is what is important. Just as I told
6 you two years ago that I thought the one way that
7 Article 120 needed to be amended was to make a
8 specific prohibition against revenge porn. And I
9 think we have all seen that what I said two years
10 ago was probably right.

11 Now, what I wanted to talk about,
12 Article 32 hearings. I know they have been
13 changed. I know it is controversial. I want to
14 stress that the Article 32 still serves a great
15 purpose in that this process starts with the
16 swearing of charge, the preferral, in which
17 somebody takes an oath and says I believe these
18 charges are true. We're already past the
19 probable cause point at that point. The
20 Government has said these are true.

21 The Article 32's purpose is to get a
22 neutral person, the convening authority, to say

1 yes, there is probable cause. We have to
2 remember what the purpose of it is. It is not
3 for the Government to perfect their case. It is
4 not for the defense to perfect their case. And
5 it is a probable cause hearing that meets the
6 standards that any person in the civilian world
7 would have and I would say it is even greater.

8 So, I worry that there is any kind of
9 discussion to pull back on the reforms on that.

10 I would say when the defense community
11 complains -- and I understand, I was defense
12 counsel -- that they don't have access to the
13 victim, they have never had the opportunity to
14 force a civilian victim to testify. Dependents
15 rarely have to testify. Child victims never
16 testify. That is nothing unique. It does not
17 say the 32 process is not valuable.

18 I provided the numbers to you why I
19 think it is valuable and I am almost done.

20 Expedited transfers I think are
21 extremely important. To see them as a barrier to
22 justice is very concerning to me. When I hear

1 this comment or complaint from the trial counsel
2 that you must have interviewed in the
3 Subcommittee that this is a barrier to their
4 access, I wonder what the experience level is.

5 I can tell you as somebody who
6 prosecuted more cases than probably anybody you
7 have talked to in the military justice system, it
8 is not uncommon that the victim is at an entirely
9 different location than where the trial is going
10 to occur. Dependent children, spouses who may be
11 raped and the last thing they want to do is be in
12 that location and they, on their own, go home.
13 Cases that occur in a deployed location, the
14 victim goes back to her base, the accused goes
15 back to his base. They may be in entirely
16 different parts of the world.

17 It is not a barrier. It is something
18 that experienced counsel can easily overcome and
19 it is something that young trial counsel need to
20 work around. These are not barriers.

21 I would just say I implore you at the
22 end of the day do not see these as barriers to

1 the fair administration of justice. See them as
2 necessary changes that have been made.

3 And I will be done now. And I
4 appreciate, again, sincerely everything this
5 Panel has done.

6 And the last thing I will say when you
7 talk about convictions, the number one thing that
8 would help is getting rid of minority acquittals.
9 Minority acquittals --

10 CHAIR HOLTZMAN: What's a minority
11 acquittal?

12 Col CHRISTENSEN: Well, we have the
13 only system in the country --

14 CHAIR HOLTZMAN: Oh, you mean not --

15 Col CHRISTENSEN: Yes, there is not a
16 consensus verdict.

17 CHAIR HOLTZMAN: I see.

18 Col CHRISTENSEN: And the lack of
19 consensus verdicts and I would imagine, Judge
20 Jones, you would agree that having people be
21 forced to come up with a verdict is good for the
22 system.

1 MR. STONE: You mean non-unanimous
2 acquittals.

3 CHAIR HOLTZMAN: You mean as opposed
4 to -- you mean non-unanimous.

5 Col CHRISTENSEN: Right. Right and
6 what I'm saying right now is the minority vote
7 can drive an acquittal, whereas there is no other
8 system like that. You might get a hung jury but
9 you don't get an acquittal.

10 And I personally think our low sexual
11 assault conviction rates is directly tied to the
12 fact that one-third plus one vote, after only one
13 vote, not days of deliberations as we might
14 receive in the Cosby case results in an
15 acquittal. And it is something to think about.

16 CHAIR HOLTZMAN: Okay. I'm going to
17 try to get our questions quickly. I know Judge
18 Jones has to leave.

19 JUDGE JONES: I never ask a question.

20 CHAIR HOLTZMAN: Mr. Taylor, do you
21 have a question? Judge Jones, you can go first.

22 JUDGE JONES: No, I don't have any.

1 I think I understand your concern.

2 Col CHRISTENSEN: Thank you.

3 CHAIR HOLTZMAN: Admiral?

4 VADM TRACEY: Thank you.

5 CHAIR HOLTZMAN: Mr. Stone?

6 MR. STONE: One question. Do you feel
7 the same way about non-unanimous verdicts of
8 guilty?

9 Col CHRISTENSEN: My personal view is,
10 when I talk about the fairness of the system, we
11 should get two consensus verdicts.

12 MR. STONE: So you believe we should
13 have unanimous vote as a recommendation in both
14 cases.

15 Col CHRISTENSEN: In both cases.

16 MR. STONE: Okay.

17 Col CHRISTENSEN: I think the system
18 would be better served by an appearance of
19 fairness and do better.

20 MR. STONE: Okay.

21 CHAIR HOLTZMAN: Thank you for your
22 comments. I think we have changed the title of

1 the report so we don't see these as barriers. I
2 think the points you raised are important.

3 As we've said, I personally feel
4 strongly about the expedited transfer but if we
5 are having an unintended consequence to that, we
6 need to know about it. That's really what you
7 were trying to do here.

8 But we appreciate your input and your
9 guidance. Thank you.

10 Col CHRISTENSEN: Thank you.

11 CHAIR HOLTZMAN: Thanks, everybody.

12 Thanks to the Panel members. I think we are
13 going to be adjourned.

14 MS. FRIED: Thank you, the meeting is
15 closed.

16 (Whereupon, the above-entitled matter
17 went off the record at 3:52 p.m.)

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